To Protect the Right to Vote, Look to State Courts and State Constitutions

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What is the right to vote? This question has befuddled courts, law professors, historians, and policymakers for years. We hear that the right to vote is "fundamental,"[1] the "essence of a democratic society,"[2] and "preservative of all rights."[3] We know that voting is sacred. Yet we are still searching for a solution to the puzzle of how best to protect voting rights. On the fiftieth anniversary of the Voting Rights Act, as voting rights advocates and scholars reflect on the history of voting protections and propose new reforms, the answer to this question is right in front of us: state constitutions and state courts.

Part of the difficulty in protecting the right to vote as robustly as possible is that the U.S. Constitution does not provide an explicit individual right to vote. This might seem surprising given that voting is one of our most cherished rights.[4] But the U.S. Constitution confers only "negative" rights, or prohibitions on governmental action, as opposed to specifically stated grants of individual liberties.[5] Yet virtually every state constitution confers the right to vote to its citizens in explicit terms. Moreover, the U.S. Constitution directs the inquiry over voter eligibility to state sources.[6] As Justice Scalia recently declared, the Elections Clause of the U.S. Constitution "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them,"[7] and instead leaves voter eligibility rules to the states.

Why, then, has this avenue of protecting the right to vote not garnered more support? There are several possible reasons. First, even though state courts are primary actors in shaping the right to vote, most people pay less attention to state judges than to their federal counterparts. The media, for example, spend relatively little time covering state voting rights decisions.[8] Most election law scholars focus primarily on decisions from the U.S. Supreme Court. This is

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

[2] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[3] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[4] *See* Douglas, *supra* note 1, at 144–45.

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

[6] U.S. CONST. art. I, § 4.

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

[8] *See* Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 567 (2014) (citing Martin Kaplan, Ken Goldstein & Matthew Hale, *Local News Coverage of the 2004 Campaign: An Analysis of Nightly Broadcasts in 11 Markets*, Local News Archive 9-12, 28-29 (Feb. 15, 2005), http://www.localnewsarchive.org/pdf/LCLNAFinal2004.pdf)).

inherently backward given how active state courts are in regulating the voting process.[9] Another, and perhaps weightier, reason is that state courts, much like federal courts, have largely underenforced the right to vote because they have too closely followed federal voting-rights jurisprudence. A renewed focus on the power of state constitutions and state judges provides a solution for how best to protect the fundamental right to vote.

This Issue Brief details the scope of voting rights under state constitutions, an overlooked source of the right to vote. Part I considers both the lack of a federal constitutional right to vote and the explicit right mentioned in virtually all state constitutions. Part II describes recent state-level voter ID cases, providing a summary of how courts facing litigation over voter ID laws have employed their state constitutions. Part III contends that state courts, instead of simply following narrow federal jurisprudence in "lockstep," should give broader, independent force to their explicit state constitutional provisions conferring the right to vote. Part IV highlights how different state judges construe their state constitutions, either broadly or narrowly, with respect to voting rights and posits that we should consider both judicial ideology and the method of judicial selection if we seek broad enforcement of these state constitutional provisions. Finally, an Appendix presents a chart, initially published in the *Vanderbilt Law Review*, illustrating all fifty state constitutions and the language they employ for the right to vote.[10]

I. CONSTITUTIONAL PROVISIONS ON THE RIGHT TO VOTE

There are two sources of constitutional rights: the U.S. Constitution and state constitutions. Because the former is the "Supreme Law of the Land," it provides the "floor" of individual rights.[11] State constitutions, on the other hand, can grant more robust rights. Following this formula, although the U.S. Constitution merely implies the right to vote, almost all state constitutions explicitly enumerate this right. Because the right to vote provides the foundation of our democracy,[12] we must understand comprehensively the differing scope of federal and state constitutional protection. This Part provides details on how the U.S. Constitution and each of the fifty state constitutions treat the right to vote.

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

As stated above, the U.S. Constitution does not confer the right to vote explicitly. Rather, it sets limitations on the government's ability to curtail voting rights. The Constitution mentions individual voting seven times—in Article I, Section 2 and in the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments—but none of those provisions actually grant a right to vote to U.S. citizens.[13] Article I, Section 2 provides that, in

[9] As a general matter state courts issue thousands more decisions than federal courts every year, affecting millions more people. *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456-57 (2010).

[10] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144-49 (2014).

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

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

[13] *Cf.* Laurence H. Tribe, Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 208 (2001) (contrasting the fact that "nothing in the U.S. Constitution mentions a 'right to vote' in a presidential election" with the U.S. Supreme Court's statement in *Bush v. Gore* that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental").

electing members of the House of Representatives, "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[14] That is, the U.S. Constitution does not provide the qualifications for voters itself but instead delegates that responsibility to the states, applying state eligibility rules to federal elections. The Seventeenth Amendment has the same language for the election of U.S. Senators.[15] The Fourteenth Amendment's "Reduction in Representation" Clause provides that if a state denies the right to vote to eligible citizens (except based on participation in a rebellion or other crime), the state loses representation in its Congressional delegation.[16] This clause does not provide citizens the right to vote as an explicit liberty but instead details a potential penalty states will suffer if they deny that right. The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all speak in the passive voice, providing that the right to vote "shall not be denied" according to race (Fifteenth),[17] sex (Nineteenth),[18] ability to pay a poll tax (Twenty-Fourth),[19] or age (Twenty-Sixth).[20]

Given all of these textual sources of the right to vote—albeit negatively implied—it might seem surprising that the U.S. Supreme Court has not relied on these provisions but instead has located the federal right to vote within the Fourteenth Amendment's Equal Protection Clause.[21] The genesis of modern voting-rights jurisprudence comes from *Baker v. Carr*, a 1962 case in which the Supreme Court declared that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution."[22] Subsequent cases placed the right to vote squarely within the Fourteenth Amendment's Equal Protection Clause. For example, in *Harper v. Virginia Board of Elections*, the Court acknowledged that although the U.S. Constitution does not specifically confer a right to vote in state elections, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[23]

Later cases, however, lowered the judicial scrutiny that regulations on the right to vote receive. In *Anderson v. Celebrezze* and *Burdick v. Takushi*, the Court developed a framework for considering federal constitutional challenges to state voting regulations.[24] Known as the *Anderson-Burdick* "severe burden" test, courts first determine whether the state law in question imposes a severe burden on voters.[25] If it does, then the Court applies strict scrutiny review.[26] If

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There have been frequent calls to amend the U.S. Constitution to include an explicit grant of the right to vote, but these proposed amendments so far have not had much traction. *See, e.g.*, H.R.J. Res. 44, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hjres44ih/pdf/BILLS- 113hjres44ih.pdf.

[14] U.S. CONST. art. I, § 2.

[15] *Id.* amend. XVII.

[16] *Id.* amend. XIV, § 2.

[17] *Id.* amend. XV.

[18] *Id.* amend. XIX.

[19] *Id.* amend. XXIV.

[20] *Id.* amend. XXVI.

[21] Bush v. Gore, 531 U.S. 98, 105 (2000); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); *see* Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 186 (2012).

[22] 369 U.S. 186, 208 (1962).

[23] 383 U.S. 663, 665 (1966).

[24] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)); Anderson v. Celebrezze, 460 U.S. 780, 793 (1983).

[25] *Id.*

the burden is less than severe, however, then the Court applies a lower, intermediate level of scrutiny, in which it balances the burdens the law does impose against the state's regulatory interests. If the state's interests outweigh the burden on voting, then the state law is valid, despite the fact that it nevertheless might restrict a so-called fundamental right.[27] At the federal level, in other words, some state impediments to voting are constitutionally permissible, so long as the burden is not too severe. The federal constitutional protection for the right to vote is thus not particularly robust, either textually or under recent case law.

B. State Constitutional Grants of the Right to Vote

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

Forty-nine states explicitly grant the right to vote through specific language in their state constitutions.[28] Most of these provisions directly define who is eligible to vote, such as Wisconsin's, which states that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[29] That is, state constitutions grant voting rights to all individuals who are citizens of the United States, residents of the state for a certain period preceding the election, and over eighteen years old. Certain state constitutions then explicitly deny voting rights to convicted felons or mentally incompetent persons.[30] A few state constitutions allow the state's legislature to enact other "necessary" voting procedures to root out fraud or protect the integrity of the election process.[31] But at bottom, state constitutions include specific language granting voting rights to the state's citizens.

As an added level of protection, twenty-six states include a provision in their constitutions stating that elections shall be "free," "free and equal," or "free and open."[32] Although these terms might seem amorphous, several state courts have construed this language as guaranteeing all eligible voters access to the ballot. As Kentucky's highest court long ago explained—in a passage that several other courts have cited[33]—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."[34]

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[26] *Burdick*, 502 U.S. at 433–34.
[27] *See generally* Douglas, *supra* note 1, at 174 (discussing how the use of the severe burden test suggests that the Court does not always consider the right to vote to be a "fundamental right").
[28] *See infra* Appendix. The only state constitution that does not include explicit language granting the right to vote is Arizona's, which instead provides that no one shall have the right to vote unless they meet the citizenship, residency, and age requirements. This language still grants the right to vote, albeit in the reverse of all other states, because it provides who may *not* vote (no one unless they meet the state's eligibility requirements).
[29] WIS. CONST. art. III, § 1.
[30] *See, e.g.*, KY. CONST. § 145.
[31] *See, e.g.*, DEL. CONST. art. V, § 1; MD. CONST. art. I, § 7.
[32] *See infra* Appendix.
[33] Gunaji v. Macias, 31 P.3d 1008, 1016 (N.M. 2001).
[34] Wallbrecht v. Ingram, 175 S.W. 1022, 1026–27 (Ky. 1915).

Finally, fifteen state constitutions mirror the U.S. Constitution in delineating voting rights through indirect, negative language declaring when the state may not infringe the right to vote on the basis of certain characteristics.[35] Table 1 summarizes these state constitutional provisions on the right to vote.

Table 1: State Constitutional Provisions on the Right to Vote

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

In sum, state constitutions go well beyond the U.S. Constitution in protecting the right to vote. Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens who meet simple qualification rules. As discussed below, state courts should not interpret such broad constitutional provisions to be coextensive (or in "lockstep") with the more limited federal jurisprudence of the U.S. Supreme Court. Indeed, the U.S. Constitution explicitly points to state voter eligibility rules for determining voter qualifications in federal elections, suggesting the paramount importance of these state constitutional provisions. State court jurisprudence also should be more robust than federal law because state constitutions go further than the U.S. Constitution in specifically conferring voting rights. That is, a faithful understanding of federal and state constitutional structure and of the differences between how each document grants voting rights counsel toward recognizing state constitutions' independent force.

II. STATE JUDICIAL METHODS OF INTERPRETING STATE CONSTITUTIONS

State courts construe state constitutional provisions regarding individual rights either in lockstep with federal jurisprudence or more independently and robustly. This Part outlines the lockstep and non-lockstep methods and explains how state courts have construed voting-rights provisions under each interpretive lens in recent voter ID litigation.

A. Lockstep

The U.S. Constitution establishes the federal floor of individual rights because the Supremacy Clause forbids states from providing less protection than what the U.S. Constitution guarantees.[36] When state courts lockstep, they follow the U.S. Supreme Court's lead in construing the scope of these individual rights, and in essence analyze the analogous rights in the

[35] *See infra* Appendix.

[36] U.S. CONST. art. VI, cl. 2; *see* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 875 (2007).

state constitution as conferring the same level of protection as their federal counterparts.[37] State courts that follow the lockstep approach will provide the exact same protection for the right as federal courts do under the U.S. Constitution.[38] But this is problematic when federal protection is insufficient, as is the case with voting rights.

Lockstepping is fairly common with regard to the right to vote.[39] A prominent, recent example comes from the Wisconsin Supreme Court. On July 31, 2014, the Wisconsin Supreme Court issued two opinions, one 5-2 and the other 4-3, upholding the state's voter ID law, following both the U.S. Supreme Court and prior state court decisions in its analysis.[40]

Initially two Wisconsin trial courts held that the state's voter ID law imposed an impermissible qualification for voting under the Wisconsin Constitution.[41] In both cases, plaintiffs challenged the voter ID requirements *only* under the Wisconsin Constitution, not the United States Constitution. Specifically, the plaintiffs invoked Article III, Section 1 of the Wisconsin Constitution, which provides that all persons age 18 or older are qualified electors of the district in which they reside.[42] Presumably, the plaintiffs focused their argument on the Wisconsin Constitution and did not invoke the Fourteenth Amendment's Equal Protection Clause because they wished to avoid an analysis under the U.S. Supreme Court's 2008 decision in *Crawford v. Marion County*,[43] in which the Court upheld a similar Indiana law under the *Anderson-Burdick* "severe burden" balancing test. This proved successful at the trial court, with one court explicitly distinguishing *Crawford* by noting, "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while *Crawford* was based upon the U.S. Constitution which offers no such guarantee."[44]

But that strategy failed before the Wisconsin Supreme Court, largely because that court followed the U.S. Supreme Court's lead to construe the state constitution. The Wisconsin Supreme Court upheld the state's voter ID requirement, adopting federal jurisprudence for the state constitutional question to conclude that the law did not add an additional qualification to vote and did not impose an undue burden on voting.[45] In the 5-2 decision, the court found that the voter ID provision did not add an additional qualification to vote beyond what the state constitution allows; in the 4-3 decision, the majority found that the voter ID requirement was not

[37] *See id.* at 875, 880.
[38] *See id.* at 881.
[39] As one commentator notes, lockstepping is the prevailing norm for most state constitutional adjudication. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).
[40] Milwaukee Branch of the NAACP v. Walker, 357 Wis.2d 469 (Wisc. 2014); League of Women Voters of Wisconsin Education Network v. Walker, 357 Wis.2d 360 (Wisc. July 31, 2014).
[41] *See* League of Women Voters of Wisc. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).
[42] *See* WIS. CONST. art. III, § 1.
[43] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).
[44] *Milwaukee Branch of the NAACP*, 2012 WL 739553 at *1.
[45] Milwaukee Branch of the NAACP v. Walker, 357 Wis.2d 469 (Wisc. 2014); League of Women Voters of Wisconsin Education Network v. Walker, 357 Wis.2d 360 (Wisc. July 31, 2014).

overly burdensome.[46] Throughout both cases, the Wisconsin Supreme Court relied heavily on the U.S. Supreme Court's jurisprudence and analysis in *Crawford*. In fact, in the 4-3 decision, the court explicitly followed the Supreme Court's lead in *Crawford* by stating that it would "structure [its] discussion of plaintiffs' challenges to [the voter ID law] consistent with the method of analysis employed in *Burdick* and *Anderson* . . ."[47] Although the court did not explicitly state that it was lockstepping the scope of voting rights under Wisconsin's Constitution with the U.S. Constitution, its mode of analysis placed the two protections of the right to vote in "absolute harmony."[48] This interpretation means that Wisconsin's explicit grant of voting rights in its constitution is in lockstep with the U.S. Constitution's Equal Protection Clause—even though those two provisions are textually and substantively different. The U.S. Constitution does not explicitly grant the right to vote, while the Wisconsin Constitution does, yet the court construed the two constitutions to be coextensive and therefore substantively identical. This suggests that the Wisconsin Constitution's explicit grant of the right to vote is irrelevant because the court simply followed the U.S. Constitution's lead even though it lacks the same substantive provision.

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

B. Non-lockstep

Instead of using a lockstep approach, some state courts recognize that their constitutions go further than the U.S. Constitution in conferring voting rights. This methodology gives state constitutions significant authority in protecting individual rights because it is not hampered by the more limited federal analysis.

State courts employing a non-lockstep approach start with the notion that their state constitution may be broader than the U.S. Constitution.[49] A court's analysis thus begins and often ends with the state constitution, and the court considers the federal floor only if the state

[46] Milwaukee Branch of the NAACP, 357 Wis.2d 469; League of Women Voters of Wisconsin Education Network, 357 Wis.2d 360. Justice Crook joined the majority in *League of Women Voters*, the 5-2 decision, but joined the dissent in *Milwaukee Branch of the NAACP*, the 4-3 ruling. He wrote separately in *League of Women Voters* to explain that his decision in that case rested largely on the fact that the plaintiffs brought only a facial challenge to the law. He dissented in *Milwaukee Branch of the NAACP*, however, finding that the plaintiffs had presented enough evidence of specific burdens the law imposed on voters.

[47] *Milwaukee Branch of the NAACP*, 357 Wis.2d at 490.

[48] *See* Robert F. Utter & Sanford E. Pitler, Speech, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645 (1987).

[49] *See* Anderson & Oseid, *supra* note 36, at 885.

constitution does not cover the right in question.[50] Federal constitutional interpretation is merely persuasive in non-lockstep state jurisprudence, with no presumptive validity.[51]

The Missouri Supreme Court, in its 2006 voter ID decision, set out the reasons for using this state-focused method quite nicely, contrasting the voter protection provisions in both the U.S. and Missouri Constitutions.[52] The Missouri court recognized that, although both the U.S. Constitution and the state's constitution safeguard the right to vote, the broader state constitution provides independent and explicit voting protection.[53] So construed, the voter ID law violated the Missouri Constitution's conferral to Missouri citizens of a "fundamental right to vote."[54] The court acknowledged that the U.S. Constitution still provides a floor of protection under the Fourteenth Amendment's Equal Protection Clause.[55] But the court, while giving credence to the U.S. Constitution's more limited protection of voting rights, focused its analysis on the Missouri Constitution. Missouri's constitution goes beyond the federal floor, so regardless of whether the law was permissible under the U.S. Constitution, the court invalidated it under the state constitution using the non-lockstep methodology. Similarly, the Arkansas Supreme Court, in rejecting that state's voter ID law more recently, also recognized the primacy and independence of the state constitution's conferral of voting rights.[56] The court found that the four qualifications listed in the Arkansas Constitution (U.S. citizen, Arkansas resident, over 18, and lawfully registered) "simply do not include any proof-of-identity requirement."[57] The court also refused to rely on *Crawford* or on cases from other jurisdictions, explaining that "those courts interpreted the United States Constitution or their respective states' constitutions, and here, we address the present issue solely under the Arkansas Constitution."[58]

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

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[50] *See id.* at 885; *see also* Utter & Pitler, *supra* note 48, at 647.
[51] Utter & Pitler, *supra* note 48, at 647.
[52] Weinschenk v. State, 203 S.W.3d 201, 211–12 (Mo. 2006) ("The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart . . .")
[53] *Id.* at 216 ("Here, the issue is constitutionality under Missouri's Constitution, not under the United States Constitution.").
[54] *Id.* at 212–13 (citing MO. CONST. art. I, § 25).
[55] *Id.* at 216.
[56] *See* Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014).
[57] *Id.*
[58] *Id.*

III. A NON-LOCKSTEP APPROACH PROVIDES THE BEST INTERPRETATIVE METHOD FOR THE RIGHT TO VOTE

A. The Problems with Lockstepping the Constitutional Right to Vote

Textually and jurisprudentially, a non-lockstep analysis presents the best approach to construe the constitutional right to vote. There are at least three reasons to reject a lockstep methodology to interpreting voting rights under state constitutions.

First, the text of the U.S. Constitution says that *states* will determine voter qualifications.[59] The U.S. Constitution does not define who has the right to vote; it delegates that responsibility to the states. In turn, and unlike the U.S. Constitution, state constitutions specifically grant voting rights to the state's residents. Therefore, if we are faithful to the U.S. Constitution's delegation of voter eligibility rules to the states, then there is little with which to lockstep, beyond the amorphous standards of the Equal Protection Clause. It is incongruent to lockstep a state's more specific voting rules with a completely different general provision of the U.S. Constitution that actually says nothing directly about the right to vote.

Second, the history of the constitutional structure for voting rights portends a greater role for state definitions of the right to vote. Well before the adoption of the U.S. Constitution, state constitutions already granted the right to vote to the state's citizens. The Founding Fathers likely felt no need to insert a right-to-vote provision in the U.S. Constitution due to the preceding direct state grants of that right.[60] Instead, the drafters provided in Article I, Section 2 that voter eligibility for federal elections was dependent on state eligibility rules. This provision was a "compromise, an outgrowth both of an ideologically divided constitutional convention and the practical politics of constitutional ratification," but it was possible specifically because state constitutions already conferred the right to vote.[61] Accordingly, we need not locate the right to vote in the Fourteenth Amendment's Equal Protection Clause, especially given that it exists already within state constitutions.[62]

Third, lockstepping goes against the ideal of judicial federalism, which suggests that state constitutions should play a significant role in protecting individual liberties. As Justice Brennan explained in his seminal *Harvard Law Review* article, state courts should give their constitutions independent force when they disagree with U.S. Supreme Court decisions on an important issue of individual liberties.[63] State courts that robustly protect rights can help to check more

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[59] U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

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

[61] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 21 (2009).

[62] Amar, *supra* note 21, at 186-87 (explaining that, at the time of its adoption, the Fourteenth Amendment's Equal Protection Clause was not understood to encompass voting rights).

[63] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); *cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (positing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which

restrictive federal jurisprudence and, ultimately, national power.[64] State courts should therefore use a state-focused, federalist-driven, non-lockstep method that allows them to recognize state constitutions as more protective of voting rights than the U.S. Constitution.

B. The Presumptive Invalidity of Election Laws That Add Voter Qualifications

A non-lockstep approach to state constitutional interpretation of the right to vote rejects the U.S. Supreme Court's *Anderson-Burdick* standard as too deferential to state regulation of elections, as that test fails to recognize the explicit right of suffrage within state constitutions. But in its place, state courts need a workable test that elevates the importance of the fundamental right to vote while still allowing jurisdictions to run their elections. Again, the solution is right in front of us: the structure of state constitutions. Courts simply need to apply faithfully what state constitutions say.

1. State Constitutional Structure

As discussed above, all but one state constitution explicitly grants to its citizens the right to vote. Most of these constitutional provisions are couched in mandatory terms: all citizens "*are* qualified electors" or "*shall* be entitled to vote" so long as they are U.S. citizens, residents of the state for a certain time, and over eighteen years of age.[65]

State constitutions, as previously noted, also delegate authority to state legislatures to regulate elections, but this comes only *after* the state constitutions confer voting rights. That is, the right to regulate elections is derivative of the people's right to vote. As one Wisconsin trial court considering a voter ID law explained, the citizenry of the state ratified the constitution, so the citizen's right to vote arises first, and legislative authority to alter that right follows.[66] In addition, the constitutional power state legislatures enjoy is based on permissive language and is often limited to regulating only certain aspects of the election process. Pennsylvania citizens, for example, "*shall* be entitled to vote at all elections subject . . . to such laws requiring and regulating the registration of electors as the General Assembly *may* enact."[67] Other state constitutions allow legislatures to pass laws involving absentee balloting or felon disenfranchisement.[68] Some state constitutions also permit the legislature to enact laws to "preserve the integrity" of elections or "guard against abuses of the elective power."[69]

State constitutions thus grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process. The constitution, not

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

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

[65] *See, e.g.*, PA. CONST. art. VII, § 1.

[66] Order Granting Motion for Temporary Injunction, Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Mar. 6, 2012).

[67] PA. CONST. art. VII, § 1 (emphasis added).

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

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

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

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

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

A plaintiff satisfies his or her initial burden under this proposed test by showing that the law creates categories—those who may vote and those who may not—based on additional criteria not listed in the state constitution. For example, a voter ID law, in a state in which many voters do not have an ID and face substantial burdens in obtaining one, can be seen as an additional qualification because those voters who satisfy all other eligibility rules still may not vote without possessing an ID. Having an ID has become a qualification. In this scenario (which is the reality in most states with strict ID requirements) a voter ID law does more than just enforce the constitutionally-enumerated eligibility rules, because those who meet the valid qualifications may still suffer disenfranchisement if they do not also have the ID. Put another way, if *every* voter possessed a valid ID, then the ID law would not be an additional qualification because it would not impose a status requirement on voters that some people cannot easily meet. Everyone would still be eligible to vote regardless of the voter ID law because everyone would have one, and the law would be regulating the process of voting instead of delineating an additional qualification. But that is not the reality of many of today's voter ID laws. To be sure, a voter ID law in a state in which everyone owned an ID still might impose an added burden on voters—of bringing and presenting the ID—but this is different in kind from distinguishing between which voters may cast a ballot based on possession of an ID when not everyone can easily obtain one. If having an ID is not a universal trait, or the state does not otherwise accommodate those without one, then the requirement turns into an additional voter qualification.

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

This proposal flips the normal burden in constitutional voting-rights litigation. Under the federal *Anderson-Burdick* test, the plaintiff has the obligation to show that the law in question burdens the right to vote to a severe level.[70] If the plaintiff cannot do so, then a lockstepping state court following *Anderson-Burdick* will apply an intermediate balancing test that largely defers to the state's justifications for the law.[71] In essence, "laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association."[72] Under *Anderson-Burdick*, then, the plaintiff assumes the ultimate burden of proving the law's invalidity by demonstrating the barriers the law imposes on voting rights, and the court typically credits whatever justification the state posits for its election regulation.[73] A court following *Anderson-Burdick* will reverse the presumption of validity and hold the state to a higher threshold only if the court finds that the law imposes a severe burden.[74]

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

This two-part, burden-shifting analysis is akin to strict scrutiny, requiring the state to justify an election regulation by demonstrating how it is tied specifically to the legislature's power.[75] The U.S. Supreme Court has recognized that "under our Constitution . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress."[76] A close analysis of state constitutions reveals that those documents explicitly grant the right to vote in unequivocal terms, subject only to a few enumerated status qualifications and to the legislature's authority, which is limited to certain areas in most states. Thus, state constitutions themselves suggest that legislatures must justify the imposition of additional voter qualifications that infringe the right to vote. An analysis that is similar to federal strict scrutiny

[70] Burdick v. Takushi, 504 U.S. 428, 434 (1992).
[71] *Id.*; *see* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553 (2015).
[72] Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336 (2007).
[73] *See id.* at 323; *Burdick*, 504 U.S. at 434; *see also* Douglas, *supra* note 71 (discussing the Court's undue deference to states in the interest prong of the constitutional analysis).
[74] *See* Elmendorf, *supra* note 72, at, 336–37.
[75] Using heightened scrutiny and rejecting deference to state legislatures for impediments to voting rights was the original formulation of the Warren Court's right-to-vote decisions. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627–28 (1969) ("Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.").
[76] Storer v. Brown, 415 U.S. 724, 729–30 (1974) (citing U.S. CONST. art. I, § 2, cl. 1).

review comes directly from the state constitutional text and structure, as well as the fundamental nature of the right to vote.[77]

This formulation does not require widespread judicial oversight of elections, however, as states should be able to overcome the presumption of invalidity in most instances for run-of-the-mill election-administration laws. States need to regulate how an election should operate. Many election-related laws, moreover, do not impose additional voter qualifications but instead are about other mechanics of the election process, such as ballot access requirements for candidates or campaign finance regulations.[78] But when a plaintiff can demonstrate that a particular law adds an additional voting qualification beyond what the state constitution permits, courts should consider the law presumptively invalid under the constitutional text. The state should then have the burden of showing with specific evidence why it was justified in passing that law. This mode of analysis is most faithful to a non-lockstep approach to constitutional protection of the right to vote and adheres most closely to state constitutional text and structure.

IV. SELECTING JUDICIAL CANDIDATES WHO WILL ROBUSTLY PROTECT THE RIGHT TO VOTE

Some state judges are better than others in broadly construing voting rights and therefore are more likely to adopt the two-part analysis described above. After all, a judge who is predisposed to lockstep the state constitutional protection of voting rights with limited federal jurisprudence or otherwise narrowly construe the right to vote is unlikely to follow the proposed test. An evaluation of state right-to-vote cases may tell us whether ideologically liberal versus conservative judges, as well as elected versus appointed judges, are better at broadly construing the state-conferred constitutional right to vote. If the right to vote is the most fundamental right in our democracy,[79] then we should favor judges who will issue rulings that robustly protect that right for all voters. This Part provides a jumping off point for analyzing how ideology and methods of judicial selection may help to determine how a potential judge will construe the constitutional right to vote. Although the data is preliminary, and further studies are needed, it appears that liberal and appointed judges may be better at robustly construing the right to vote as compared to their conservative and elected counterparts.

A. Political Ideology

Liberal judges tend to view individual rights broadly, granting fuller protection to plaintiffs asserting these rights against state regulation, while conservative judges analyze them more narrowly.[80] For example, court decisions in Wisconsin, Michigan, and Georgia have

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[77] *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1295 (2002).

[78] *See* Douglas, *supra* note 1, at 178 (distinguishing between laws that directly impact voters with laws that only tangentially affect voters by regulating other aspects of the election process).

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

[80] Prior empirical studies have shown that liberal and conservative judges rule differently on various election law issues. For example, Professors Adam Cox and Thomas Miles have found that ideology, based on the partisanship of the appointing President, correlates strongly with how a federal judge rules in a Voting Rights Act case. *See* Adam B. Cox & and Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19-25 (2008). Similarly, Professors Michael Kang and Joanna Shepherd have found that state judges' rulings are often consistent with the

seemingly tracked the sitting judges' ideologies, with the liberal judges ruling in favor of broader protection of the right to vote and conservative judges going in the opposite direction.[81] Of course, ideology is not the only driver of judicial decision making, as legal analysis is based on law, precedent, and the facts of a particular case.[82] That said, ideology often correlates with the outcome in a case, especially on highly-partisan issues such as election law and voting rights.[83] It should come as no surprise, then, that a judge's analysis of the constitutional right to vote often correlates with his or her ideology. The link between ideology and interpretation of the constitutional right to vote is most poignant in decisions on voter ID laws.[84] Most (although not all) of the state judges ruling on voter ID laws in the past decade have followed their ideological predilections.[85] Liberal judges construe the constitutional right to vote broadly and therefore view voter ID laws skeptically, while conservative judges do the opposite.[86]

Although not *every* Democratic or liberal judge is going to invalidate a voter ID law, and not *every* Republican or conservative judge is going to uphold a voter ID requirement, there is still a discernable trend, particularly regarding the scope of protection afforded to the constitutional right to vote under state constitutions. It may not be possible to categorize all judges along an ideological spectrum, and a judge's constitutional analysis on this issue may have nothing to do with his or her personal ideological predilections. Moreover, voter ID laws come in different shapes and sizes, and some laws – such as the ones in Rhode Island or Colorado[87] – do not necessarily infringe the fundamental right to vote or impose a qualification because all voters can easily comply with no added burden. Regardless, the analysis shows that *who* is deciding these cases can matter a great deal[88] because liberal-leaning judges seem to understand more clearly that state constitutions provide broad protection to the individual right to vote that goes beyond federal jurisprudence.

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views of the political parties that funded their election campaigns. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239 (2013).

[81] *See* Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016). An important caveat is required here: I am not attempting a quantitative empirical analysis, and the sample size is relatively small, so the conclusions are necessarily tentative. Also, the direction of influence is unclear: does ideology affect the decision, or is the decision simply evidence of the judge's ideology? But the analysis at least provides a first step in showing that the political identity of the judges may matter when deciding a voting rights controversy.

[82] *See, e.g.*, Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301, 302 (2008).

[83] *See, e.g.*, Kyle Kopko, The Effect of Partisanship in Election Law Judicial Decision-Making (2010) (electronic theses and dissertation, Ohio State University), *available at* https://etd.ohiolink.edu/!etd.send_file?accession=osu1275415061&disposition=inline.

[84] *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for A Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 647 (2008).

[85] For a detailed discussion of ideology and recent state court voter ID decisions, see Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016).

[86] *See* Elmendorf, *supra* note 82.

[87] *See* Justin Levitt, *Rhode Island Voter ID Follow-up*, ELECTION LAW BLOG (May 23, 2012), http://electionlawblog.org/?p=34694; Colorado Common Cause v. Davidson, No. 04-CV-7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004).

[88] *See* Elmendorf, *supra* note 84, at 647 (considering both federal and state voter ID decisions and finding that, as of 2008, "there have been fourteen votes by Democratic judges against the constitutionality of photo-ID requirements, and only three votes indicating that the requirement at issue is permissible. For Republican judges, the respective numbers are three (against constitutionality) and fifteen (for constitutionality)."

B. Judicial Selection

Voting rights cases often involve challenges to state laws that have the effect of making it harder for typically disfavored groups to vote, such as poor people, minorities, felons, or people with disabilities. Perhaps judges are more likely to rule broadly in construing voting rights for these individuals if the judges are more isolated from the political process by being appointed instead of elected, or if they face merely a retention election instead of a campaign against an opponent. Prior studies show that elected judges tend to pay more attention to public opinion than appointed judges or judges who must win only a "yes" or "no" retention vote to stay on the bench.[89] Retention elections for appointed judges are usually boring affairs with little political drama, but elected judges must actively campaign because they must beat an opponent who also wants the seat.[90] The theory, then, is that an elected judge may be less likely to rule in favor of a political minority than an appointed judge who will not worry as much about the potential backlash from a vigorous campaign.[91]

The initial evidence suggests that, for issues that are not already highly ideological, appointed judges or judges who will face only retention elections are better at broadly construing the right to vote and including political minorities in the democratic process.[92] For instance, courts in California, Iowa, and Tennessee ruled that the state could not disenfranchise the (former felon) plaintiffs who brought suit, thus limiting the scope of the states' felon disenfranchisement laws; judges in these states are appointed initially and must withstand retention elections to keep their seats.[93] These cases exemplify how appointed judges tend to rule broadly and independently of federal jurisprudence when construing their state constitutions' grant of the right to vote, especially in cases involving felon disenfranchisement or the voting process.[94] This finding adds data to the robust and complex debate over methods of judicial selection.

V. CONCLUSION

There have been myriad calls for Congress or the federal courts to fix voting-rights jurisprudence to give broader protection to the individual right to vote.[95] But the solution is in plain sight if state courts simply read state constitutions faithfully to their text and independently from federal jurisprudence. In locating the right to vote, we too often look solely at the implied

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[89] *See* Damon M. Cann & Teena Wilhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RES. 557, 570 (2011).

[90] *See* Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-based Reform*, 75 ALB. L. REV. 1799, 1805- 06 (2011-2012).

[91] *See e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

[92] For a detailed discussion of methods of judicial selection and recent state court voting rights cases, see Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016).

[93] League of Women Voters of Cal. v. McPherson, 145 Cal. App. 4th 1469 (Cal. App. 2006); Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 847 (Iowa 2014); May v. Carlton, 245 S.W.3d 340, 345 (Tenn. 2008).

[94] *See* Douglas, *supra* note 92.

[95] *See, e.g.*, Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution*: *Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 572 (2004); *see also* Brad Plumer, *'We Have to Fix That,' but Will We?*, WASH. POST (Nov. 8, 2012), http://www.washingtonpost.com/politics/decision2012/we- have-to-fix-that-but-will-we/2012/11/08/c83b4976-29ca-11e2-bab2-eda299503684_story.html.

right under the U.S. Constitution's negative language and the Equal Protection Clause. Construing a voting regulation under the U.S. Constitution, however, presents only half of the inquiry. Almost all state constitutions grant citizens the right to vote through explicit, direct language. Yet many state courts interpret their own state's constitution to be in lockstep with federal constitutional law.

This lockstepping approach is backwards. The U.S. Constitution directs the inquiry about voting qualifications to the states, not the other way around.[96] Moreover, it makes little sense to lockstep a state constitution's specific grant of voting rights with the very different implied right under the general language of the federal Equal Protection Clause. Courts construing restrictions on voting rights should consider the broader scope of state constitutions.

The U.S. Supreme Court in recent years has contracted the scope of the right to vote under the federal Equal Protection Clause.[97] A renewed, independent focus on state constitutions and their explicit grant of the right to vote is textually faithful to both the U.S. and state constitutions and will restore the importance of the most foundational right in our democracy. The best way to achieve this renewed focus is to select judges who will embody and protect the fundamental importance of the right to vote.

[96] U.S. CONST. art. I, § 2.
[97] *See* Douglas, *supra* note 1, at 151–57.

APPENDIX[98]

State Constitutions' Conferral of the Right to Vote

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
Alabama[99]	"shall have the right to vote"		
Alaska[100]	"Every citizen . . . may vote"		
Arizona[101]		"All elections shall be free and equal"	"No Person shall be entitled to vote . . . unless"; "shall not be denied or abridged"
Arkansas[102]	"any person may vote"	"Elections shall be free and equal"	
California[103]	"may vote"		"may not be conditioned by a property qualification"
Colorado[104]	"shall be qualified to vote"	"free and open"	
Connecticut[105]	"shall be . . . an elector"		"No person shall be denied . . . enjoyment of his or her civil or political rights"

[98] This Appendix appeared initially in Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144-49 (2014). It is reprinted here with permission.
[99] ALA. CONST. art. VIII, § 177.
[100] ALASKA CONST. art. V, § 1.
[101] ARIZ. CONST. art. II, § 21; *id.* art. VII, § 2.
[102] ARK. CONST. art. III, §§ 1–2.
[103] CAL. CONST. art. II, § 2; *id.* art. I, § 22.
[104] COLO. CONST. art. VII, § 1; *id.* art. II, § 5.
[105] CONN. CONST. art. VI, § 1; *id.* art. I, § 20.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
Delaware[106]	"shall be entitled to vote"	"All elections shall be free and equal"	
Florida[107]	"shall be an elector"		
Georgia[108]	"shall be entitled to vote"		
Hawaii[109]	"shall be qualified to vote"		"No citizen shall be disfranchised, or deprived"
Idaho[110]	"is a qualified elector"		"No power . . . shall at any time interfere with . . . the right of suffrage"
Illinois[111]	"shall have the right to vote"	"All elections shall be free and equal"	
Indiana[112]	"may vote"	"All elections shall be free and equal"	
Iowa[113]	"shall be entitled to vote"		
Kansas[114]	"shall be deemed a qualified elector"		

[106] DEL. CONST. art. V, § 2; *id.* art. I, § 3.
[107] FLA. CONST. art. VI, § 2.
[108] GA. CONST. art. II, § 1, ¶ II.
[109] HAW. CONST. art. II, § 1; *id.* art. I, § 8.
[110] IDAHO CONST. art. VI, § 2; *id.* art. I, §§ 19, 20.
[111] ILL. CONST. art. III, §§ 1, 3.
[112] IND. CONST. art. II, §§ 1, 2.
[113] IOWA CONST. art. II, § 1.
[114] KAN. CONST. art. V, § 1.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
Kentucky[115]	"shall be a voter"	"All elections shall be free and equal"	
Louisiana[116]	"shall have the right to register and vote"		
Maine[117]	"shall be an elector"		
Maryland[118]	"and every citizen . . . ought to have the right of suffrage"; "shall be entitled to vote"	"elections ought to be free and frequent"	
Massachusetts[119]	"have an equal right to elect officers"	"All elections ought to be free"	
Michigan[120]	"shall be an elector and qualified to vote"		
Minnesota[121]	"shall be entitled to vote"		"No member of this state shall be disfranchised"
Mississippi[122]	"is declared to be a qualified elector"		
Missouri[123]	"are entitled to vote"	"free and open"	

[115] KY. CONST. §§ 6, 145.
[116] LA. CONST. art. I, § 10(A).
[117] ME. CONST. art. II, § 1.
[118] MD. CONST. DECLARATION OF RIGHTS, art. I, § 7; MD. CONST. art. I, § 1.
[119] MASS. CONST. pt. I, art. IX.
[120] MICH. CONST. art. II, § 1.
[121] MINN. CONST. art. VII, § 1; *id.* art. I, § 2.
[122] MISS. CONST. art. XII, § 241.
[123] MO. CONST. art. VIII, § 2; *id.* art. I § 25.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
Montana[124]	"is a qualified elector"	"free and open"	"No person shall be denied the equal protection of the laws"
Nebraska[125]	"shall . . . be an elector"	"shall be free"	
Nevada[126]	"shall be entitled to vote"; also calls voting a "privilege"		"There shall be no denial of the elective franchise at any election"
New Hampshire[127]	"shall have an equal right to vote"	"All elections are to be free"	"The right to vote shall not be denied to any person because of the nonpayment of any tax."
New Jersey[128]	"shall be entitled to vote"		
New Mexico[129]	"shall be qualified to vote"	"All elections shall be free and open"	"and no power . . . shall at anytime interfere to prevent the free exercise of the right of suffrage"
New York[130]	"shall be entitled to vote"		

[124] MONT. CONST. art. IV, § 2; *id.* art. II, §§ 4, 13.
[125] NEB. CONST. art. I, § 22; art. VI, § 1.
[126] NEV. CONST. art. II, § 1.
[127] N.H. CONST. pt. I, art. XI.
[128] N.J. CONST. art. II, § 1, ¶ 3.
[129] N.M. CONST. art. VII, § 1; *id.* art. II, § 8.
[130] N.Y. CONST. art. II, § 1.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
North Carolina[131]	"shall be entitled to vote"	"All elections shall be free"	
North Dakota[132]	"shall be a qualified elector"		
Ohio[133]	"has the qualifications of an elector"		
Oklahoma[134]	"are qualified electors"	"the free exercise of the right of suffrage"	"The State shall never enact any law restricting or abridging the right of suffrage"
Oregon[135]	"is entitled to vote"	"All elections shall be free and equal"	
Pennsylvania[136]	"shall be entitled to vote"	"Elections shall be free and equal"	
Rhode Island[137]	"shall have the right to vote"		
South Carolina[138]	"shall have an equal right to elect officers"; "shall be an elector"; "is entitled to vote"	"free and open"	

[131] N.C. CONST. art. VI, § 1; *id.* art. I, § 10.
[132] N.D. CONST. art. II, § 1.
[133] OHIO CONST. art. V, § 1.
[134] OKLA. CONST. art. III, § 1; *id.* art. II, § 4; *id.* art. I, § 6.
[135] OR. CONST. art. II, §§ 1, 2.
[136] PA. CONST. art. VII, § 1; *id.* art. I, § 5.
[137] R.I. CONST. art. II, § 1.
[138] S.C. CONST. art. I, § 5; *id.* art. II, §§ 4, 5.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
South Dakota[139]	"shall be entitled to vote"	"free and equal" (two different clauses)	
Tennessee[140]	"shall be entitled to vote . . . and there shall be no other qualification attached to the right of suffrage"	"free and equal"	"right of suffrage . . . shall never be denied to any person"
Texas[141]	"shall be deemed a qualified voter"		
Utah[142]	"shall be entitled to vote in the election"	"All elections shall be free"	"The rights . . . to vote . . . shall not be denied or abridged"
Vermont[143]	"all voters . . . have a right to elect officers"; "shall be entitled to all the privileges of a voter"	"ought to be free and without corruption"	
Virginia[144]	"all men . . . have the right of suffrage"	"all elections ought to be free"	
Washington[145]	"shall be entitled to vote"	"free and equal"	

[139] S.D. CONST. art. VI, § 19; *id.* art. VII, § 1, 2.
[140] TENN. CONST. art. IV, § 1; *id.* art. I, § 5.
[141] TEX. CONST. art. VI, § 2.
[142] UTAH CONST. art. IV, §§ 1, 2; *id.* art. I, § 17.
[143] VT. CONST. ch. I, art. VIII; *id.* ch. II, § 42.
[144] VA. CONST. art. I, § 6.
[145] WASH. CONST. art. VI, § 1; *id.* art. I, § 19.

State	Explicit Grant of the Right to Vote	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language
West Virginia[146]	"shall be entitled to vote"		"Nor shall any person be deprived by law, of any right, or privilege"
Wisconsin[147]	"is a qualified elector"		
Wyoming[148]	"shall be entitled to vote"	"open, free, and equal"	"The rights . . . to vote . . . shall not be denied or abridged"

[146] W. VA. CONST. art. IV, § 1; *id.* art. III, § 11.
[147] WIS. CONST. art. III, § 1.
[148] WYO. CONST. art. VI, §§ 1, 2; *id.* art. I, § 27.