Litigating Trans Rights in the States

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Trans rights are under attack. Across the country, states are banning trans children and adults from gender-affirming care, forcing them into bathrooms and gender-segregated school activities that don't align with their actual gender, and forcing them to be deadnamed and misgendered in a variety of contexts. While the U.S. Supreme Court has yet to weigh in on whether the Equal Protection Clause prohibits at least some discrimination on the basis of gender identity, trans advocates have been heartened by the Court's ruling in Bostock v. Clayton County *and early wins in federal court that have struck many of these restrictions down.*

But the failure to challenge these laws with state constitutional claims is a short-sighted strategy. While there are reasonable signs for optimism, whether the U.S. Supreme Court will ultimately uphold or strike down these laws remains to be seen. And even if the Court affirms that at least some discrimination on the basis of gender identity is unconstitutional at least some of the time, not all discriminatory laws will be held unconstitutional. Accordingly, regardless of whether the ultimate outcome of federal litigation is success, failure, or something in between, advocates will need another venue to pursue their claims.

Not only are state courts available, but many state constitutions provide litigants with unequivocally stronger claims. While the U.S. Constitution does not contain an Equal Rights Amendment, many states do—and review gender-based discrimination under strict scrutiny. While the scope of privacy rights under the U.S. Constitution is ambiguous after Dobbs v. Jackson Women's Health Organization*, many state constitutions contain robust privacy protections that have long been more expansive than the federal right to privacy. Most state constitutions also contain many, many more rights than the U.S. Constitution does, providing advocates with more claims still.*

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In this Article, I use the analogies of abortion-rights litigation and early gay-rights litigation to argue why state constitutional litigation and development is a necessary, complementary part of any nationwide trans legal strategy. I argue that, regardless of how federal litigation plays out, trans advocates need to start engaging with state constitutions—through both litigation and constitutional amendments. To that end, I explore what possible arguments and constitutional amendments might look like, and situate state advocacy in the context of a national strategy.

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I. INTRODUCTION

State legislatures are adopting anti-trans legislation at a rapid clip.[1] The types of legislation are as far-reaching in their impact as they are cruelly imaginative. Bans on trans students participating in school-sponsored sports, coupled with the prospect of deeply invasive procedures for "verifying" a

[1] *See* Molly Sprayregen, *Here Are All the Anti-Trans Bills that Have Become Law in 2023*, LGBTQNATION (Mar. 14, 2023), https://www.lgbtqnation.com/2023/03/here-are-all-the-anti-trans-bills-that-have-become-law-in-2023/ [https://perma.cc/EG5J-NC8C].

student's gender,[2] have been among the most popular pieces of legislation,[3] despite the rarity of trans student athletes.[4] States have increasingly restricted trans youth from using any bathroom other than the one corresponding with their assigned gender,[5] and some states have even obligated schools to "out" trans students to their parents.[6] Severe limitations, or outright bans, on gender-affirming care for trans youth have been widely adopted[7]—and these restrictions are slowly being expanded to adults, too.[8] So-called bans on "drag shows"[9] are

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[2] *See* Morgan Trau, *After Backlash, GOP Leader Says 'Genital Inspections' Won't Be Part of Anti-Trans Athlete Bill*, OHIO CAP. J. (June 17, 2022), https://ohiocapitaljournal.com/2022/06/17/after-backlash-gop-leader-says-genital-inspections-wont-be-part-of-anti-trans-athlete-bill/ [https://perma.cc/S39V-J38Z].

[3] ALA. CODE § 16-1-52 (2023); ARIZ. REV. STAT. ANN. § 15-120.02 (2023); ARK. CODE ANN. § 6-1-107 (2023); FLA. STAT. ANN. § 1006.205 (West 2023); IDAHO CODE § 33-6203 (2023); IND. CODE ANN. § 20-33-13-4 (LexisNexis 2023); IOWA CODE § 261I.2 (West 2023); KAN. STAT. ANN. § 60-5603 (West); KY. REV. STAT. ANN. § 164.2813 (West 2023); LA. STAT. ANN. § 4:444 (2023); MISS. CODE ANN. § 37-97-1 (2023); MO. REV. STAT. § 163.048 (2023); MONT. CODE ANN. § 20-7-1306 (West 2023); N.D. CENT. CODE § 15.1-39-02 (2023); OKLA. STAT. ANN. tit. 70, § 27-106 (West 2023); S.C. CODE ANN. § 59-1-500 (2023); S.D. CODIFIED LAWS § 13-67-1 (2023); TENN. CODE ANN. § 49-6-310 (West 2023); TEX. EDUC. CODE ANN. § 33.0834 (West 2023); UTAH CODE ANN. § 53G-6-902 (West 2023); W. VA. CODE ANN. § 18-2-25d (2023); WYO. STAT. ANN. § 21-25-204 (West 2023).

[4] *E.g.*, Anne Branigin, *Utah Governor Vetoes Transgender Athlete Bill, Citing High Suicide Rates: 'I Want Them to Live*,*'* WASH. POST (Mar. 23, 2022), https://www.washingtonpost.com/lifestyle/2022/03/23/utah-cox-transgender-athlete-veto/ [https://perma.cc/6SFW-YLJV] (noting that, of the 75,000 high-school athletes in Utah schools, only 4 are transgender).

[5] ALA. CODE § 16-1-54 (2023); ARK. CODE ANN. § 6-21-120 (2023); FLA. STAT. ANN. § 553.865 (West 2023); IDAHO CODE § 33-6601 (2023) *et seq.*; IOWA CODE § 280.33 (West 2023); KY. REV. STAT. ANN. § 158.189 (West 2023); N.D. CENT. CODE § 15.1-06-21 (2023); OKLA. STAT. ANN. tit. 70, § 1-125 (West 2023); TENN. CODE ANN. § 49-2-802 (West 2023).

[6] ALA. CODE § 26-26-5 (2023); IND. CODE ANN. § 20-33-7.5-2 (LexisNexis 2023); IOWA CODE § 279.78(2) (2023); N.D. CENT. CODE § 15.1-06-21(4)(b) (2023).

[7] ALA. CODE § 26-26-4 (2023); ARIZ. REV. STAT. § 32-3230 (2023); ARK. CODE ANN. § 20-9-1502 (2023); GA. CODE ANN. § 43-34-15 (2023); IDAHO CODE § 18-1506C (2023); IND. CODE ANN. § 25-1-22-13 (LexisNexis 2023); IOWA CODE § 147.164 (West 2023); KY. REV. STAT. ANN. § 311.372 (West 2023); LA. STAT. ANN. § 40:1098.2 (2023); MISS. CODE ANN. § 41-141-5 (2023); MO. REV. STAT. § 191.1720 (2023); MONT. CODE ANN. § 50-4-1004 (2023); Neb. Rev. Stat § 71-7302 (2023); N.D. CENT. CODE § 12.1-36.1-02 (2023); OKLA. STAT. ANN. tit. 63, § 2607.1 (West 2023); S.D. CODIFIED LAWS § 34-24-38 (2023); TENN. CODE ANN. § 68-33-103 (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 161.702 (West 2023); UTAH CODE ANN. § 58-1-603 (West 2023); W. VA. CODE ANN. §§ 30-3-20, 30-14-17 (2023).

[8] Azeen Ghorayshi, *Many States Are Trying to Restrict Gender Treatment for Adults, Too*, N.Y. TIMES (Apr. 22, 2023), https://www.nytimes.com/2023/04/22/health/transgender-adults-treatment-bans.html [https://perma.cc/HKL4-P4KP].

[9] ARK. CODE ANN. §§ 14-1-302(7)(B)(ii), 14-1-303 (2023); FLA. STAT. ANN. § 827.11 (West 2023); MONT. CODE ANN. § 45-8-201(1)(b) (West 2023); N.D. CENT. CODE § 12.1-27.1-03.4(1)(a)(1)(b) (2023); TENN. CODE ANN. §§ 7-51-1401(2)–(3), 7-51-1407 (West 2023).

sometimes written so broadly that they may well criminalize the mere act of *being* trans in particular states.[10]

From the passage of the first pieces of legislation that inaugurated this new era of transphobia, LGBT legal groups have been pushing back. The passage of a new piece of legislation is usually followed shortly thereafter by a legal challenge.[11] And over the past several years, LGBT advocates have notched some early and impressive wins across the board. In comprehensively documenting challenges to trans-discriminatory legislation under the U.S. Constitution from 2017 to 2021, Katie Eyer notes that the cases brought by transgender litigants "have been overwhelmingly successful, no matter which metric of success they are evaluated under."[12] In the past two years, advocates have added to their wins, quickly securing injunctions against laws around the country.[13]

Almost all of the litigation challenging this legislation has been brought in federal court with claims arising under federal law.[14] While the specifics of each

[10] The plain language in Tennessee's statutes, for example, refers to "male or female impersonators," without defining the term, which lends itself to the interpretation that the mere act of *being* trans in public might be deemed as obscene. TENN. CODE ANN. § 7-51-1102(2); *id.* §§ 1401(2)–(3); *see* Jonathan Allen, *Tennessee Takes Lead in Republican Effort to Restrict Drag Shows*, REUTERS (Feb. 23, 2023), https://www.reuters.com/world/us/tennessee-takes-lead-republican-effort-restrict-drag-shows-2023-02-23/ [https://perma.cc/88WQ-QHT3].

[11] *See, e.g.*, Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KFF (Jan. 20, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/ [https://perma.cc/V98G-WYEJ] (After the *Dobbs* decision, several states have implemented abortion legislation which has spurred numerous legal challenges).

[12] Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1, 11 (2023).

[13] *See, e.g.*, Li Zhou, *Anti-Trans Bills Keep Losing in Court*, VOX (June 30, 2023), https://www.vox.com/politics/2023/6/30/23780060/anti-trans-bills-court-gender-affirming-care-bans. [https://perma.cc/R9GB-7Y7Z].

[14] Eyer, *supra* note 12, at 9 (noting that "the number of state law cases is so few that it is hard to make generalizations about trends in the state courts, or under state constitutional law"). So far, litigation has taken place in Iowa, Louisiana, Minnesota, Missouri, Ohio, Texas, and Utah. *See* N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 570–71, 573 (Minn. Ct. App. 2020); Noe v. Parson, No. 23AC-CC04530, slip op. at 1 (Mo. Cir. Ct. Aug. 25, 2023) https://www.courts.mo.gov/fv/c/Order.PDF?courtCode=19&di=2891988 (denying preliminary injunction); Ruling on Petition for Judicial Review at 32, Vasquez v. Iowa Dep't of Hum. Servs., No. CVCV061729 (Iowa Dist. Ct. Nov. 19, 2021), *dismissed as moot*, 990 N.W.2d 661 (Iowa 2023) [hereinafter *Vasquez* Ruling on Petition for Judicial Review]; Loe v. Texas, No. D-1-GN-23-003-616, slip op. at 5–6 (Tex. Dist. Ct. Aug. 25, 2023), https://www.aclutx.org/sites/default/files/d-1-gn-23-003616_temporary_injunction_order.pdf [https://perma.cc/22A4-BK3B] [hereinafter *Loe v. Texas* Preliminary Injunction Order] (granting preliminary injunction); Roe v. Utah High Sch. Activities Ass'n, No. 220903262, slip op. at 14–15 (Utah Dist. Ct. Aug. 19, 2022) https://www.acluutah.org/sites/default/files/field_documents/roe_-_courts_order_granting_

challenge are dependent on the contours of the law in question, advocates have commonly argued that the legislation constitutes an impermissible sex-based classification under the Equal Protection Clause;[15] a restriction on parents' substantive due process right to make decisions for their children;[16] and a violation of federal anti-discrimination laws, drawing from the Supreme Court's 2020 decision in *Bostock v. Clayton County*.[17]

Without guessing as to how the Supreme Court will ultimately rule on the constitutionality or legality of these laws, the arguments against them are not a slam dunk. To embrace the constitutional arguments would require, as the Sixth Circuit recently noted, courts "to extend the constitutional guarantees" of the Due Process Clause and the Equal Protection Clause "to new territory."[18] Advocates may have better luck if they are able to invoke a federal statute that bans discrimination "on the basis of" or "because of" "sex" or "gender," because it may allow them to invoke *Bostock*—where the Court held that, when Title VII of the Civil Rights Act of 1964 banned discrimination "because of sex" in employment, that included anti-LGBT discrimination.[19] Most lower courts have applied *Bostock*'s holding to similarly worded statutes to ban discrimination on the basis of sexual orientation or gender identity in other contexts, too.[20] But

plaintiffs_motion_for_preliminary_injunction.pdf (granting preliminary injunction); Van Garderen v. State, No. DV-23-541, slip. op. at 45–47 (Mont. Dist. Ct. Sept. 27, 2023) https://www.documentcloud.org/documents/23993157-montana-order-granting-plaintiffs-motion-for-preliminary-injunction [hereinafter *Van Garderen v. State* Order] (granting preliminary injunction); Verified Petition for Declaratory and Permanent Injunctive Relief Enjoining the Implementation or Enforcement of Louisiana Act 466 of 2023, La. R.S. §§ 40:1098.1–1098.6 at 45–50, Soe v. La. St. Bd. of Medical Exam'rs, (No. TBD) (La. Civ. Dist. Ct. 2024), https://lambdalegal.org/wp-content/uploads/2024/01/LA-Verified-Petition-FINAL-01.08.2024-SIGNED.pdf [hereinafter *Soe v. Louisiana State Board of Medical Examiners* Petition] (seeking injunction); Moe v. Yost, No. 24CVH03-2481, slip op. at 14 (Ohio Ct. Common Pleas Apr. 16, 2024) (granting temporary restraining order), https://www.acluohio.org/sites/default/files/24-2481_decision_on_tro.pdf [hereinafter *Moe v. Yost* Order].

[15] Eyer, *supra* note 12, at 27, 41.

[16] *Id.* at 41–48.

[17] JARED P. COLE & MADELINE W. DONLEY, CONG. RSCH. SERV., LSB10953, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: TITLE IX CHALLENGES DIVIDE APPELLATE COURTS, (2023), https://crsreports.congress.gov/product/pdf/ (on file with the *Ohio State Law Journal*).

[18] *See, e.g.*, L.W. v. Skrmetti, 73 F.4th 408, 415–16 (6th Cir. 2023); *see also* Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1232 (11th Cir. 2023) (Brasher, J., concurring) ("We should be cautious when we are asked to extend heightened scrutiny to novel facts like these.").

[19] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2); Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).

[20] *See* Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 382 (2024); Shayna Medley, *[Mis]Interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE 673, 714–16 (2022).

while this strategy might work where there is a federal statute that can be invoked, that won't always be the case.[21]

Given the uncertainty of federal litigation, it is a grave misstep for litigants to not simultaneously pursue litigation under state constitutions and broader state constitutional change. State courts can recognize rights under their state constitutions not recognized by the U.S. Supreme Court under the U.S. Constitution—and can provide a higher level of protection for rights where there *is* a federal analog.[22] There is a long history, as well as a present reality, of litigants using state constitutions for this exact purpose, as well as amending constitutions to include more protective language.[23]

In the 1970s, when the conservative majority on the U.S. Supreme Court, led by Chief Justice Warren Burger, pulled back on the Court's most expansive rulings from the previous decades, state constitutions suddenly became attractive venues for vindicating constitutional rights.[24] The failure of a claim to prevail in federal court did not foreclose the possibility that a *state* supreme court would reach a different ruling—and across the board, in interpreting the scope of the Bill of Rights, many courts did.[25]

Abortion rights present an obvious case study. Prior to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade* and tossed the issue of abortion to "the people's elected representatives,"[26] abortion-rights advocates long turned to state constitutions for rights to abortion independent of *Roe*. State supreme courts in a number of states held that their constitutions recognized some form of abortion rights[27]—

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[21] *See Eknes-Tucker*, 80 F.4th at 1229 ("The Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*.").

[22] *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1408–16 (1982).

[23] *Id.* at 1410.

[24] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 387–92 (1980); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 961–64 (1982).

[25] Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 324–27 (1986); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 846 (1991); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1023–26 (1997).

[26] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022). *But see* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 760 (2024) ("But the irony of *Dobbs* is that it purported to 'return' the issue of abortion to the democratic process while revealing an extraordinarily limited, even myopic, conception of democracy.").

[27] *E.g.*, Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 968–69 (Alaska 1997); Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 784–85 (Cal. 1981); *In re* T.W., 551 So.2d 1186, 1193 (Fla. 1989); Hodes & Nauser v. Schmidt, 440 P.3d 461, 491–92 (Kan. 2019); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 400 (Mass. 1981); Doe *ex*

some of which were *more* robust than federally guaranteed rights.[28] And since *Dobbs*, supreme courts in otherwise conservative states have recognized some level of abortion rights[29] and voters in four states (so far) have ratified constitutional amendments expressly recognizing rights to abortion and contraception.[30]

If trans-rights advocates were to bring their claims against anti-trans legislation in the states, they could rely on an equally vibrant history of using state courts to vindicate LGBT rights. Prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*, which held that bans on "sodomy" were unconstitutional violations of the right to privacy,[31] a handful of state courts reached similar rulings based on their own constitutions.[32] And prior to *Obergefell v. Hodges*, which struck down marriage-equality bans nationwide,[33] courts in a number of states struck down bans on gay marriage as violating their own constitutions.[34]

In reaching these rulings, state courts relied on a host of provisions in state constitutions that could be used by advocates today. At the outset, litigants could raise under their state constitutions the exact claims that they have made under

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rel Women of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995); Armstrong v. State, 989 P.2d 364, 373–74 (Mont. 1999); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982).

[28] *See, e.g.*, *Valley Hospital Ass'n*, 948 P.2d at 969 (adopting a "fundamental right to abortion" that is "similar to that expressed in *Roe v. Wade*," rejecting "the narrower definition of that right promulgated in the plurality opinion in *Casey*," and adopting a strict-scrutiny test); *T.W.*, 551 So.2d at 1193–96 (adopting a strict-scrutiny test); *Hodes & Nauser*, 440 P.3d at 498 (adopting a strict-scrutiny test).

[29] Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 782 (S.C. 2023) (plurality opinion) (recognizing a right to abortion under the South Carolina Constitution); Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1128, 1130 (Okla. 2023) (recognizing a "limited right" to abortion under the Oklahoma Constitution to allow a woman to terminate a pregnancy if "the continuation of the pregnancy will endanger the woman's life"); Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023) (recognizing a "fundamental right to receive an abortion to preserve a pregnant woman's life or health" under the North Dakota Constitution); Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Northwest, 211 N.E.3d 957, 962 (Ind. 2023) (recognizing "a woman's right to an abortion that is necessary to protect her life or to protect her from a serious health risk" under the Indiana Constitution, but allowing the General Assembly "broad legislative discretion for determining whether and the extent to which to prohibit abortions"). *But see* Planned Parenthood Great Northwest v. State, 522 P.3d 1132, 1188 (Idaho 2023) (holding that the Idaho Constitution does not recognize any right to abortion); Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 126–27, 129 (S.C. 2023) (affirming constitutionality of abortion ban that "generally prohibits an abortion after the detection of a fetal heartbeat," and noting that its earlier decision "held article I, section 10 does not expressly include a right to an abortion").

[30] CAL. CONST. art. I, § 1.1 (amended 2022); MICH. CONST. art. I, § 28 (amended 2022); OHIO CONST. art. I, § 22 (amended 2023); VT. CONST. ch. 1, art. 22 (amended 2022).

[31] Lawrence v. Texas, 539 U.S. 558, 564–79, 85 (2003).

[32] *See infra* Part III.A.1.

[33] Obergefell v. Hodges, 576 U.S. 644, 676–81 (2015).

[34] *See infra* Part III.B.

the U.S. Constitution. Many state courts have interpreted their equal protection and due process protections more broadly than the U.S. Supreme Court has.[35] Even where their coverage turned out to be relatively analogous, state courts frequently got there first[36]—and have frequently applied a less-deferential version of rational-basis review.[37] While only Nevada has amended its constitution to expressly bar discrimination on the basis of "sexual orientation" and "gender identity or expression,"[38] state courts might be more willing to recognize gender identity—or, more specifically, transgender status—as a suspect or quasi-suspect class. (And while none have yet,[39] the recognition of sexual orientation as a suspect class by some courts[40] bodes well in this context).

But advocates might also draw on constitutional provisions or state-court interpretations that are unique to the states. The most obvious example is the proliferation of state equal rights amendments.[41] Efforts to amend the federal constitution to add an Equal Rights Amendment—which would have banned discrimination "on account of sex"[42]—have not been successful as of yet,[43] but states have adopted provisions that use similar verbiage to achieve similar

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[35] *See infra* Part IV.

[36] *E.g.*, *infra* Part III.B.

[37] Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 472–73 (1996); *see also, e.g.*, Trujillo v. City of Albuquerque, 965 P.2d 305, 314 (N.M. 1998).

[38] NEV. CONST. art. I, § 24 ("Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.").

[39] *E.g.*, N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020) ("Minnesota appellate courts have not specifically addressed what level of scrutiny applies to classifications based on 'transgender status' or 'gender identity,' nor have any federal courts determined that transgender persons qualify as a suspect class receiving strict scrutiny, and we decline to do so here." (citations omitted)).

[40] *E.g.*, Griego v. Oliver, 316 P.3d 865, 880–81 (N.M. 2013); Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009); *In re* Marriage Cases, 183 P.3d 384, 441–53 (Cal. 2008); Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 446–47 (Or. Ct. App. 1998).

[41] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1227–31 (2005); *see also* Sadie Logerfo-Olsen, Katie Hawkinson, Alicia Bannon, Jennifer Weiss-Wolf & Ting Ting Cheng, *State-Level Equal Rights Amendments*, STATE CT. REP. (Aug. 26, 2022), https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments [hereinafter *State-Level Equal Rights Amendments*]. [https://perma.cc/679T-KHSE].

[42] H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

[43] Annie Karni, *Democrats Try a Novel Tactic to Revive the Equal Rights Amendment*, N.Y. TIMES (July 13, 2023), https://www.nytimes.com/2023/07/13/us/politics/democrats-equal-rights-amendment.html [https://perma.cc/C7GS-D8RX].

outcomes.[44] Many have interpreted these provisions to review sex- and gender-based discrimination under *strict*, not intermediate, scrutiny.[45]

Moreover, while the scope of the privacy rights protected by the U.S. Constitution is hazy after the overturning of *Roe v. Wade* and its progeny in 2022,[46] many state constitutions include privacy-rights protections—either expressly or impliedly.[47] And state constitutions contain a multitude of rights that are totally different from the scope of protections afforded by the U.S. Constitution, like "healthcare freedom" provisions adopted in a handful of states after the passage of the Affordable Care Act.[48] Any of these provisions could be wielded to provide advocates with a stronger argument under their state constitution than under the U.S. Constitution.

There is also work to be done in making state constitutions more hospitable to the LGBT community. Though *Obergefell v. Hodges* struck down all state bans on gay marriage, almost all the state constitutional bans adopted from 1998 to 2012 remain on the books.[49] A handful of other discriminatory provisions, equally unenforceable, still also appear in state constitutional texts.[50] It is not uncommon for state constitutions to contain discriminatory language that is unconstitutional under the U.S. Constitution—Alabama retained its ban on interracial marriage until 2000 and requirement of segregated schools until 2022, for example[51]—and these provisions do not alter how state courts

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[44] Logerfo-Olsen, Hawkinson, Bannon, Weiss-Wolf & Cheng, *supra* note 41.

[45] Wharton, *supra* note 41, at 1240–43 (noting that "[m]ost state courts apply a 'strict scrutiny' standard of review," with some "announc[ing] an even more stringent 'near absolutist' standard, condemning the vast majority of sex-based classifications except where physical differences dictate a different result," and that only a "minority of states assess the validity of sex-based classifications under their equality guarantees using a standard of review that is much like the federal intermediate standard of review").

[46] *See* Carole J. Petersen, *Women's Right to Equality and Reproductive Autonomy: The Impact of* Dobbs v. Jackson Women's Health Organization, 45 U. HAW. L. REV. 305, 326–30 (2023); Robin Maril, *Queer Rights After* Dobbs v. Jackson Women's Health Organization, 60 SAN DIEGO L. REV. 45, 87–98 (2023).

[47] *See infra* Part IV.B.

[48] Quinn Yeargain, *How Attacks Against Obamacare Turned into Tools to Protect Abortion Access*, BOLTS (Mar. 3, 2023), https://boltsmag.org/abortion-access-and-measures-against-obamacare-ohio-wyoming/ [https://perma.cc/2DKG-PTY8].

[49] *See infra* notes 197, 263, and accompanying text.

[50] *See, e.g.*, COLO. CONST. art. II, § 30b (barring the State of Colorado and municipalities from adopting any policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination").

[51] Jannell McGrew, *Unpopular Interracial Marriage Ban Removed from Constitution*, MONTGOMERY ADVERTISER, Nov. 9, 2000, at 5AA (noting passage of constitutional amendment eliminating interracial marriage ban in 2000 election); Sarah Swetlik, *Alabama Approves New Constitution, Strips Racist Language from Text*, AL.COM (Nov. 8, 2022), https://www.al.com/election/2022/11/alabama-approves-new-state-constitution-strips-racist-language-from-text.html [https://perma.cc/LC6Z-SNUW].

interpret state constitutions.[52] However, their continued inclusion in state constitutions shows that progress is needed to strengthen state constitutional protections against anti-LGBT discrimination.

In this Article, I argue that LGBT advocates should add state constitutions to their broader legal strategy—including both litigation in state courts and campaigning for constitutional modifications. I frame my argument not as a rejection of federal litigation, but as an embrace of state courts as a necessary and complementary part of a comprehensive strategy. Even a set of favorable determinations by the U.S. Supreme Court—far from a sure thing!—will not end the legal battles. Much like *Roe* did not permanently resolve the battle over legal abortion, it seems unlikely that ruling *these* anti-trans laws unconstitutional will stop *other* laws from cropping up.

My argument, then, is that trans advocates need to take their claims to the states, too. Creating a trans-friendly legal culture in the states is both a prophylactic measure and an ambitious one. Developing a robust jurisprudence that recognizes transgender status as a protected class, for example, can help insulate the trans community against future discrimination. Moreover, it provides activists with an opportunity to push even further, to challenge other transphobic assumptions made in state legal systems and to advocate for members of the trans community who are frequently ignored from high-profile legal battles—like those who are intersex or nonconforming.[53]

I begin in Part II by arguing why state constitutions should be used to litigate trans legal issues. Using abortion rights as a case study, I explain how the rise of new judicial federalism in the 1970s pushed individual-rights litigation into state courts—and how many of those efforts have paid dividends. The abortion-rights context illustrates how parallel state constitutional litigation can accomplish multiple goals. In the event that federal litigation is successful, it can fill the gaps and allow state-level litigants to pursue more aggressive claims. And if federal litigation is unsuccessful, the establishment of trans-friendly decisions will help insulate states from the effect of the unfavorable decision.

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[52] Michael L. Smith, *Constitutional Interpretation and Zombie Provisions*, 40 GA. ST. L. REV. (forthcoming 2024) (manuscript at 17–18).

[53] *E.g.*, Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 921–30 (2019) (noting the ways that discrimination against nonbinary people intersects with discrimination against gay, trans, and intersex people); Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 310–18 (2021) (arguing that including nonbinary, intersex, and asexual people in the LGBT legal movement would require a reformulation of LGBT organizations' missions); Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After* Bostock, 24 U. PA. J. L. & SOC. CHANGE 323, 339–43 (2021) (discussing the possibility for gender-based challenges to voter ID laws on behalf of transgender and nonbinary people); Sam Parry, *Sex Trait Discrimination: Intersex People and Title VII After* Bostock v. Clayton County, 97 WASH. L. REV. 1149, 1160–65 (2022) (discussing uncertain status of intersex people in the context of sex and gender discrimination).

Then, in Part III, I sketch out the history of how gay rights have been litigated in state courts and determined by state constitutions. Gay rights are not trans rights, however, and I do not tell this history to overly analogize the two. Instead, because many of the underlying legal issues—*i.e.*, discrimination on the basis of "sex" or an as-yet unrecognized suspect class, as well as invocations of the right to privacy—are similar, the fight for gay rights presents a reasonable analogy.

This history begins with the universal rejection of the earliest efforts to recognize marriage equality in the 1970s, which slowly segued into the invalidation of state laws criminalizing sodomy under state constitutions in the 1980s and 1990s. The 1990s also brought the first meaningful rulings by state supreme courts that struck down discrimination against the gay community—as well as a national backlash to those efforts. The use of constitutional amendments sanctioning anti-gay discrimination and barring the recognition of marriage equality dominated the landscape in the late 1990s and through much of the 2000s. However, even in this largely negative context, state supreme courts began striking down statutory bans on marriage equality as violative of their state constitutions.

In Part IV, I outline the arguments that trans advocates could raise under state constitutions today, drawing in part from the discussions in Part III. Here, I focus on the constitutional provisions and theories that are likeliest to be successful—and do not represent that I am capturing all provisions in all constitutions nationwide that might be wielded. I demonstrate how state guarantees of equality frequently provide greater protection than the federal Constitution's Equal Protection Clause and explore how state-constitutional conceptions of the right to privacy and personal autonomy are frequently broader than the analogous federal right. I conclude this part by arguing that, in the event that any state-court litigation fails, advocates should turn their attention to constitutional revision.

* * *

At the outset, however, I want to disclose that this Article is not written as a neutral piece on the possible arguments that LGBT-rights advocates might make, nor as a wholly objective analysis on how these arguments might be resolved. Instead, I write from a place of empathy and compassion—not just as someone who identifies as genderqueer, but as someone who is acutely aware of the difficulties that the trans community faces.

Trans-based discrimination—transphobia—is uniquely difficult to combat because the needs of the trans community are so particularized. While trans legal issues are frequently categorized with broader LGBT legal issues, this categorization only makes sense at a very abstract level—and may indeed be actively harmful in rejecting transphobic laws.

Medicines, surgeries, and other procedures that might be described as "cosmetic" or "voluntary" in other contexts are *necessary and life-saving* when

it comes to affirming the gender of trans people.[54] Trans-based discriminations are not just about treating similarly situated people differently—they are about denying trans people the ability to be openly and safely trans, and forcing trans people into lives, bodies, and genders that are not true to them. In other words, discrimination against trans people is about making them *not* trans. The cruelty, therefore, is the point.[55]

As such, I would be doing a disservice if I treated this Article like any other article appearing in any other law review. It isn't. The constitutionality of anti-trans discrimination is not an abstract legal question. Transphobic laws, coupled with the mainstreaming of transphobic rhetoric by government officials, help entrench deep prejudices in society. This intolerance has real consequences for trans people, as the murder of Nex Benedict, a nonbinary high schooler in Oklahoma, painfully illustrates.[56] The Oklahoma Legislature has adopted a host of anti-trans legislation and Ryan Walters, the elected Superintendent of Public Instruction, has enthusiastically pushed transphobia in schools—including by appointing Chaya Raichik, who routinely targets gay and trans people through her "Libs of TikTok" account, to a departmental advisory committee.[57] Anti-trans rhetoric percolated through the public school system,[58] which was ultimately followed by a brutal attack on Benedict, who died shortly thereafter.[59] In the aftermath of Benedict's death, little changed for Oklahoma policymakers. Walters superficially expressed sadness over his death—while simultaneously maintaining that there were only two genders and that "there's a civil war going on, where the left is really fighting for the soul of our country."[60] State Senator

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[54] Kareen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, COLUM. UNIV. DEP'T OF PSYCHIATRY (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/LKT6-GUSH]; Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, SCI. AM. (May 12, 2022), https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows/ [https://perma.cc/YSF3-3B9Z].

[55] *Cf.* Adam Serwer, *The Cruelty Is the Point*, ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/ [https://perma.cc/2CQD-Q2U3].

[56] J. David Goodman & Edgar Sandoval, *After Nonbinary Student's Death, Schools Chief Defends Restrictive Gender Policies*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/23/us/oklahoma-nonbinary-student-superintendent.html (on file with the *Ohio State Law Journal*).

[57] *Id.*

[58] Taylor Lorenz, *How Libs of TikTok Became a Powerful Presence in Oklahoma Schools*, WASH. POST (Feb. 24, 2024), https://www.washingtonpost.com/technology/2024/02/24/libs-tiktok-oklahoma-nonbinary-teen-death/ ("Evan Powers, a trans student at an Oklahoma high school, said he carries a bulletproof backpack, along with books to use in self-defense. 'I'm quite honestly scared to go to school every day,' said Powers, 17, adding: 'I have been bullied by people that watch Libs of TikTok.'").

[59] Goodman & Sandoval, *supra* note 56.

[60] *Id.*

Tom Woods referred to trans people as "filth," and emphasized that he was "going to fight to keep that filth out of the state of Oklahoma, because we're a Christian state."[61]

Regardless of anyone's comfort with the idea of being trans or interacting with trans people, or whether they are able to fully empathize with the trans experience, supporting efforts to "exterminate" or "eradicate"[62] the trans community and forcibly de-transition trans people is not just a polite disagreement over policy. I will not pretend as though it is.

II. WHY STATE COURTS?

Given that federal litigation is still ongoing—and has, up until this point, been *winning*[63]—it may seem premature to argue that litigants should shift their focus to include state courts. It also poses a burden on the lawyers in these cases to develop *new* arguments, grounded in state-specific constitutions and jurisprudence, to attack these laws.

But the permissibility of discrimination on the basis of sexual orientation and gender identity under the U.S. Constitution is far from settled. Despite the success of litigants in the lower courts in vindicating their claims, how the U.S. Supreme Court will resolve these cases is an open question. Regardless of how the process plays out, federal litigation looks likely to continue for the foreseeable future, and there will still be significant room—and a strong need—for state-level litigation.

Since the 1970s, state courts emerged as an attractive venue for vindicating constitutional rights. The retreat of the conservative Burger Court from the Warren Court's liberal position on civil liberties spurred many litigants to turn to state courts—a practice commonly known as "new judicial federalism."[64] Justice William Brennan is widely credited with shepherding this trend,[65] aided by a coterie of state supreme court justices and state constitutional law scholars.[66]

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[61] Max Bryan, *State Senator Calls LGBTQ+ People 'Filth' When Asked About Death of Nonbinary Student*, PUB. RADIO TULSA (Feb. 23, 2024), https://www.publicradiotulsa.org/local-regional/2024-02-23/state-senator-calls-lgbtq-people-filth-when-asked-about-death-of-nonbinary-student [https://perma.cc/W2FK-UHM8].

[62] Peter Wade & Patrick Reis, *CPAC Speaker Calls for Eradication of 'Transgenderism'—And Somehow Claims He's Not Calling for Elimination of Transgender People*, ROLLING STONE (Mar. 6, 2023), https://www.rollingstone.com/politics/politics-news/cpac-speaker-transgender-people-eradicated-1234690924/ [https://perma.cc/836G-7BAW].

[63] Eyer, *supra* note 12, at 89.

[64] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 771 (1992); Ronald K.L. Collins, *Utter Lessons*, 91 WASH. L. REV. ONLINE 23, 23 (2016).

[65] Brennan, *supra* note 24, at 491.

[66] Collins, *supra* note 64, at 23–24 (observing the contributions of Justices Shirley Abrahamson of Wisconsin, Hans Linde of Oregon, Stanley Mosk of California, Stewart

In the last half-century, scholars and judges alike have debated whether, how, and under what circumstances state supreme courts should deviate from the U.S. Supreme Court's jurisprudence and interpret their own provisions independently.[67] To some extent, this debate may have overestimated the frequency with which state courts would engage in this interpretative exercise at all, given that many of them voluntarily interpret their constitutions in "lockstep" with the federal constitution.[68] The modern consensus seems to be that independent state constitutional interpretation is "intermittent"[69] and that "high-profile, rights-protective rulings remain the exception[.]"[70]

The widespread success of litigating abortion rights in state courts is one of the bright spots of new judicial federalism—and a case study for why state-court litigation has a complementary role to play in the broader trans legal strategy.[71] While federal court was the preferred venue for abortion-rights advocates until *Dobbs*, beginning in the 1980s, advocates began playing in state courts, too.[72] They were frequently able to capitalize on several unique provisions in state constitutions, like explicit rights to privacy and equal rights amendments,[73] to achieve a *greater* level of protection for abortion rights than the U.S. Supreme Court recognized in *Roe* and its progeny.

Pollock of New Jersey, and Robert Utter of Washington to the field of state constitutional law). *See generally* John Dinan, *Beyond Rights, Courts, and the U.S. Federal Constitutional Model: Robert F. Williams and the Study of State and Subnational Constitutionalism*, 72 RUTGERS U. L. REV. 1169, 1170–77 (2020) (observing the contributions of Professor Bob Williams to the field of state constitutional law).

[67] *E.g.*, Gardner, *supra* note 64, at 771–78 (summarizing debates).

[68] Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338–39 (2002). While much of this discussion has focused on analogous provisions in the U.S. and state constitutions, much of the litigation involves altogether different provisions. Jessica Bulman-Pozen and Miriam Seifter have recently argued that state courts also use "techniques developed by federal courts to implement the federal Constitution" to interpret the rights unique to state constitutions, a practice they criticize as "methodological lockstepping." Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1881–82 (2023).

[69] Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 96–99 (2006).

[70] James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 365 (2016).

[71] *See, e.g.*, G. Alan Tarr, *Does the New Judicial Federalism Have a Future?*, 74 RUTGERS U. L. REV. 1405, 1418–21 (2022) ("Many cases under the New Judicial Federalism . . . resulted from policy-oriented, litigation, in which those advocating policy change or expansion of rights, . . . chose to frame their claims in state constitutional terms. The litigants did so because state constitutions seemed to offer the legal ammunition for vindicating those claims, even when the Federal Constitution did not.").

[72] *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

[73] *See infra* Part IV.

Take Florida, for example. In 1989, the Florida Supreme Court heard a challenge to the state's requirement that minors receive parental consent before undergoing an abortion.[74] Had this claim been brought in federal court, the relevant standard would have been whether the regulations had a "significant impact on the women's exercise of her right" and were "justified by important state health objectives."[75] "In evaluating the validity of parental consent and notice statutes, the [U.S. Supreme] Court ha[d] taken into consideration the state's interest in the well-being of the immature minor, and in the integrity of the family."[76] Judging from the Court's decisions on other consent requirements, it seems likely that Florida's requirements would have been constitutional.[77]

But the Florida Supreme Court reached a different result. In 1980, Florida voters ratified an amendment to the state constitution that added an express right to privacy.[78] In the decade after ratification, the court repeatedly held that this provision was "much broader in scope" than the implied right to privacy in the U.S. Constitution.[79] The applicable test for evaluating the permissibility of an

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[74] *In re* T.W., 551 So.2d 1186, 1196 (Fla. 1989). In 2024, the Florida Supreme Court overruled *T.W.*, concluding that "abortion does not naturally fit within" the Florida Constitution's right to privacy. Planned Parenthood v. State, 2024 Fla. LEXIS 483, at *42–43 (Fla. Apr. 1, 2024). As Justice Jorge Labarga pointed out in dissent, *Roe v. Wade* was decided less than a decade before the amendment passed and "fundamentally changed the landscape of abortion rights on a national scale by redefining the scope of the right of privacy," which "was key to the public understanding of the right to privacy." *Id.* at *63 (Labarga, J., dissenting).

[75] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 430 (1983).

[76] *T.W.*, 551 So.2d at 1194 (citations omitted).

[77] In *Planned Parenthood v. Danforth*, the Court held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). In *Bellotti v. Baird*, it explained the importance of a case-by-case determination in this context—"if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." Bellotti v. Baird, 443 U.S. 622, 643 (1979). "[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." *Id.* at 643 n.23. Where a statute does not allow for such an opportunity, it is unconstitutional. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 441 (1983). The Florida law in question imposed a default requirement of parental consent but allowed minors seeking abortions to obtain judicial authorization in lieu of consent where they could demonstrate sufficient maturity, that their parent "unreasonably withheld consent," or that they reasonably feared "physical or emotional abuse" if they requested consent. FLA. STAT. ANN. § 390.001(4)(a)(1) (1988). This requirement seems like the sort of case-by-case, context-sensitive determination that the Court held was required in *Danforth*, *Bellotti*, and *City of Akron*, and seems like it would have been upheld.

[78] Joseph Jackson, *Interpreting Florida's New Constitutional Right of Privacy*, 33 FLA. L. REV. 565, 565 n.1 (1981); Comm. Sub. for H.J.R. No. 387, 6th Leg., 2d Reg. Sess., 1980 Fla. Laws 1788, *amending* FLA. CONST. art. I, § 23 (amended 1980).

[79] Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985).

intrusion onto someone's privacy rights was whether the law "furthers a compelling state interest through the least intrusive means."[80] Accordingly, in the 1989 challenge, while the court "agree[d] that the state's interests in protecting minors and preserving family unity are worthy objectives," these interests were neither "compelling" nor the "least intrusive means of furthering the state interest."[81] Accordingly, it struck down the statute as unconstitutional.[82]

Florida's story illustrates how even a favorable Supreme Court ruling on an individual right or liberty—there, *Roe v. Wade*'s recognition of a right to abortion—does not obviate the value in turning to state courts for further expansion of that same right. But Florida's story is not unique. It could be also told in Alaska,[83] California,[84] Kansas,[85] Massachusetts,[86] Minnesota,[87]

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[80] *T.W.*, 551 So.2d at 1193 (citing *Winfield*, 477 So.2d at 547).

[81] *Id.* at 1195–96. With respect to the first prong (compelling state interest), it noted that "Florida does not recognize these two interests as being sufficiently compelling to justify a parental consequent requirement where procedures other than abortion are concerned," citing a Florida law allowing a pregnant minor to consent to "any medical procedure involving her pregnancy or her existing child—no matter how dire the possible circumstances—except abortion." *Id.* at 1195 (quoting FLA. STAT. ANN. § 743.065 (1987)). And with respect to the second prong (least-intrusive means of furthering the state interest), it observed that "although the instant statute does provide for a judicial bypass procedure, it makes no provision for a lawyer for the minor or for a record hearing," which was required in other contexts. *Id.* at 1196.

[82] *Id.* In 2004, the Florida Legislature proposed a constitutional amendment adding an exception to the right to privacy that expressly allowed for a parental-notification requirement, which voters overwhelmingly ratified, nullifying the court's decision. H.J.R. No. 1, 18th Leg., 2d Reg. Sess., 2004 Fla. Laws 3319, *amending* FLA. CONST. art. X, § 22 (amended 2004) ("The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.").

[83] Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 968–69 (Alaska 1997); State v. Planned Parenthood of Alaska, 28 P.3d 904, 909–10 (Alaska 2001); State v. Planned Parenthood of Alaska, 35 P.3d 30, 43–46 (Alaska 2001); Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1139–45 (Alaska 2016); State v. Planned Parenthood of the Great Nw., 436 P.3d 984, 1003–05 (Alaska 2019).

[84] Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 784–86 (Cal. 1981); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 823–31 (Cal. 1997).

[85] Hodes & Nauser v. Schmidt, 440 P.3d 461, 491–92 (Kan. 2019).

[86] Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 400 (Mass. 1981); Planned Parenthood League of Mass. v. Att'y Gen., 677 N.E.2d 101, 108 (Mass. 1997).

[87] Doe *ex rel.* Women of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995).

Montana,[88] and New Jersey.[89] In each of those states, prior to *Dobbs*, state supreme courts have recognized a robust right to abortion that likely extended beyond the protection afforded by *Roe* and its progeny.[90]

The abortion context also demonstrates that merely establishing a right under the U.S. Constitution does not mean that all restrictions on it will be unconstitutional. In *Harris v. McRae*, for example, the Supreme Court upheld the Hyde Amendment—which bars the use of federal funds for abortions—and held that states are not obligated to fund medically necessary abortions through Medicaid.[91] Litigants quickly turned to state courts, which largely held that their state constitutions required the state to fund medically necessary abortions.[92] Significantly, resolving the abortion-funding cases in the plaintiffs' favor did not require state courts to establish an independent state constitutional right to abortion, though some did reach that conclusion.[93] Instead, several state courts determined that the different treatment of similarly situated women violated the state's equal-protection clause[94]—or that the difference in treatment between men and women violated the state's equal-rights provision.[95]

These rulings illustrate the utility of using state constitutions to separately develop a body of state constitutional caselaw *even after winning at the Supreme Court*. The state-court litigation establishing an independent right to abortion under the state constitution allowed plaintiffs to develop a more robust right than *Roe* had guaranteed. Likewise, the cases in the funding context allowed plaintiffs to successfully pursue a derivative constitutional theory that the U.S. Supreme Court had rejected.

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[88] Armstrong v. State, 989 P.2d 364, 373–74 (Mont. 1999); Weems v. State (*Weems I*), 440 P.3d 4, 13 (Mont. 2019); Planned Parenthood of Mont. v. State, 515 P.3d 301 (Mont. 2022); Weems v. State (*Weems II*), 529 P.3d 798, 809–12 (Mont. 2023).

[89] Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 632–39 (N.J. 2000).

[90] *See* Valley Hospital Ass'n v. Mat-Su Coal. For Choice, 948 P.2d 963, 969 (adopting a "fundamental right to abortion" that is "similar to that expressed in *Roe v. Wade*," rejecting "the narrower definition of that right promulgated in the plurality opinion in *Casey*," and adopting a strict-scrutiny test); In re *T.W.*, 551 So.2d 1186, 1193–96 (1989) (adopting a strict-scrutiny test); *Hodes & Nauser*, 440 P.3d at 498 (adopting a strict-scrutiny test).

[91] Harris v. McRae, 448 U.S. 297, 326–27 (1980).

[92] *See* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 501–10 (2009).

[93] *E.g.*, Comm. to Def. Reprod. Rights v. Myers, 625 P.2d 779, 785–86 (Cal. 1981); *Right to Choose*, 450 A.2d at 934.

[94] Simat Corp. v. Az. Health Care Cost Containment Sys., 56 P.3d 28, 32–37 (Ariz. 2002).

[95] N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 855–57 (N.M. 1998); *see also* Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 888–91 (Pa. 2024). *But see* Bell v. Low Income Women of Tex., 95 S.W.3d 253, 266 (Tex. 2001) (rejecting an argument under the Texas Constitution's Equal Rights amendment).

The reversal of fortunes in *Dobbs* extends the abortion analogy to another possible outcome: losing at the Supreme Court. The states with pre-*Dobbs* rulings on the right to abortion were insulated from the immediate impact of the decision in *Dobbs*. Other states, where state-court litigation did not happen, saw trigger bans come into immediate effect—and abortion went from legal one day to totally (or nearly) illegal the next.[96] And since *Dobbs*, abortion-rights advocates have turned to state courts to vindicate their rights—in some cases, merely adapting the claims that they would have previously raised in federal court, and in others, developing totally new claims based on specific provisions in state constitutions.[97] In the year after the Court's decision in *Dobbs*, state supreme courts in Indiana, North Dakota, Oklahoma, and South Carolina have recognized some right to abortion under their state constitutions,[98] resulting in the invalidation of statutes in Oklahoma[99] and South Carolina[100] that would *now* be lawful under the U.S. Constitution.

There are plenty of other examples of state courts developing constitutional theories that have been rejected by the U.S. Supreme Court. The Court's refusal to recognize a fundamental right to education in *San Antonio Independent School District v. Rodriguez*[101] led to decades of successful[102] litigation over education funding in state courts,[103] much of which is still ongoing.[104] The

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[96] Sarah McCammon, *Two Months After Dobbs Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/X8DK-9SU9].

[97] Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to Abortion Bans Since the Dobbs Decision*, KFF (Jan. 20, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/ [https://perma.cc/K9XT-22ML].

[98] Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 782–85 (S.C. 2023); Okla. Call for Reproductive Rights v. Drummond, 526 P.3d 1123, 1128–30 (Okla. 2023); Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023); Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 961–62 (Ind. 2023).

[99] *Oklahoma Call for Reprod. Rights*, 526 P.3d at 1132.

[100] *Planned Parenthood S. Atl.*, 882 S.E.2d at 785–86.

[101] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 (1973).

[102] I quibble somewhat with the word "successful," because while state supreme courts have largely recognized a right under state constitutions to education, the ultimate outcome of the litigation seems unclear at best. *See, e.g.*, Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & POL'Y 346, 365–72 (2018); Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 562–75 (2010).

[103] Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1360–73 (2010).

[104] *See, e.g.*, Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193, 248–29 (N.C. 2022). *But see* T. Keung Hui, *NC Supreme Court Blocks Transfer of School Funds in Leandro Court Case*, NEWS & OBSERVER (Mar. 3, 2023), https://www.newsobserver.com/news/local/education/article272730600.html [https://perma.cc/S2RK-P2P2].

Court's decision in *Gregg v. Georgia*,[105] which allowed use of the death penalty to resume nationwide,[106] spurred state-court litigation that has resulted in courts declaring capital punishment unconstitutional under state constitutions.[107] And in the context of LGBT rights, discussed *infra*,[108] the Court's refusal to strike down Georgia's statutory ban on sodomy in *Bowers v. Hardwick*[109] prompted litigants to turn to state courts—including to strike down Georgia's law on state constitutional grounds, which ultimately laid the foundation for the Court's decision in *Lawrence*.[110]

Where litigation in state courts is uncertain or unlikely to be successful, advocates are also pushing for state constitutional changes. In 2022 alone, voters in California, Michigan, and Vermont ratified constitutional amendments that incorporated express rights to abortion and contraception[111]—the first such amendments in the country's history.[112] And in 2023, voters in Ohio added a similar provision to their constitution,[113] months after overwhelmingly rejecting an effort to raise the voter-approval threshold to amend the constitution.[114] More abortion-rights measures look likely in the years to come.[115]

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[105] 428 U.S. 153 (1976).

[106] Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 318 (1983).

[107] James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1331–37 (1989) (describing early efforts to challenge the constitutionality of the death penalty under state constitutions); Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2070–71 (2012–13) (describing more recent efforts); Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1625–47 (2022).

[108] *See infra* Part III.A.1.

[109] Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[110] Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 990–94 (2010).

[111] CAL. CONST. art. I, § 1.1 (amended 2022); MICH. CONST. art. I, § 28 (amended 2022); VT. CONST. ch. 1, art. 22 (amended 2022).

[112] Quinn Yeargain, *Measures to Protect Abortion Rights Triumph on Tuesday*, BOLTS MAG. (Nov. 9, 2022), https://boltsmag.org/measures-to-protect-abortion-rights-triumph-on-tuesday/ [https://perma.cc/4TDN-ZL8H].

[113] OHIO CONST. art. I, § 22 (amended 2023).

[114] Cameron Joseph, *Ohioans Reject GOP Effort to Weaken Direct Democracy, in Big Win for Abortion Rights*, BOLTS MAG. (Aug. 9, 2023), https://boltsmag.org/ohio-ballot-issue-1-abortion-direct-democracy-ballot-initiative/. [https://perma.cc/7LMS-V2K4].

[115] As of the time of writing, the Maryland General Assembly has placed on the ballot in 2024 a proposed constitutional amendment that would recognize a broad right to abortion and reproductive freedom. S.B. 798, 2023 Leg., 445th Sess. (Md. 2023). The New York Legislature has proposed a dramatic expansion of its equal-rights guarantee, and many groups have asserted that it would safeguard abortion access, too. *See* Grace Panetta, *New York's Novel Equal Rights Amendment Could Make the State a Haven for Abortion Access*, 19TH NEWS (July 7, 2023), https://19thnews.org/2023/07/new-york-novel-equal-rights-amendment-abortion-lgbtq-rights/ [https://perma.cc/GHU4-CPD7]. Though, I note that the amendment does not use the word "abortion" at all. A. 1283, 2023–24 Reg. Sess. (N.Y. 2023). Instead, it obliquely provides, "No person shall, because of . . . reproductive healthcare and autonomy, be subjected to any discrimination[.]" *Id.* Other efforts are

This exact blueprint can be used as a complementary part of the trans legal strategy. As the federal litigation continues apace, trans advocates can and should turn to the states, where they can pick up many of the same arguments that abortion-rights advocates have used to produce favorable rulings. The symbiotic relationship between LGBT and reproductive rights extends outside the federal context, where the right to privacy articulated in *Griswold*, *Eisenstadt*, and *Roe* was used to strike down bans on "sodomy" nationwide in *Lawrence v. Texas*.[116] In the states, too, court decisions on one issue have been used to support the other.[117]

However, litigating individual rights and liberties under state constitutions is not a skeleton key. Certainly, despite the higher floor for rights that *can* exist, many state courts in many cases have rejected claims to raise that floor from the U.S. Constitution's minimum.[118] Even where courts agree to raise the floor in one case, changes in a court's composition can result in a change down the line.[119] Moreover, state legislatures and voters both have agency in determining the content and interpretation of state constitutions. Both have used constitutional amendments to overturn state supreme court rulings—and have

proceeding in Arizona, Arkansas, Colorado, Florida, Missouri, Montana, Nevada, and South Dakota. Geoff Mulvihill & Kimberlee Kruesi, *Which States Could Have Abortion on the Ballot in 2024?*, ASSOCIATED PRESS (Mar. 19, 2024), https://apnews.com/article/abortion-ballot-amendment-ban-protection-states-2024-052ff9846f8416efb725240af22b92ec [https://perma.cc/5YJP-XFB6].

[116] Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (discussing development of privacy-rights jurisprudence).

[117] In Armstrong v. State, for example, the Montana Supreme Court determined that the state constitution's express right to privacy encompassed the right to abortion, Armstrong v. State, 989 P.2d 364, 373–74 (Mont. 1999)—drawing on a decision from two years earlier in which it relied on the right to privacy to strike down the state's ban on "sodomy." *Id.* at 374 (citing Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997)).

[118] Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973, 983–87 (1986).

[119] In Iowa, for example, the state legislature modified the historically nonpartisan judicial nominating process to give the governor more power to select judicial nominees of their choice—a change that occurred after the Iowa Supreme Court recognized a right to abortion under the state constitution in 2018. Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1170 (2019). Republican Governor Kim Reynolds benefited from the changes, and her nominees turned the court in a much more conservative bent. David Pitt, *Iowa Supreme Court Rulings Turn Conservative After Reynolds' Appointments—And It Might Be Just the Beginning*, DES MOINES REG. (July 3, 2019), https://www.desmoinesregister.com/story/news/crime-and-courts/2019/07/03/iowa-supreme-court-rulings-turn-conservative-after-governor-kim-reynolds-appointments/1638881001/ (on file with the *Ohio State Law Journal*). In 2022, the court reversed its previous ruling and held that the state constitution conferred no right to abortion. Planned Parenthood of the Heartland v. Reynolds, 975 N.W.2d 710, 744 (Iowa 2022).

done so with some regularity over the last century.[120] This has been true with respect to some state supreme court decisions that have expanded existing constitutional rights or recognized new ones. Florida, for example, has adopted constitutional amendments that *require* its courts to interpret provisions relating criminal procedure or punishment in a manner commensurate with the U.S. Supreme Court's interpretation of the Fourth Amendment,[121] which were prompted by decisions that expanded criminal defendants' rights.[122] In the abortion context, state supreme courts in Tennessee and West Virginia recognized abortion rights under their state constitutions.[123] Shortly after Republicans won legislative majorities in both states,[124] they proposed constitutional amendments that barred *any* recognition of abortion rights, which voters ratified.[125]

But while state constitutional litigation is no skeleton key, the specific protections afforded by state constitutions, and their robust interpretation by state supreme courts, provide trans advocates with a very promising strategy. In the parts that follow, I develop this argument further, and articulate a trans legal strategy that focuses on state courts and state constitutions.

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[120] *See generally* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 985–1019 (2007) (describing usage of constitutional amendments to overturn supreme court rulings in a variety of contexts).

[121] FLA. CONST. art. I, § 12 (amended 1982) (requiring that protection against "unreasonable searches and seizures . . . be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); *id.* § 17 (requiring that protection against "cruel and unusual punishment . . . be construed in conformity with decisions of the United States Supreme Court which interpret the provision against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution").

[122] Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence from the Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701, 702–08 (2003); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 JUDICATURE 190, 192–97 (1991).

[123] Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993) (striking down abortion-funding restrictions under West Virginia Constitution); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 15 (Tenn. 2000) (recognizing a fundamental right to procreational autonomy under the Tennessee Constitution).

[124] Reid Wilson, *Party Switch Gives Republicans Control of West Virginia Senate*, WASH. POST (Nov. 5, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/05/party-switch-gives-republicans-control-of-west-virginia-senate/ [https://perma.cc/H54U-N3GW]; Tom Humphrey, *Legislature in New Hands*, KNOXVILLE NEWS-SENTINEL, Nov. 4, 2010, at A9.

[125] TENN. CONST. art. I, § 36 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother."); W. VA. CONST. art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.").

III. LITIGATING GAY RIGHTS UNDER STATE CONSTITUTIONS

Gay rights are not trans rights.[126] While the broader LGBT community encompasses both the gay and lesbian community and the trans community, their struggles are different.[127] Too often, trans people have been excluded from the broader movement for gay rights[128]—or, when included, a very sanitized, inoffensive version of the trans lived experience is presented for heterosexual, cisgender audiences.[129]

These are important realities to acknowledge at the outset of this part, which focuses on litigating *gay rights* under state constitutions, *not* litigating trans rights. To be sure, trans people clearly benefited from the litigation described in this Part. The earliest legal challenges filed on behalf of the LGBT community, which are captured by William Eskridge, involved the unequal application of the law to gay and trans people alike.[130] The battles that captured national attention and resulted in landmark rulings from the U.S. Supreme Court—the lawfulness of state bans on "sodomy" and gay marriage—were fought with very real stakes for the trans community.[131]

More than that, however, the arguments and caselaw that were produced from fighting for gay rights under state constitutions are important to consider in building a state constitutional case for trans rights. The scope and coverage of rights to equal protection and substantive due process under state-level equivalents to the Fourteenth Amendment, as well as state equal rights amendments and express rights to privacy, matter for the trans legal movement, too.

Accordingly, in this Part, I detail the use of state constitutions and state courts to litigate gay rights. I do so with the caveats detailed above, and with the understanding that the relationship between the legal battle for gay rights and the legal battle for trans rights is *more* than just a helpful analogy, but *less* than a perfect match.

In Section A, I begin at the beginning (or thereabouts). I discuss the earliest battles for gay rights, beginning with the criminalization of consensual sexual intercourse between adults of the same gender through state bans on "sodomy"

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[126] *See, e.g.*, Ezra Young, *Demarginalizing Trans Rights*, *in* DEPLOYING INTERSECTIONALITY: LEGAL, INTELLECTUAL, AND ACTIVIST INTERVENTIONS (Kimberlé Crenshaw et al. eds., forthcoming 2024); JOHN CORVINO, WHAT'S WRONG WITH HOMOSEXUALITY? 14–15 (2013).

[127] Young, *supra* note 126, at 2.

[128] George, *supra* note 53, at 261–66.

[129] Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 581–91 (2019); *see also* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 272–86 (2020).

[130] William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos*, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 832–42 (1997).

[131] *See infra* notes 252–255 and accompanying text.

and continuing through the nascent efforts to achieve state recognition of gay relationships. In Section B, I begin with the first signs of hope: the Hawai'i Supreme Court's decision in *Baehr v. Lewin*, which opened the door to marriage equality. From there, I explore how state constitutions became battlegrounds over gay rights, with social conservatives pushing for constitutional amendments banning gay marriage (and sometimes barring any recognition of anti-gay discrimination) and gay rights activists pushing for state courts to strike down statutory bans on gay marriage. My goal in this part is not to comprehensively catalog all cases, applicable constitutional provisions, or arguments that were raised against the challenged statutes, but for the reader to walk away with a sense of how state constitutions were used in these battles and which arguments, based on which constitutional provisions, courts found most persuasive.

A. *National Inertia and State Pushback*

Early efforts to litigate LGBT rights in the mid- to late-twentieth century centered around basic survival: pushing back against heteronormative assumptions in the American legal system, fighting the disparate impact of law enforcement on the gay and trans communities, and reaching for some sort of legal status. The areas of focus here are too voluminous to mention. They include challenges to sodomy laws as violations of the right to privacy, bans on cross dressing and "lewdness" as unconstitutionally vague, restrictions on gay spaces as free-speech violations, the unequitable use of law enforcement power against LGBT people, employment and immigration restrictions, and the exclusion of gay relationships from legal recognition.[132]

Much of this litigation, despite relying on constitutional claims, said little about the specific constitutional rights of the LGBT community. First and Fourth Amendment-type claims about content restrictions or invasions of privacy, as well as claims that laws are unconstitutionally vague, are not dependent on a discriminatory intent or result—and could be litigated without specific reference to the sexual orientation or gender identity of the affected people. But where the litigation concerned the legality of consensual sexual intercourse between adults of the same gender, the civil rights of gay and trans people, or the recognition of same-gender relationships, litigants developed arguments that focused specifically on LGBT rights. Accordingly, I focus on the latter three categories in this section.

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[132] All of these challenges are expounded in greater detail in previous scholarship. *See generally* Eskridge, *supra* note 130, at 842–52 (describing litigation against sodomy laws); *id.* at 852–63 (litigation against crossdressing and lewdness); *id.* at 863–909 (describing litigation against speech and content restrictions); *id.* at 909–39 (describing litigation in criminal-justice context); *id.* at 939–52 (describing litigation over legal recognition of same-gender relationships).

1. *The Legality of Consensual Sexual Intercourse Between Adults of the Same Gender*

Prior to the 1960s, most states criminalized "deviant" consensual sexual conduct as "sodomy"—which could include certain sexual acts between married people that were deemed inappropriate, consensual sexual intercourse between unmarried people, consensual sexual intercourse between adults of the same gender, or rape.[133] The Model Penal Code, as proposed in 1961, proposed the abolition of "sodomy" laws that criminalized consensual sexual conduct between adults.[134] Regardless of whether homosexuality was a sin, a disease, or merely a difference, the drafters nonetheless concluded that criminal sanctions were inappropriate.[135] In response, state legislatures across the country began—tentatively and unevenly—to repeal or modify their bans on sodomy, though many retained bans on consensual sexual intercourse between adults of the same gender.[136]

Litigants, consisting of both straight and gay couples who were ensnared by the sodomy laws that remained, challenged many of these laws in federal and state court beginning in the 1970s. Drawing on the privacy-rights jurisprudence of the U.S. Supreme Court—including in *Griswold v. Connecticut*,[137] *Eisenstadt v. Baird*,[138] and *Roe v. Wade*[139]—litigants argued that state restrictions on private sexual activity was unconstitutional.[140] State-court litigants relied on the right to privacy that the Court found implied in the U.S. Constitution, as well as claims that state constitutions contained similar rights.[141]

The first two states to strike down sodomy bans did so on entirely different grounds. In *People v. Onofre*, the New York Court of Appeals struck down the state's ban on "deviate sexual intercourse," drawing on the federal right to privacy.[142] Though both the plaintiffs and the National Committee for Sexual Civil Liberties argued that the state law also violated the New York Constitution's right to privacy, the court neither reached the issue nor even *mentioned* the state constitution.[143] In *Commonwealth v. Bonadio*, the Pennsylvania Supreme Court likewise concluded that the state's Voluntary

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[133] *See* David A. J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1322–33 (1977).

[134] MODEL PENAL CODE § 213.2 (AM. L. INST., 1985).

[135] *Id.*

[136] Eskridge, *supra* note 130, at 842–43.

[137] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

[138] *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[139] *See generally* Roe v. Wade, 410 U.S. 113 (1973).

[140] *See generally* Eskridge, *supra* note 130.

[141] *Id.*

[142] People v. Onofre, 415 N.E.2d 936, 937, 939–42 (N.Y. 1980).

[143] Katheryn D. Katz, *Sexual Morality and the Constitution:* People v. Onofre, 46 ALB. L. REV. 311, 328–30, 329 n.110 (1982) (describing arguments of litigants).

Deviate Sexual Intercourse Statute was unconstitutional.[144] It held that the law "infring[es] the right to equal protection of the laws guaranteed by the Constitution of the United States and of this Commonwealth,"[145] but did not cite to any provision of the state constitution, did not explain whether the holding was based on a parallel interpretation of the state and federal constitutions, and referred to "*the* Constitution" in the singular tense.[146]

Some state court litigation continued in the decade that followed,[147] but much of the action took place in federal court.[148] In 1986, in *Bowers v. Hardwick*, the U.S. Supreme Court rejected a challenge to Georgia's statutory ban on sodomy.[149] Justice Byron White, writing for the 5–4 majority, rejected the framing of the argument as involving the "right to privacy," which he concluded did not "extend[] to homosexual sodomy."[150] Instead, White framed the issue as whether there was a "fundamental right" of "homosexuals to engage in acts of consensual sodomy," concluding that "[p]roscriptions against that conduct have ancient roots."[151] In dissent, Justice Harry Blackmun disputed that the case was about "a fundamental right to engage in homosexual sodomy," instead arguing that "we must analyze [the] claim in light of the values that underlie the constitutional right to privacy."[152]

But while litigants lost at the Supreme Court in *Hardwick*, the litigation continued, ultimately leading to the Court's 2003 decision in *Lawrence v. Texas*, which overruled *Hardwick* and struck down sodomy bans nationwide.[153] State courts in Arkansas, Georgia, Kentucky, Montana, and Tennessee struck down their states' bans on exclusively state constitutional grounds, concluding in each case that *their* constitutions' rights to privacy were more expansive than the

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144 Commonwealth v. Bonadio, 415 A.2d 47, 51–52 (Pa. 1980).

145 *Id.* at 50.

146 *See generally id.* at 51 (emphasis added).

147 *See, e.g.*, Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 509–21 (1992); Michael James Confusione, *Sexual Conduct, Sexual Orientation, and State Constitutional Law*, 25 RUTGERS L.J. 1004, 1005 (1994). *See generally* State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (rejecting Equal Protection challenge to sodomy law under the U.S. Constitution, but not discussing any claims under the Missouri Constitution).

148 Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1589–1611 (1993).

149 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

150 *Id.* at 190.

151 *Id.* at 192.

152 *Id.* at 199–200 (Blackmun, J., dissenting).

153 Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

federal constitution's.[154] Several state courts upheld their bans, however[155]—including in Louisiana, where the state supreme court rejected claims that the state constitution's express right to privacy "include[s] the right to engage in private acts which were condemned as criminal" when the constitution was ratified,[156] and in Texas, where a state appellate court upheld the conviction of John Geddes Lawrence, Jr., for sodomy,[157] ultimately leading to the Supreme Court's decision in *Lawrence*.[158]

2. *The Civil Rights of Gay and Trans People*

Usage of state-level equal protection requirements to combat anti-LGBT discrimination proceeded slowly. One of the most promising early signs came in *Gay Law Students Association v. Pacific Telephone and Telegraph Company*, a case decided by the California Supreme Court in 1979, in which the company's practice of discriminating on the basis of sexual orientation was challenged in a class action lawsuit.[159] In a somewhat unclear and muddled opinion, the court held that the actions of a public utility constituted "state action" under the state constitution,[160] that the utility could not "arbitrarily or invidiously discriminate in its employment decisions,"[161] and that discrimination on the basis of sexual orientation was arbitrary and thus unreasonable.[162] The court did *not* hold that sexual orientation constituted a suspect class in *Gay Law Students Association*—and did not do so until 2008, when it struck down the state's ban on gay marriage, discussed *infra*.[163] Until recent decades, little litigation took

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[154] Jegley v. Picado, 80 S.W.3d 332, 350–54 (Ark. 2002); Powell v. State, 510 S.E.2d 18, 22–26 (Ga. 1998); Gryczan v. State, 942 P.2d 112, 121–22 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250, 261–66 (Tenn. Ct. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487, 491–99 (Ky. 1992).

[155] *E.g.*, State v. Smith, 766 So.2d 501, 506–10 (La. 2000); Lawrence v. State, 41 S.W.3d 349, 360–61 (Tex. Ct. App. 2001); State v. Rowe, 2002 Kan. App. Unpub. LEXIS 1024, at *10–11, *19–20 (Kan. Ct. App. Dec. 6, 2002); *see also* Sawatzky v. Oklahoma City, 906 P.2d 785, 786 (Okla. 1995) (declining to reach the question of whether "the right to privacy" under the Oklahoma Constitution "extends to private non-commercial sodomy between consenting adults of the same gender," because "this case involves a public solicitation and nothing more").

[156] *Smith*, 766 So.2d at 505–10.

[157] *Lawrence*, 41 S.W.3d at 360–61.

[158] *Lawrence*, 539 U.S. at 578–79.

[159] Gay L. Students Ass'n. v. Pac. Tel. & Tel. Co., 595 P.2d 592, 595 (Cal. 1979).

[160] *Id.* at 598–600.

[161] *Id.* at 602.

[162] *Id.* The court simultaneously rejected a statutory argument that the state Fair Employment Practice Act's ban on discrimination based on "sex" applied in the context of sexual orientation. *Id.* at 612. It concluded that though, "as a semantic argument, the contention may have some appeal, we think, when viewed in terms of expressed intent, the Legislature, in proscribing discrimination on the basis of 'sex,' did not contemplate discrimination against homosexuals." *Id.*

[163] *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

place in state courts that established the status of sexual orientation, much less gender identity, under state constitutions—and, as discussed later, most of it concluded that sexual orientation was not a protected class.[164]

By the 1990s, some states and municipalities had extended civil-rights protections to members of the LGBT community in at least some contexts.[165] In Colorado and Oregon, social conservatives moved to undo these protections through constitutional amendments.[166] Oregon voters rejected constitutional amendments in 1992 and 1994 that would have barred the state and local governments from recognizing sexual orientation as a protected class. The 1992 amendment, if adopted, would have prevented the state from "recogniz[ing] any categorical provision such as 'sexual orientation, 'sexual preference,' or similar phrase, that includes homosexuality, pedophilia, sadism or masochism" or "promot[ing], encourag[ing], or facilitat[ing]" the same.[167]

After the 1992 amendment was rejected in a landslide, the 1994 amendment omitted the references to pedophilia, sadism, and masochism, instead excluding sexual orientation from recognized "minority status," barring the state and municipalities from recognizing gay relationships, and preventing the government from teaching that homosexuality is the legal or social equivalent of "race, color, religion, gender, age or national origin[.]"[168] This amendment narrowly failed.[169]

Efforts in Colorado saw greater success. In 1992, as a response to municipal anti-discrimination ordinances in Aspen, Boulder, and Denver, as well as a 1990 executive order by Governor Roy Romer barring discrimination on the basis of sexual orientation in state employment, a group of social conservatives proposed to amend the Colorado Constitution.[170] Their amendment prohibited the state and municipalities from recognizing sexual orientation as the basis for "any

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[164] *Infra* Part II.B; *Marriage Cases*, 183 P.3d at 441 (noting that "the great majority of out-of-state decisions that have addressed this issue have concluded that . . . statutes that treat persons differently because of their sexual orientation should not be viewed as constitutionally suspect and thus should not be subjected to strict scrutiny").

[165] Anthony Michael Kreis, *Amputating Rights-Making*, 69 HASTINGS L.J. 95, 105 (2017).

[166] Hans Linde, a former Oregon Supreme Court Justice and one of the leading intellectual forces behind new judicial federalism, strongly condemned these measures as violations of the Guarantee Clause, arguing that states could not adopt constitutional amendments that stigmatized minority groups. Hans A. Linde, *When Initiative Lawmaking Is Not Republican Government: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 35–39 (1993).

[167] VOTERS' PAMPHLET 93 (Or. Sec'y of State ed., 1992).

[168] VOTERS' PAMPHLET 76 (Or. Sec'y of State ed., 1994); George T. Nicola, *Oregon Anti-Gay Ballot Measures*, GAY & LESBIAN ARCHIVES OF THE PAC. NW. (Apr. 10, 2013), https://www.glapn.org/6013OregonAntiGayMeasures.html [https://perma.cc/SF6Y-SUKK].

[169] Nicola, *supra* note 168.

[170] Joan Biskupic, *Court Strikes Down Colorado's Anti-Gay Amendment*, WASH. POST, May 21, 1996, A01.

minority status, quota preferences, protected status or claim of discrimination."[171] This amendment ended up narrowly passing, but it was subsequently enjoined by the Colorado Supreme Court, which determined that it violated the Equal Protection Clause of the U.S. Constitution.[172] The U.S. Supreme Court granted review and struck the amendment down, concluding that it failed even under rational-basis review.[173]

3. *The Recognition of Gay Relationships*

A small but noteworthy amount of litigation took place in state court beginning in the 1970s over the assumption in state law that only a single man and a single woman could be lawfully married. The litigants in these cases raised claims under both the U.S. and state constitutions—but the response from state courts was inconsistent in its rationale.

Courts in Pennsylvania and Washington half-heartedly considered state constitutional arguments but rejected them out of hand. In Pennsylvania, the Superior Court concluded that whether state law violated the state constitution's Equal Rights Amendment had not been properly briefed and dismissed it.[174] And in Washington, the Court of Appeals rejected a similar argument on the merits. It concluded that "an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex."[175] In the case at hand, "the state's refusal to grant a license allowing the appellants to marry one another is not based on appellants' status as males[.]"[176] Instead, it is "based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children," which constituted a permissible differentiation "based on the unique physical characteristics of a particular sex[.]"[177] The court rejected a similar challenge based on the Equal Protection Clause in the U.S. Constitution, concluding that the fundamental "right to marry" was not violated by the ban and that sexual orientation did not constitute a suspect class.[178]

The most well-known case, and likely the first one, involved a state court rejecting a challenge that was raised solely under the U.S. Constitution. In *Baker v. Nelson*, the Minnesota Supreme Court interpreted state law to bar recognition of a same-gender marriage and then held that the restriction on the eligibility to

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[171] COLO. CONST. art. II, § 30b (amended 1992).

[172] Evans v. Romer (*Evans II*), 882 P.2d 1335, 1349–50 (Colo. 1994); *see also* Evans v. Romer (*Evans I*), 854 P.2d 1270, 1284–86 (Colo. 1993) (identifying appropriate standard of review).

[173] *See generally* Romer v. Evans, 517 U.S. 620 (1996).

[174] De Santo v. Barnsley, 476 A.2d 952, 956 (Pa. Super. Ct. 1984).

[175] Singer v. Hara, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974).

[176] *Id.* at 1195.

[177] *Id.* at 1194–95.

[178] *Id.* at 1195–97.

marry did not violate the Equal Protection Clause.[179] Cases in Kentucky and New York that were decided in the same period ostensibly rejected similar claims under the U.S. Constitution, but the basis for their decision was, at best, ambiguous.[180]

This early failure did not chill the litigation, however. And a decision of the Hawai'i Supreme Court in 1992 that opened the door to state judicial recognition of same-gender marriage triggered a national backlash—including the adoption of the Defense of Marriage Act, the ratification of state constitutional amendments expressly banning gay marriage, and the introduction of gay rights as a national social issue.

B. *Limited Progress Amid Widespread Setbacks*

In 1993, the Hawai'i Supreme Court embraced an argument that no court before it had—that same-gender couples might be entitled to recognition of their unions after all. In *Baehr v. Lewin*, the court heard a challenge to the state's statutory exclusion of gay couples from marriage.[181] The plaintiffs argued that the statute violated their rights under the Hawai'i Constitution twice over: first, it violated their express "right to privacy," and second, it violated their right to "equal protection and due process of law."[182]

The court suggested that the state constitution's express right to privacy was coterminous with the federal right to privacy and rejected the first argument.[183] But with respect to the second argument, the court held that the state's equal-protection clause meaningfully differed from the U.S. Constitution's, and "prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex," which results in a broader reach than the federal Equal Protection Clause.[184] The court rejected as an "exercise in tortured and conclusory sophistry" the early state court rulings that rejected same-gender marriage claims,[185] and concluded that the state law "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex," thereby "establish[ing] a sex-based classification."[186]

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[179] Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

[180] Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973); Anonymous v. Anonymous, 67 Misc.2d 982, 984–85 (N.Y. Sup. Ct. 1971); *see also In re* Cooper, 149 Misc.2d 282, 284–85 (N.Y. Sup. Ct. 1990) (clearly rejecting claim under the U.S. Constitution).

[181] Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993).

[182] *Id.* at 50 (citing HAW. CONST. art. I, §§ 5, 6).

[183] The court acknowledged that it *could* extend the right to privacy beyond the U.S. Constitution, but that its historical practice, reinforced by records from the 1978 state constitutional convention, was to interpret the right in accordance with the U.S. Supreme Court. *Id.* at 55–57.

[184] *Id.* at 60.

[185] *Id.* at 63 (citing Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973)).

[186] *Id.* at 64.

However, the court noted that the trial court erred in not reaching this conclusion, and as such, the state did not have an opportunity to "show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."[187] Accordingly, it remanded the case so that the trial court could review, based on the evidence and arguments that the state would proffer, whether the statute passed strict-scrutiny review.[188]

The backlash to the court's decision in *Baehr* was swift.[189] Polling at the time showed that a sizable majority of Americans was opposed to gay marriage,[190] and in the 1996 presidential election, Bob Dole, the Republican nominee for President, joined with congressional Republicans to push the Defense of Marriage Act, which received overwhelming and bipartisan support in Congress.[191] While President Bill Clinton downplayed the significance of the issue, he ended up signing DOMA before the presidential election took place.[192]

While DOMA did not *prevent* states from legalizing gay marriage, the same backlash that triggered DOMA also resulted in state lawmakers and voters taking several steps back from the court's decision in *Baehr*. Though the Hawai'i legislature created the Commission on Sexual Orientation and the Law to review the issue of marriage equality, and bills creating civil unions popped up in the legislature,[193] the legislature ultimately opted for a constitutional amendment that overturned the court's ruling. In 1998, voters ratified an amendment drafted by the legislature that added section 23 to the constitution's bill of rights—which gave the legislature "the power to reserve marriage to opposite-sex couples."[194] In response, the Hawai'i Supreme Court dismissed *Baehr*, which was still working its way through the state court system, as moot.[195] No same-gender unions of any kind were recognized until the legislature established civil unions in 2011.[196]

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[187] *Id.* at 67.

[188] *Baehr*, 852 P.2d at 68.

[189] *Gay Ruling Stirs Lively Reaction: Advertiser Fields Over 200 Calls*, HONOLULU ADVERTISER, May 8, 1993, at A2.

[190] *Most Against Gay Marriage, Poll Finds*, L.A. TIMES, May 25, 1996, at A19; *see also* Justin McCarthy, *U.S. Same-Sex Marriage Support Holds at 71% High*, GALLUP (June 5, 2023), https://news.gallup.com/poll/506636/sex-marriage-support-holds-high.aspx [https://perma.cc/C6DZ-CJ3K] (showing that 27% of Americans supported gay marriage when Gallup asked the question in 1996).

[191] Melissa Healy, *GOP Lawmakers Seek to Restrict Gay Marriages*, L.A. TIMES, May 9, 1996, at A3; David S. Cloud, *Ban on Gay Marriage Advances*, CHICAGO TRIB., July 13, 1996, at 3.

[192] *Clinton Draws Criticism from Gay Activists*, CHI. TRIB., Sept. 23, 1996, at 6.

[193] Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. C.R.L.J. 1, 3–5 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 16–17 (1996).

[194] HAW. CONST. art. I, § 23 (amended 1998).

[195] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *8 (Dec. 9, 1999).

[196] S.B. 232, Act No. 1, 26th Leg., Reg. Sess., 2011 Haw. Laws 1.

The 1998 constitutional amendment in Hawai'i was merely the first of many amendments to banning gay marriage. Between 1998 and 2012, thirty-one states ratified constitutional amendments prohibiting the recognition of gay marriage—and, in many cases, civil unions, too.[197] 2004 was the most popular year for these amendments to appear on the ballot, when marriage equality emerged as a significant issue in that year's presidential election.[198]

State courts varied considerably in how they applied these amendments. All courts rejected challenges as to the validity of the amendments themselves, which were most commonly based on alleged violations of state constitutional subject-matter restrictions on constitutional amendments.[199] But questions arose as to what the impact of the amendments was outside the specific context of marriage. Did a ban on gay marriage necessarily ban civil unions, too? (The Wisconsin Supreme Court said no).[200] Were public employers precluded from granting any benefits to same-gender couples?[201] (The Michigan Supreme Court

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[197] ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. art. LXXXIII, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, para. 1(a); HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16(a); KY. CONST. § 223A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21 (repealed 2020); N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35(A); OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32(a); UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIV, § 13.

[198] Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1748–1753 (2013).

[199] *See, e.g.*, McConkey v. Van Hollen, 783 N.W.2d 855, 870 (Wis. 2010) (rejecting single-subject challenge); Strauss v. Horton, 207 P.3d 48, 78 (Cal. 2009) (rejecting challenge that amendment was an impermissible revision of the state constitution); Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006) (rejecting single-subject challenge); Forum for Equal. PAC v. McKeithen, 893 So.2d 715, 737 (La. 2005) (rejecting single-subject challenge); Li v. State, 110 P.3d 91, 102 (Or. 2005) (rejecting challenge that voters had no authority to adopt amendment); *see also* O'Kelley v. Cox, 604 S.E.2d 773, 780 (Ga. 2004) (concluding that pre-election challenge to proposed amendment was non-justiciable); Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1634 (2005).

[200] Appling v. Doyle, 826 N.W.2d 666, 686 (Wis. 2012).

[201] Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1095 (2009); Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125 (2012); Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL'Y & L. 83 (2009); *see also* Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 453 (Mont. 2004) (holding, prior to ratification of constitutional amendment, that state university policy of only providing benefits to married couples violated the state equal protection clause).

said yes)[202]. Were laws that criminalized intimate-partner violence unconstitutional?[203] (Courts generally said no).[204]

Even as states amended their constitutions to ban marriage equality, however, litigation continued to push the issue in state courts. In 1999, the Vermont Supreme Court ruled in *Baker v. State* that its state constitution's Common Benefits Clause[205] entitled same-gender couples "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."[206] The court hedged its ruling by noting that it "do[es] not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate," but suggested that the legislature might extend marriage equality or create a civil-union structure.[207] The legislature opted for the latter.[208] The New Jersey Supreme Court reached a similar ruling in 2006.[209] In *Lewis v. Harris*, it held that "denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose" and violated the New Jersey Constitution's equal protection guarantee.[210] Accordingly, the legislature was required to either provide same-gender couples with the ability to marry or "create a separate statutory structure, such as a civil union," that afforded the same rights.[211] As in Vermont, the legislature opted to establish civil unions.[212]

In 2003, the Massachusetts Supreme Judicial Court issued a bolder ruling in *Goodridge v. Department of Public Health*, holding that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples

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[202] Nat'l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524, 543 (Mich. 2008).

[203] Shannon Little, Note, *Challenging Changing Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 260 (2008); Claire Wack, Note, *Unintended Consequences: The Ramifications of Defense of Marriage Amendments to State Domestic Violence Laws: North Carolina and Ohio*, 14 GEO. J. GENDER & L. 749, 752 (2013).

[204] *E.g.*, State v. Carswell, 871 N.E.2d 547 (Ohio 2007); State v. Curreri, 213 P.3d 1084 (Kan. Ct. App. 2009).

[205] VT. CONST. ch. 1, art. 7 ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community[.]"). The Vermont Constitution does not contain an equal-protection clause, but the court has viewed the Common Benefits Clause as filling a comparable role, but one distinct in its own right. *See* Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 96 (2001) (referring to the "confused state of Vermont equality jurisprudence").

[206] Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

[207] *Id.*

[208] S. 304, Act No. 91, 65th Biennial Sess., 2000 Vt. Laws 90.

[209] Lewis v. Harris, 908 A.2d 196, 220–22 (N.J. 2006).

[210] *Id.* at 220.

[211] *Id.* at 221.

[212] N.J. STAT. ANN. § 37:1-28 (West 2007).

violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."[213] The *Goodridge* court concluded that "the statute does not survive rational basis review," and declined to address whether the discrimination at issue involved a fundamental right or suspect classification such that heightened review was appropriate.[214]

The California Supreme Court held in 2008 that discriminations on the basis of sexual orientation needed to be evaluated under strict scrutiny under the state constitution's equal protection clause and invalidated the state's statutory ban on gay marriage.[215] Though the passage of Proposition 8 later that year overturned the court's ruling on the constitutionality of the ban itself,[216] the court concluded in a follow-up case that the amendment did not disturb the holding that sexual orientation was a suspect class.[217]

Connecticut followed suit shortly thereafter, holding in *Kerrigan v. Commissioner of Public Health* in 2008 that sexual orientation was a quasi-suspect class under the Connecticut Constitution's equal protection clause, and restrictions on it were therefore subject to intermediate scrutiny.[218] Concluding that the state's asserted justifications were weak—and certainly fell far short of the "compelling" rationale required to pass intermediate scrutiny—the court invalidated the statutory ban.[219]

In 2009, the Iowa Supreme Court unanimously held in *Varnum v. Brien* that the state's ban on gay marriage was unconstitutional.[220] It concluded that sexual orientation was a cognizable suspect class under the Iowa Constitution's equal protection clause—and that classifications based on sexual orientation were

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[213] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). In referring to the "individual liberty and equality" protections in the constitution, the court collectively referred to seven different provisions of the constitution. *See* MASS. CONST. pt. 1, arts. 1, 6, 7, 10, 12, 16; pt. 2, ch. 1, § 1, art. IV; arts. amend. 77, 106, 112.

[214] *Goodridge*, 793 N.E.2d at 961.

[215] *In re* Marriage Cases, 183 P.3d 384, 441–53 (Cal. 2008).

[216] CAL. CONST. art. I, § 7.5 ("Only marriage between a man and woman is valid or recognized in California."); Strauss v. Horton, 207 P.3d 48, 74 (Cal. 2009) ("[T]here is no question but that article I, section 7.5—the section added by Proposition 8 to the California Constitution—properly must be interpreted to apply both to marriages performed in California and to marriages performed in other jurisdictions.").

[217] *Id.* at 78. ("Proposition 8 must be understood as creating a limited exception to the state equal protection clause as interpreted in the majority opinion in the *Marriage Cases*. This exception—although constituting the governing state constitutional rule with regard to the specific matter it addresses—does not alter the general equal protection principles set forth in the *Marriage Cases* and in other California decisions interpreting and applying the state constitutional equal protection clause. Those principles continue to apply in all other contexts.").

[218] Kerrigan v. Comm'r, 957 A.2d 407, 475–76 (Conn. 2008).

[219] *Id.* at 481–82.

[220] Varnum v. Brien, 763 N.W.2d 862, 895–96, 907 (Iowa 2009).

subject to *at least* intermediate scrutiny.[221] The court reviewed the government's proffered justifications for the ban and concluded that, while the objectives "may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage."[222] The backlash to *Varnum* was severe. Three of the justices faced retention elections in 2010, and though judicial retention elections are historically sleepy affairs, all three justices were rejected by Iowa voters in a landslide—the first time in state history that any justice had lost a retention election.[223]

Finally, in 2013, the New Mexico Supreme Court struck down the state's statutory ban on gay marriage in *Griego v. Oliver*.[224] Like the *Kerrigan* and *Varnum* courts, the *Griego* court concluded that sexual orientation constituted a suspect classification, and that intermediate scrutiny was appropriate.[225]

During the same period, several state supreme courts rejected arguments that gay-marriage bans ran afoul of their state constitutions. Courts in Arizona, Indiana, Maryland, New York, Puerto Rico, and Washington rejected a host of claims that the discrimination created by the definition of marriage was unconstitutional. Plaintiffs in these cases relied on state equal protection[226] and substantive due process analogs,[227] as well as express rights to privacy[228] and some other state-specific provisions.[229]

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[221] *Id.* The court concluded that, because the statute "cannot withstand intermediate scrutiny, we need not determine whether classifications based on sexual orientation are subject to a higher level of scrutiny." *Id.*

[222] *Id.* at 904.

[223] J. Gordon Hylton, *Iowa Vote Reflects Dissatisfaction with Both Gay Marriage and the Judiciary*, MARQUETTE UNIV. L. SCH. FACULTY BLOG (Nov. 18, 2010), https://law.marquette.edu/facultyblog/2010/11/iowa-vote-reflects-dissatisfaction-with-both-gay-marriage-and-the-judiciary/ [https://perma.cc/FF3V-RZWA].

[224] 316 P.3d 865, 872 (N.M. 2013).

[225] *Id.* at 880–84.

[226] Standhardt v. Super. Ct. of Az. *ex rel.* Maricopa, 77 P.3d 451, 464–65 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (rejecting the challenge based on the Indiana Constitution's Equal Privileges and Immunities Clause, which is similar to, but distinct from, the federal Equal Protection Clause); Hernandez v. Robles, 855 N.E.2d 1, 10–12 (N.Y. Ct. App. 2006); Andersen v. King Cnty., 138 P.3d 963, 971–79 (Wash. 2006) (rejecting the challenge based on the Washington Constitution's Privileges and Immunities Clause, which is similar to, but distinct from, the federal Equal Protection Clause); Conaway v. Deane, 932 A.2d 571, 605–16 (Md. Ct. App. 2007); *Ex parte* A.A.R., 187 D.P.R. 835, 862–65 (P.R. 2013).

[227] *Standhardt*, 77 P.3d at 455–60; *Hernandez*, 855 N.E.2d at 9–10; *Andersen*, 138 P.3d at 985–90; *Conaway*, 932 A.2d at 616–29.

[228] *Standhardt*, 77 P.3d at 460; *Andersen*, 138 P.3d at 985–90 (rejecting challenge that sought to construe the right to privacy with due-process protections).

[229] *Morrison*, 812 N.E.2d at 31–34 (rejecting challenge based on Article I, Section 1, of the Indiana Constitution, which the court held was not judicially enforceable and rejecting challenge based on Article I, Section 12, of the Indiana Constitution, the Opens Courts Clause); *Andersen*, 138 P.3d at 973 (rejecting challenge that incorporated state Equal Rights

Several points are worth noting in reviewing the decisions from California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico, and Vermont, especially as compared to the Hawai'i Supreme Court's decision in *Baehr*. First, most of the state constitutions interpreted in these cases have equal rights provisions, which bar discrimination on the basis of, or because of, sex or gender.[230] (Only New Jersey and Vermont do not).[231] However, only the Hawai'i Supreme Court embraced the argument that banning gay marriage constituted unlawful discrimination on the basis of sex.[232] The supreme courts in California, Connecticut, Iowa, Massachusetts, and New Mexico opted for different conclusions.

The Connecticut, Massachusetts, New Jersey, and Vermont courts did not even address the issue of sex-based discrimination. The Vermont Supreme Court relied on the unique (and frequently "confused")[233] jurisprudence of its Common Benefits Clause, which it explained omits "labelling the excluded class."[234] The New Jersey Supreme Court's rule similarly avoids drawing lines among categories, and required that legislation, "in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental

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Amendment into the analysis of the Privileges and Immunities Clause); *Conaway*, 932 A.2d at 592–602 (rejecting argument based on state Equal Rights Amendment); *A.A.R.*, 187 D.P.R. at 865–74 (rejecting argument based on territorial Equal Rights Amendment and rejecting argument based on Article II, Section 1, of the Puerto Rico Constitution, which bars discrimination based on "birth").

[230] CAL. CONST. art. I, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment *because of sex*[.]" (emphasis added)); CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights *because of . . . sex*[.]" (emphasis added)); HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied or abridged by the State *on account of sex*." (emphasis added)); IOWA CONST. art. I, § 1 ("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." (emphasis added)); MASS. CONST. pt. 1, art. I ("Equality under the law shall not be denied or abridged *because of sex*[.]" (emphasis added)); N.M. CONST. art. II, § 18 ("Equality of rights under law shall not be denied *on account of the sex of any person*." (emphasis added)).

[231] *See generally* N.J. CONST.; VT. CONST.

[232] Baehr v. Lewin, 852 P.2d 44, 59–64 (Haw. 1993).

[233] Williams, *supra* note 205, at 96.

[234] Baker v. State, 744 A.2d 864, 878 (Vt. 1999). In a concurring opinion, Justice John A. Dooley, III, criticized the majority opinion's rationale, arguing that it "fails to provide any guidelines whatsoever for the Legislature, the trial courts, or Vermonters in general to predict the outcome of future cases." *Id.* at 893 (Dooley, J., concurring). While Justice Dooley did not "detail a suspect-classification analysis," but "agree[d] with the general framework adopted by the Oregon courts" in two of its recent cases—the second of which resulted in a conclusion by the Oregon Court of Appeals that sexual orientation was a suspect classification. *Id.* (first citing Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998); and then Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 976 (1982)).

purpose."[235] The Massachusetts Supreme Judicial Court relied on the panoply of individual rights and liberties guarantees in the constitution, and concluded that the statute failed rational-basis review, so it did not need to address the constitutionality under any heightened scrutiny.[236] And in Connecticut and Iowa, though plaintiffs argued that the statute discriminated both on the basis of sex and sexual orientation,[237] the courts only addressed the second claim.[238]

The California and New Mexico supreme courts were presented with similar sex-based discrimination arguments, but expressly *rejected* them, instead embracing the argument that sexual orientation was a protected class. In *Marriage Cases*, the California Supreme Court held that "the challenged marriage statutes do not treat men and women differently," and that "the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood."[239] Likewise, in *Griego*, the New Mexico Supreme Court held that "persons of either gender are treated equally in that they are each permitted to marry only a person of the opposite gender."[240]

Outside of the marriage context, and even in states with constitutional definitions of marriage, state courts occasionally confronted the question of how to evaluate equal-protection challenges to discrimination on the basis of sexual orientation. Many decisions were skeptical, or even outright dismissive, of claims that sexual orientation might be a suspect class.[241] However, some limited movement began taking place in the late 1990s. One of the earliest decisions in favor of that classification was *Tanner v. Oregon Health Sciences*

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[235] Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006). As the court noted in *Lewis*, its "equal protection analysis differs from the more rigid, three-tiered federal equal protection methodology." *Id.* at 212 n.13.

[236] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). In a concurring opinion, Justice John M. Greaney argued that "the case is more directly resolved using traditional equal protection analysis," and that the ban represented a classification on the basis of gender. *Id.* at 970–71 (Greaney, J., concurring).

[237] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 414 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 884 (Iowa 2009).

[238] *Kerrigan*, 957 A.2d at 476–81; *Varnum*, 763 N.W.2d 862 at 884.

[239] *In re* Marriage Cases, 183 P.3d 384, 436 (Cal. 2008).

[240] Griego v. Oliver, 316 P.3d 865, 880 (N.M. 2013).

[241] *See* Opinion of the Justices, 525 A.2d 1095, 1100 (N.H. 1987) (holding that "no suspect class is involved, nor is heightened scrutiny requiring application of the fair and substantial relation test appropriate" in reviewing a law barring people from being foster parents, adoptive parents, or child-care agency operators on the basis of sexual orientation (citations omitted)); Dep't of Health & Rehab. Servs. v. Cox, 627 So.2d 1210, 1218–19 (Fla. Dist. Ct. App. 1993), *aff'd in part, rev'd in part*, 656 So.2d 902 (Fla. 1995); Page v. Page, 2008-Ohio-3011, *6 (Ohio Ct. App. 2008); *In re* Marriage of J.B. and H.B, 326 S.W.3d 654, 672 (Tex. Ct. App. 2010); *see also* Phillips v. Wis. Personnel Comm'n, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992) (declining to reach issue); Donaldson v. State, 292 P.3d 364, 366 (Mont. 2012) (same).

University, decided by the Oregon Court of Appeals in 1998.[242] In *Tanner*, the court held that sexual orientation was a cognizable suspect class, and struck down as unconstitutional a state university policy of denying insurance benefits to the domestic partners of its gay employees.[243] Alaska, which uses a sliding-scale test for equal protection violations,[244] twice held that the denial of government benefits to same-gender partners was a violation of the state's equal protection clause.[245] Because the classification at issue did not pass minimum scrutiny, the court did not reach the question of whether it would be subject to heightened scrutiny.[246]

In 2015, the U.S. Supreme Court's decision in *Obergefell v. Hodges* had the effect of nullifying all state constitutional and statutory bans on marriage equality.[247] As I explain later, although only Nevada has repealed its constitutional ban on gay marriage so far,[248] the continued existence of these bans is likely of little significance.[249] Though some commentators suggested that these bans might have continued force in limited instances,[250] this does not seem to have come to pass—and these bans are best understood as "zombie" provisions that lack any interpretative force.[251]

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I conclude where I began: gay rights are not trans rights.[252] The lived experiences of trans people and gay people, as well as the legal challenges that each community has faced, are fundamentally different. Bans on "sodomy,"[253] as well as older laws that outright criminalized homosexuality,[254] denied gay people the ability to lawfully exist, and bans on gay marriage denied them the ability to have state-recognized legal relationships.[255] The refusal of some states

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[242] Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 446–47 (Or. Ct. App. 1998).

[243] *Id.* at 447–48.

[244] For a more detailed description of this test, *see* Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1, 29–35 (1986); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 253–64 (1998).

[245] Harris v. Millennium Hotel, 330 P.3d 330, 335 (Alaska 2014); Alaska Civil Liberties Union v. State, 122 P.3d 781, 790–95 (Alaska 2005).

[246] *Harris*, 330 P.3d at 335; *Alaska Civil Liberties Union*, 122 P.3d at 790.

[247] Obergefell v. Hodges, 576 U.S. 644, 680–81 (2015).

[248] A.J.R. 22, 2017 Leg., 79th Sess. (Nev. 2017) (amending NEV. CONST. art. I, § 21 (amended 2020)).

[249] *See supra* note 20 and accompanying text.

[250] *E.g.*, Mark Strasser, *The Possible Lingering Effect of Mini-DOMAs*, 47 CAP. U. L. REV. 679, 693–94 (2019).

[251] Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1065, 1079 (2022); Smith, *supra* note 52, at 17–18.

[252] *See supra* notes 125–130 and accompanying text.

[253] *See supra* notes 131–134 and accompanying text.

[254] William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159–69 (2002).

[255] *See supra* notes 179–186 and accompanying text.

to allow trans people to change their birth certificates or other forms of legal identification to reflect their actual gender, rather than the one assigned at birth, lumped many trans people into a legal classification that was both untrue and dehumanizing.[256] Older bans on "crossdressing" likewise deprived trans people of the ability to publicly present as their actual genders.[257]

State-level prohibitions on changes to gender markers sometimes intersected with the fight over gay marriage. A straight trans person could be denied the ability to marry—or do any of the things that are contingent on a lawfully existing marriage, like inherit or reach a divorce agreement—because, according to the inaccurate gender listed on their birth certificate, their marriage was an unlawful gay marriage. That discrimination was usually not at the forefront of LGBT legal advocacy.[258]

The relationship between gay legal advocacy and trans legal advocacy is complicated. Trans people clearly benefited from legislative efforts to repeal, and court cases to overturn, bans on "sodomy," which ensnared their sexual relationships, too. And, especially in states that made "changing" legal gender impossible (or extremely invasive),[259] the legalization of gay marriage brought recognition to trans relationships, too.

But very little of this litigation focused on trans issues or trans rights. Accordingly, in Part IV, I discuss the current state of LGBT rights in state constitutions generally, and explore what rights trans people may have under state constitutions today.

IV. DEVELOPING TRANS RIGHTS UNDER STATE CONSTITUTIONS

Judged solely by their text, state constitutions say little about the LGBT community—and virtually nothing about trans rights. Every state but Nevada that adopted a constitutional ban on gay marriage still has it.[260] Likewise, despite some recent modifications to equal protection clauses around the country,[261] none but Nevada's expressly prohibits discrimination on the basis of sexual orientation or gender identity.[262]

But, just like the U.S. Constitution, the text is just one part of the picture of state constitutional law. The U.S. Supreme Court's decision in *Obergefell* wiped

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[256] Ben-Asher, *supra* note 20, at 371–73.

[257] Eskridge, *supra* note 130, at 861–63.

[258] George, *supra* note 53, at 261–266.

[259] Terry S. Kogan, *Transexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 373–83 (2004) (describing the "first wave" of cases, both in the United States and abroad, that adopted rationale from *Corbett v. Corbett*, a British case); *id.* at 383–402 (describing the "second" and "third" wave of cases, which departed from *Corbett* in different ways); Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People*, 101 CAL. L. REV. 813, 813, 835 (2013).

[260] *See supra* note 197 and accompanying text.

[261] *E.g.*, DEL. CONST. art. I, § 21 (amended 2021).

[262] NEV. CONST. art. I, § 24.

away the force of state constitutional prohibitions on gay marriage, leaving them as unenforceable "zombie" provisions.[263] And, as mentioned in the previous Part, a sizable minority of state supreme courts recognized a right, under their state constitutions, for gay couples to marry—and, in so doing, frequently recognized sexual orientation as a suspect class.[264] State constitutional claims brought by trans plaintiffs are rare, and little caselaw has developed on trans rights or gender identity and expression more broadly.[265]

That can change. And if more cases were brought, it likely would. Trans litigants could import many of their claims under the federal Constitution to state courts, relying on parallel provisions in state constitutions. Many state courts have shown a willingness to interpret their equality-based provisions more robustly than the U.S. Constitution's Equal Protection Clause. Some courts have developed different theories of interpretation that have ditched the Supreme Court's rigid three-tiered approach for gauging Equal Protection violations—and even those that have kept the same basic framework for analysis deploy rational basis with more bite. The proliferation of equal rights amendments has also prompted many state courts to scrutinize gender-based discrimination under *strict* scrutiny, not intermediate.

While the universe of substantive due process claims that trans litigants could raise in federal court is murky after *Dobbs*,[266] state courts have generally interpreted the rights protected by state constitutions more robustly than the U.S. Supreme Court has in analogous contexts. Moreover, state constitutions simply have more rights than the federal constitution does—some of which embrace rights that the Court has expressly rejected. Trans litigants could tap into rights to privacy, education, medical treatment, and beyond to strengthen their claims.

And while an amendment to the U.S. Constitution prohibiting discrimination on the basis of gender identity or expression is unthinkable, states offer a rosier option here, too. Many states allow for voter-initiated constitutional amendments,[267] which could be used to provide even greater protection to the trans community than is currently possible under state constitutions.

I explore each of these options in this Part. I begin in Section A by discussing the options for equality-based claims under state constitutions. These claims will look very similar to the kinds of claims currently being brought in federal court, but with some important distinctions. I outline two main possibilities here, which could be tailored to the specific constitutional context

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[263] *See* Brady, *supra* note 251, at 1065–69; Smith, *supra* note 52, at 17–18. The decision in *Romer v. Evans* likewise wiped away the force of the Colorado Constitution's prohibition on the state and local governments recognizing anti-gay discrimination. *Id.* at 17.

[264] *See supra* Part III.B.

[265] Eyer, *supra* note 12, at 89.

[266] *Id.* at 44–47; *see also* Emily Kaufman, Comment, *On Liberty: From Due Process to Equal Protection—Dobbs' Impact on the Transgender Community*, 14 U. MIA. RACE & SOC. JUST. L. REV. 81, 90–95 (2023).

[267] *See, e.g.*, *supra* notes 111–115 and accompanying text.

of each state. First, litigants could argue that discrimination on the basis of gender identity or expression is akin to discrimination on the basis of "sex" or "gender." Not only could litigants take advantage of state courts' stronger interpretations of these provisions, but in states with equal-rights amendments, they could also raise claims under those provisions, too. Second, they could seek to recognize gender identity or expression as a new suspect classification. Regardless of how any litigation proceeds in federal court, it seems unlikely that the U.S. Supreme Court would recognize a *new* suspect classification[268]—but state courts are likelier to do so.[269]

Then, in Section B, I argue that the world of substantive due process is even better for trans litigants in state courts. Many state courts have developed more robust conceptions of the fundamental rights protected by their state constitutions than the federal courts have. Rights to privacy, education, and medical treatment have been given significant force by state courts in ways that they simply haven't by the Supreme Court.

Finally, in Section C, I talk about the role of state constitutional amendment in the broader trans legal strategy. My recommended approach here focuses on narrowly targeted efforts to expand equal-protection clauses to include sexual orientation and gender identity and expression. Here, I admit, I take a somewhat more conservative tact than in the recommendations I offer in Sections A and B. However, constitutional amendments must be approved by at least a majority of voters (and sometimes more) in every state but Delaware, and public-opinion polling is inconsistent in how it depicts Americans' attitudes toward the trans community. As the public's acceptance of, and empathy for, trans people continues to increase, bolder amendments will be possible.

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Before proceeding, a brief cautionary note. On the whole, state constitutions provide trans litigants with unequivocally stronger arguments than does the federal Constitution. But I do not mean to paint an overly rosy picture by implying, in any way, that state constitutions are monolithic, and that trans litigants will have an easier time in every state. Neither is true.

No two state constitutions are alike, and the force of constitutions is always in the hands of the interpreters. In some—perhaps many—states, trans litigants will likely face a judiciary and a constitution as friendly (or as hostile) to them as the federal judiciary and Constitution. And, unfortunately, some of the states with the most aggressively transphobic pieces of legislation also have state judiciaries and constitutions that are the least likely to support these claims. This

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[268] *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitution, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.").

[269] *See id.* at 757 n.73.

caution notwithstanding, most state courts still represent better venues for trans litigants than the federal judiciary.

A. *Equal Protection, Equal Rights, and Equality*

Most state constitutions do not contain equal-protection provisions—or, at least, provisions that would be readily identifiable as such when matched up against the text or history of the Fourteenth Amendment's Equal Protection Clause.[270] Some state constitutional law scholars, as well as state-court jurists, have argued that this is the wrong framing, anyway.[271] State constitutions were adopted at different times, and even textually similar provisions were adopted to remedy different ills.[272]

Nonetheless, and despite this diversity of approaches, most state courts have lockstepped with the U.S. Supreme Court's equal-protection jurisprudence. State courts have largely interpreted their constitutions' specific mandates of equality or uniformity as conferring the same basic set of protection from discrimination as the Fourteenth Amendment.[273] To that end, many state courts articulate the same basic three-tiered test for evaluating an equal-protection violation under their state constitutions.[274] In some cases, state courts' discussion of "equal protection" claims arising under both the U.S. and their state constitution have been so intertwined that it isn't possible to see where the discussion of one ends and the other begins.

And yet, the well-documented convergence between federal and state equal protection jurisprudence is only part of the story. The Equal Protection Clause in the Fourteenth Amendment does not expressly bar discrimination against any *specific* groups—and the development of different standards of review to evaluate discrimination against different suspect classes consists entirely of extra-textual, judge-made rules.[275] Many state equality provisions are far more

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[270] Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985) ("Most state constitutions do not contain an 'equal protection' clause. But they do contain a variety of equality provisions.").

[271] Phillips v. Wis. Personnel Comm'n, 482 N.W. 2d 121, 128 (Wis. Ct. App. 1992) (describing how Wisconsin Supreme Court uses similar analysis to U.S. Supreme Court for state equal protection claims).

[272] *See, e.g.*, Williams, *supra* note 270, at 1197 (noting that equality guarantees "were drafted differently, adopted at different times, and aimed at different evils"); *cf.* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 53–55 (1998); Bulman-Pozen & Seifter, *supra* note 68, at 1869.

[273] Williams, *supra* note 270, at 1206 ("Most state courts, however, have not developed doctrine independent of the federal equal protection clause . . . . Instead, they seem content not to read into [their] provisions anything other than what the United States Supreme Court has interpreted the equal protection clause of the fourteenth amendment to mean.").

[274] Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1029–30 (2003).

[275] *See* U.S. CONST. amend. XIV, § 1 (neither listing any specific group nor any way to determine how to judicially determine what violates equal protection); Adarand

specific, however,[276] and specifically prohibit unequal treatment on the basis of "race" or "color,"[277] "religion,"[278] "ancestry" or "national origin,"[279] "sex" or "gender,"[280] "disability" or "physical condition"[281] "age,"[282] "birth,"[283] "culture,"[284] "political ideas or affiliation,"[285] "social origin or condition,"[286] "sexual orientation,"[287] or "gender identity or expression."[288] The greater specificity of state-level equality provisions can be traced to the success of legislatures and electorates in many states in adopting equal-rights amendments,[289] as well as more modern efforts to update equality provisions.[290]

Unsurprisingly, state courts are more willing to recognize suspect classes beyond what the U.S. Supreme Court has sanctioned. If a state constitution expressly bars discrimination on the basis of a particular status, it's a good bet that state courts will subject discrimination on that basis to heightened

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Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995) (generally describing how the Courts apply strict scrutiny as a judicial remedy in the context of racial classifications).

[276] Bulman-Pozen & Seifter, *supra* note 68, at 1868–69.

[277] ARK. CONST. art. II, § 3; CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 5; LA. CONST. art. I, § 3; MASS. CONST. pt. 1, art. 1; MONT. CONST. art. II, § 4; NEV. CONST. art. I, § 24; N.J. CONST. art. I, § 5; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; PA. CONST. art. I, § 29; P.R. CONST. art. II, § 1; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WYO. CONST. art. I, § 3; N. MAR. I. CONST. art. I, § 6.

[278] CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 5; LA. CONST. art. I, § 3; MONT. CONST. art. II, § 4; N.J. CONST. art. I, § 5; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; VA. CONST. art. I, § 11; N. MAR. I. CONST. art. I, § 6.

[279] CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 5; MASS. CONST. pt. 1, art. 1; NEV. CONST. art. I, § 24; N.J. CONST. art. I, § 5; N.C. CONST. art. I, § 19; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; N. MAR. I. CONST. art. I, § 6.

[280] CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; HAW. CONST. art. I, §§ 3, 5; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; MD. CONST. DECLARATION OF RIGHTS, art. 46; MASS. CONST. pt. 1, art. 1; MONT. CONST. art. II, § 4; NEV. CONST. art. I, § 24; N.M. CONST. art. II, § 4; OR. CONST. art. I, § 46(1); PA. CONST. art. I, § 28; P.R. CONST. art. II, § 1; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3; N. MAR. I. CONST. art. I, § 6.

[281] CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; IOWA CONST. art. I, § 1; LA. CONST. art. I, § 3; NEV. CONST. art. I, § 24; R.I. CONST. art. I, § 2; WYO. CONST. art. I, § 3.

[282] LA. CONST. art. I, § 3; NEV. CONST. art. I, § 24.

[283] LA. CONST. art. I, § 3; P.R. CONST. art. II, § 1.

[284] LA. CONST. art. I, § 3; MONT. CONST. art. II, § 4.

[285] LA. CONST. art. I, § 3; MONT. CONST. art. II, § 4; P.R. CONST. art. II, § 1.

[286] MONT. CONST. art. II, § 4; P.R. CONST. art. II, § 1.

[287] NEV. CONST. art. I, § 24.

[288] *Id.*

[289] Wharton, *supra* note 41, at 1227–31.

[290] *E.g.*, DEL. CONST. art. I, § 21 (amended 2021).

scrutiny.[291] But while much of this greater willingness can be attributed to the specificity of state equality provisions, not all of it can be. In states where constitutions are less specific, state courts are still more willing to recognize additional suspect classes—even while interpreting their equal-protection provisions in tandem with the Equal Protection Clause.[292] For example, several of the state courts that recognized sexual orientation as a suspect class also view their equality provisions as conferring roughly equivalent coverage as the Equal Protection Clause.[293] And, before 2022, no state constitution barred discrimination on the basis of sexual orientation,[294] so there was no specific language in an equal-protection clause that a court could rely on in recognizing sexual orientation as such.

This leads to the next conclusion: even if state courts accept the same basic scope of equal protection that the U.S. Supreme Court has articulated, many of them apply it differently. These departures can be radical. A handful of states reject the three tiers of scrutiny, and instead adopt tests that consider, on a case-by-case basis, the relationship between the challenged classification and its

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[291] *See, e.g.*, Pierce v. Lafourche Parish Couns., 762 So.2d 608, 611–12 (La. 2000) (noting that the court applies intermediate scrutiny to "the six grounds enumerated in the third sentence of Section 3," the state's equality provision).

[292] For example, the New Mexico Supreme Court generally interprets its equal-protection provision—which provides that "[n]o person shall . . . be denied equal protection of the laws" and that "[e]quality of rights under law shall not be denied on account of the sex of any person"—similarly to the U.S. Supreme Court's Equal Protection Clause jurisprudence. N.M. CONST. art. II, § 4. The court has acknowledged that it has "looked to federal case law for the basic definitions for the three-tiered approach, but we have applied those definitions to different groups and rights than the federal courts." Breen v. Carlsbad Mun. Sch., 120 P.3d 413, 418–19 (N.M. 2005). In *Breen*, the court concluded that "it is appropriate to apply intermediate scrutiny to classifications based on mental disability because such persons are a sensitive class." *Id.* at 422–23.

[293] For example, despite the Connecticut Supreme Court's usual practice of interpreting "the state constitution's equal protection clause to 'have a like meaning and [to] impose similar constitutional limitations' as the federal equal protection clause," Markley v. Dep't of Pub. Util. Contrl., 23 A.3d 668, 677–78 (Conn. 2011) (quoting Batte-Holmgren v. Comm'r of Pub. Health, 914 A.2d 996 (Conn. 2007)), in *Kerrigan v. Commissioner of Public Health*, the court deviated from equal protection jurisprudence rather dramatically by recognizing sexual orientation as a suspect class, Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 475–76 (Conn. 2008). The same is true of the Iowa Supreme Court, State v. Williams, 628 N.W.2d 447, 452 (Iowa 2001); Massachusetts Supreme Judicial Court, Brackett v. Civil Serv. Comm'n, 850 N.E.2d 533, 545 (Mass. 2006); and the New Mexico Supreme Court, Trujillo v. City of Albuquerque, 965 P.2d 305, 314 (N.M. 1998). However, New Jersey and Vermont both apply more idiosyncratic tests. *See* Caviglia v. Royal Tours of Am., 842 A.2d 125, 136 (N.J. 2004); Badgley v. Walton, 10 A.3d 369, 476 (Vt. 2010).

[294] Amanda Powers, *Voters Amend State Constitutions to Enshrine New Rights*, BRENNAN CTR. FOR JUST. (Nov. 16, 2022), https://www.brennancenter.org/our-work/analysis-opinion/voters-amend-state-constitutions-enshrine-new-rights [https://perma.cc/CZ5M-AEZN].

purpose.[295] Most of the states that have ratified equal-rights amendments apply strict, not intermediate, scrutiny to classifications based on "sex" or "gender."[296] Other departures are minor. The Idaho Supreme Court, for example, uses a "means-focus" test in lieu of intermediate scrutiny.[297] The New Mexico Supreme Court has announced that it applies a tougher form of rational-basis review,[298] which many state courts seem to tacitly do, too.[299]

Equal protection, therefore, is a big tent. State constitutions contain diverse sources of equality principles and, even when they have ostensibly lock stepped with federal equal-protection jurisprudence, state courts have tapped into that diversity to arrive at different outcomes than federal courts do.[300]

Under this big tent, trans advocates can ground their federal Equal Protection arguments in the constitutional language of their state—with a strong chance of a better outcome than in federal court. In the states that have adopted equal-rights amendments, and especially those that review "sex"-based discrimination under strict scrutiny, their arguments that trans-discrimination *is* discrimination based on "sex" might well prevail. Where state constitutions expressly ban discrimination "on the basis of" or "because of" "sex," it's possible that the interpretative conclusion from *Bostock*—though based on a different corpus and in a different context—might be well received.[301]

While comparatively little litigation has taken place in state courts, the Minnesota Court of Appeals embraced this argument in *N.H. v. Anoka-Hennepin School District No. 11*. In *N.H.*, a local school district excluded a transgender male student from a boys' locker room, which the student

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[295] Alaska Civ. Liberties Union v. State, 122 P.3d 781, 787 (Alaska 2005) (sliding-scale test); Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994) (special test for privileges and immunities clause in lieu of equal protection clause); Caviglia v. Royal Tours of America, 842 A.2d 125, 136 (N.J. 2004); State v. Savastano, 309 P.3d 1083, 1091 n.9 (Or. 2013); Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of Providence, 888 A.2d 948, 956 (R.I. 2005); Gallivan v. Walker, 54 P.3d 1069, 1083–84 (Utah 2002); Badgley v. Walton, 10 A.3d 469, 476 (Vt. 2010); Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419, 425 (Wash. 2004).

[296] Wharton, *supra* note 41, at 1239–47.

[297] Jones v. State Bd. of Med., 555 P.2d 399, 410–11 (Idaho 1976).

[298] Trujillo v. City of Albuquerque, 965 P.2d 305, 314 (N.M. 1998); Rodriguez v. Brand W. Dairy, 378 P.3d 13, 19–20 (N.M. 2016).

[299] Kahn, *supra* note 37, at 472–73.

[300] Shaman, *supra* note 274, at 1031–32.

[301] The widespread failure of similar arguments as state courts weighed the constitutionality of statutory bans on gay marriage seems of little moment here. Most courts concluded that, whatever else could be said of the bans, they discriminated on the basis of *sexual orientation*, not "sex." Much of the litigation against trans-discriminatory demonstration has succeeded in arguing that these laws *do* discriminate on the basis of "sex." As the Eighth Circuit recently explained, "medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex," which is classic sex-based discrimination. Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022); *see* Eyer, *supra* note 12, at 27–38.

challenged the school district's actions under the Minnesota Human Rights Act and the equal-protection clause of the Minnesota Constitution.[302] While the court declined to recognize gender identity as a suspect class,[303] it instead used *Bostock* to analogize anti-trans discrimination to gender-based discrimination—and reviewed the school district's action under intermediate scrutiny.[304] It concluded that excluding a trans student from a gender-segregated locker rooms "that is available to students of which the gender with which the student identifies and to which the student has socially transitioned" can be recognized as a cognizable claim under the equal protection clause.[305]

N.H. is just one case, but one that illustrates that arguments under the federal Constitution can be translated into state-specific language and litigated successfully. Moreover, while the *N.H.* court was wary of recognizing a new suspect classification—it noted that "our role is to correct errors made by district courts, not to change law"[306]—the success of gay litigants in persuading state courts to recognize sexual orientation as a suspect class bodes well for trans litigants. Even if the door is "closed" to new suspect classifications at the federal level, it is certainly not in the states.[307]

In *Vasquez v. Iowa Department of Human Services*, plaintiffs challenged a state law that prohibited any state or local government from "provid[ing] for any sex reassignment surgery or any other . . . procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder,"[308] as well as an administrative rule containing a similar prohibition.[309] A district court in Iowa, relying on the supreme court's decision in *Varnum*, concluded that "gender identity discrimination is comparable to, if not a form of, sex discrimination."[310] It concluded, therefore, that the law and administrative rule violated the Iowa Civil Rights Act and the Iowa Constitution's Equal Protection Clause.[311] The case was appealed to the Iowa Supreme Court, which dismissed most of the appeal as moot because the Department of Human Services "agreed to pay for [the plaintiffs'] surgeries and declined to appeal the adjudication declaring unconstitutional" the administrative rule at issue.[312]

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[302] N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 558 (Minn. Ct. App. 2020).

[303] *Id.* at 569–70.

[304] *Id.* at 570–72.

[305] *Id.* at 572.

[306] *Id.* at 570 (citing *Lake George Park, LLC v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998)).

[307] Yoshino, *supra* note 268, at 757 n.73.

[308] IOWA CODE § 216.7(3) (2019); Vasquez v. Iowa Dep't of Hum. Servs., 990 N.W.2d 661 (Iowa 2023).

[309] IOWA ADMIN. CODE r. 441-78.1(4) (2021).

[310] *Vasquez* Ruling on Petition for Judicial Review, *supra* note 14, at 32–33.

[311] *Id.* at 59.

[312] Vasquez v. Iowa Dep't of Hum. Servs., 990 N.W.2d 661, 664 (Iowa 2023).

While no cases have (yet) reached state supreme courts on the merits of equality-based claims, it seems likely that some will in the coming years. Several cases are pending in state courts, some of which have resulted in preliminary injunctions against limitations on gender-affirming care or athlete-participation bans.[313] All prominently center claims that the restrictions at issue violate their state constitutions' guarantees of equality, both because they discriminate on the basis of "sex" *and* gender identity or transgender status.[314]

B. *The Right to Privacy and Personal Autonomy*

In federal litigation, trans litigants have focused their firepower on Equal Protection claims, and not as much on substantive due process claims. Given the uncertain state of the Supreme Court's privacy-rights jurisprudence, the preference for arguments rooted in Equal Protection makes sense. But in the states, there is no need to exclusively focus on equality-based provisions. The positive rights landscape is significantly broader in the states. State constitutions contain *a lot* of rights.[315] State courts, in interpreting these rights, have found

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[313] *Soe v. Louisiana State Board of Medical Examiners* Petition, *supra* note 14, at 45–50 (arguing that the act "discriminat[es] on the basis of sex" and "based on transgender status") (citing LA. CONST. art. I, § 3); Petition for Injunctive and Declaratory Relief at 39–43, 47–48 Noe v. Parson, (No. 23AC-CC04530), (Mo. Cir. Ct. 2023) [hereinafter *Noe v. Parson* Petition], https://www.aclu-mo.org/sites/default/files/1_-_petition_-_noe_v._parson.pdf (arguing that the act "classifies based on sex and transgender status") (citing MO. CONST. art. I, § 2; art. III, § 40); First Amended Complaint for Declaratory and Injunctive Relief at 39–41, Van Garderen v. State, (No. DV-23-541), (Mont. Dist. Ct. 2023) [hereinafter *Van Garderen v. State* Complaint], https://www.aclu.org/cases/van-garderen-et-al-v-state-of-montana?document=First-Amended-Complaint#legal-documents (arguing that the act "denies patients equal protection of the laws on the basis of their gender identity, transgender status, and sex" (citing MONT. CONST. art. II, § 4)); Complaint for Declaratory and Injunctive Relief at X, Moe v. Yost, No. 24CVH03-2481 (Ohio Ct. Common Pleas Mar. 26, 2024) [hereinafter *Moe v. State* Complaint], https://acluohio.org/sites/default/files/moeetal-v-yostetal_complaint_2024-0326.pdf (arguing that the law "discriminates against transgender adolescents . . . based on their sex" (citing OHIO CONST. art. I, § 2)); Plaintiffs' Verified Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief at 46–51, 64–66, Loe v. State, (No. D-1-GN-23-003-616), (Tex. Dist. Ct. 2023) [hereinafter *Loe v. State* Petition], https://www.aclu.org/cases/loe-v-texas?document=Plaintiffs-Petition-for-Declaratory-Judgment-and-Application-for-Temporary-and-Permanent-Injunctive-Relief#legal-documents (arguing that the act "classifies and discriminates based on both sex and transgender status" (citing TEX. CONST. art. I, §§ 3, 3a)); Amended Complaint Seeking Declaratory & Injunctive Relief at 17–19, Roe v. Utah High Sch. Activities Ass'n, (No. 220903262), (Utah Dist. Ct. 2022) [hereinafter *Roe v. Utah High School Activities Association* Complaint], https://www.nclrights.org/wp-content/uploads/2022/05/document-1.pdf (arguing that the act "impermissibly discriminates based on Plaintiffs' transgender status and, because being transgender is sex-based, . . . also discriminates on account of sex" (citing UTAH CONST. art. I, § 24; art. IV, § 1)).

[314] *See* cases cited *supra* note 313.

[315] Bulman-Pozen & Seifter, *supra* note 68, at 1864–68.

even more rights still.[316] Many of the claims that could be brought under these rights would not succeed in federal court—and haven't in the past.[317]

But though the rights landscape is broader in the states, it is also blurrier. In some cases, state courts have avoided developing any independent interpretations of certain rights by simply lockstepping with the U.S. Supreme Court.[318] In others, they have opted to resolve questions under the U.S. Constitution, obviating the need to render an answer under their state constitution.[319] And many unique rights in state constitutions simply lack any meaningful development at all.[320]

All of this contextualizes why state constitutional litigation can be more challenging. But this litigation also rewards intellectual creativity.[321] Drawing on a state constitution's unique provisions, and the historical conditions that resulted in their existence, can result in the recognition of a new set of individual rights and liberties that are unique to that context.[322]

It is likely impossible to fully catalog the universe of rights that trans litigants might be able to tap into. I certainly do not claim to do so here. Instead, my goal is to provide jumping-off points for state-constitutional litigation and development in future scholarship. Accordingly, I focus on one of the most important rights in the substantive-due-process toolkit: the right to privacy (or, reframed, the right to personal autonomy). While not every state court has recognized a separate right to privacy under its state constitution, a good number have—and many state constitutions have *express* rights to privacy, anyway.[323] The right to privacy, therefore, is a fairly commonplace tool in state constitutional litigation, and one that can be both strengthened *and* custom-fit for an individual state's legal culture by reference to other provisions in the same text.

Asserting claims based on violations of a right to privacy is also unequivocally easier in state courts at the present moment. At the national level, after the Court's decision in *Dobbs*, the scope of the right to privacy is unclear.[324] Whether the Court ultimately revisits *Lawrence*, *Eisenstadt*, or

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316 *See id.*

317 *See* Tarr, *supra* note 71, at 1418–21.

318 Williams, *supra* note 68, at 1509–13.

319 *Id.* at 1512–13.

320 *E.g.*, Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 85–90 (2009) (discussing general unenforceability of constitutional rights to hunt and fish).

321 Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 312–13 (2020).

322 *Id.* at 313; Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1499–505 (2016).

323 *See infra* notes 318–342 and accompanying text (state constitutional provisions and caselaw establishing an implied or express right to privacy).

324 Eyer, *supra* note 12, at 41–47, 60.

Griswold remains to be seen, but in any event, the level of privacy protections afforded by the U.S. Constitution is now in doubt.[325]

State constitutions generally recognize the right to privacy, though somewhat unevenly. "Privacy," as a constitutional concept, is somewhat amorphous. In the search-and-seizure context, we frequently speak of an "expectation" of privacy.[326] In the individual rights context, we speak of a "right" to privacy that frequently encompasses bodily autonomy or informational privacy.[327] Depending on the state, a constitution might reflect different combinations of these ideas. Most states contain express protections against unreasonable searches and seizures.[328] At times, these rights can be far more specific than the Fourth Amendment; for instance, in three states, recent amendments have clarified that the right extends to electronic data and information, too.[329] Twelve state (and territorial) constitutions expressly recognize a right to privacy,[330] which might appear as part of a provision that sounds like the Fourth Amendment,[331] as an altogether separate right to

[325] *Id.* at 44–60.

[326] *See, e.g.*, Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 30–34 (2020); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 526–31 (2007).

[327] MARY ZIEGLER, BEYOND ABORTION: ROE V. WADE AND THE BATTLE FOR PRIVACY 15–17 (Harv. Univ. Press ed., 2018).

[328] *Cf.* Shirley Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1157–65 (1985).

[329] MICH. CONST. art. I, § 11 (amended 2020); MO. CONST. art. I, § 15 (amended 2014); MONT. CONST. art. II, § 11 (amended 2022).

[330] ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; N.H. CONST. pt. 1, art. 2-b; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7; N. MAR. I. CONST. art. I, § 10.

[331] ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."); LA. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); *see also* Abrahamson, *supra* note 328, at 1187–89.

privacy,[332] or as something that sounds like a combination of the two.[333] Many state supreme courts have also inferred rights to privacy under their state constitutions in the absence of an explicit provision.[334]

The scope of the right to privacy varies depending on the court. Many state supreme courts have interpreted their express or implied rights to privacy as more expansive than the analogous federal right.[335] As mentioned earlier, some state courts recognized parallel rights to abortion that were more robust than the right under *Roe* and its progeny; others differed from the Court's decision in *Harris v. McRae* and required states to fund medically necessary abortions.[336] Litigants frequently relied on privacy rights in challenging the state

[332] ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 ("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."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); N. MAR. I. CONST. art. I, § 10 ("The right of individual privacy shall not be infringed except upon a showing of compelling interest.").

[333] ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); N.H. CONST. pt. 1, art. 2-b ("An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."); S.C. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[334] *E.g.*, Jegley v. Picado, 80 S.W.3d 332, 349–50 (Ark. 2002); Powell v. State, 510 S.E.2d 18, 21–22 (Ga. 1998); Commonwealth v. Wasson, 842 S.W.2d 487, 491–92 (Ky. 1992); Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626, 633 (Mass. 1986); Advisory Op. on Constitutionality of 1975 PA 227 (Question 2–10), 242 N.W.2d 3, 19 (Mich. 1976); State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987); In re Brown, 478 So.2d 1033, 1039–40 (Miss. 1985); In re Quinlan, 355 A.2d 647, 663–70 (N.J. 1976); Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992).

[335] Ravin v. State, 537 P.2d 494, 504 (Alaska 1975); *Jegley*, 80 S.W.3d at 349–50; Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779, 784–85 (Cal. 1981); State v. Davis, 929 A.2d 278, 294 (Conn. 2007); *Powell*, 510 S.E.2d at 21–22; Janra Enters. v. City & Cnty. of Honolulu, 113 P.2d 190, 196 (Haw. 2005); Wasson, 842 S.W.2d at 491–94; Women of the State v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995); Armstrong v. State, 989 P.2d 364, 373–74 (Mont. 1999); Planned Parenthood S. Atl., 882 S.E.2d 770, 782 (S.C. 2023); *Davis*, 842 S.W.2d at 600.

[336] Not all state courts relied on privacy protections. Some courts, especially those that did not recognize a separate right to abortion, relied on equality provisions. Wharton, *supra* note 92, at 501–02.

constitutionality of "sodomy" bans—and though the sample size was small, actually had greater success in states *without* express privacy rights than in states with those provisions.[337]

But some courts have declined to elaborate on the level of privacy rights protected by their state constitutions. Most of these courts have concluded that their state constitutions protect rights to privacy that are at least as expansive as the federal Constitution,[338] though the Missouri Supreme Court suggested that it might even be *less* than that.[339] Prior to *Dobbs*, this refusal to elaborate on the scope of a state constitutional right to privacy may have been frustrating for litigants seeking a more expansive right, but otherwise, it changed nothing. After *Dobbs*, however, with the status of the federal right to privacy more up in the air, state courts may not be able to avoid for much longer the question of what privacy rights their constitutions protect.

For trans litigants challenging discriminatory laws in state court, rights to privacy are a good entry point. In constitutional parlance, privacy rights can be synonymous with rights to personal autonomy.[340] Much of the logic that has underpinned abortion-rights decisions—namely, that there is nothing more private than a person's own body[341]—applies with equal force when defending the right of trans people to exist and present themselves consistently with their actual genders. Indeed, state-court litigants in Louisiana, Missouri, and Montana, have raised similar privacy- and autonomy-based claims in their pending lawsuits.[342]

Other substantive rights protected by state constitutions can help strengthen this right to personal autonomy. Many state constitutions contain provisions that reference health, usually in an unenforceable policy statement reflecting the

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[337] *See supra* Part III.

[338] *See* Doe v. Williams, 61 A.3d 718, 739 (Me. 2013); Doe v. Dep't of Pub. Safety & Corr. Servs., 971 A.2d 975, 986 (Md. Ct. Spec. App. 2009); Advisory Opinion on Constitutionality of 1975 PA 277, 242 N.W.2d 3, 19 (Mich. 1976); State v. Senters, 699 N.W.2d 810, 814 (Neb. 2005); McKay v. Bergstedt, 801 P.2d 617, 622 (Nev. 1990).

[339] State v. Walsh, 713 S.W.2d 508, 513 (Mo. 1986) ("Whatever its reach, however, the application of Missouri's right of privacy to date has not paralleled the right of privacy said to inhere in the Federal Constitution.").

[340] *See, e.g.*, Gryczan v. State, 942 P.2d 112, 123 (Mont. 1997) (concluding that "Montana's Constitution . . . explicitly protects individual or personal-autonomy privacy as a fundamental right by its placement in the Declaration of Rights").

[341] *See, e.g.*, Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988) ("The right [to privacy] begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent.").

[342] *Soe v. Louisiana State Board of Medical Examiners* Petition, *supra* note 314, at 40–45 (arguing that the act violates the plaintiffs' "fundamental right to privacy" and "right to medical autonomy and to obtain medical treatment" (citing LA. CONST. art. I, §§ 2, 5)); *Noe v. Parson* Petition, *supra* note 314, at 43–45 (arguing that the act violates "the fundamental right to autonomy in healthcare" (citing MO. CONST. art. I, §§ 2, 10)); *Van Garderen v. State* Complaint, *supra* note 314, at 42–44 (arguing that the act "violates patients' right to privacy" (citing MONT. CONST. art. II, § 10)).

government's duty to provide for public health.[343] Indeed, a recent student note has argued that these public-health provisions can, and should, be relied on to challenge gender-affirming care bans as violations of a state constitutional "right to health."[344] To that end, state-court litigants in Montana challenging their state's ban on gender-affirming care have argued that the restriction runs afoul of the Montana Constitution's "inalienable right[]" to "seek[] . . . health."[345]

But state constitutions do much more to guarantee rights in the context of healthcare. Separate from litigation at the federal level in *Cruzan* and *Glucksburg* over the right to die,[346] many state courts have recognized rights to refuse medical treatment under their state constitutions,[347] though they have been reluctant to recognize a "right" to physician-assisted suicide.[348] And after the passage of the Affordable Care Act in 2010, a handful of states adopted "healthcare freedom" amendments that ostensibly guaranteed individual rights to purchase the health care of one's choice.[349] Abortion-rights litigants in Ohio and Wyoming, two of the states with "healthcare freedom" amendments, have relied in part on these provisions to challenge their states' abortion bans.[350] Regardless of whether the right to "healthcare freedom" is cognizable as an individual right, it, along with the right to refuse medical treatment and public-health provisions, reinforces a strong vision of bodily autonomy—an argument recently raised by litigants in Ohio.[351]

In cases with youth plaintiffs, they have also bootstrapped their autonomy-based claims with parental rights-based claims. For example, in *Noe v. Parson*,

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[343] Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1348–68 (2010); Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RSRV. L. REV. 997, 1056–71 (2010); *see also* Richard M. Weinmeyer, *Lavatories of Democracy: Recognizing a Right to Public Toilets Through International Human Rights and State Constitutional Law*, 26 U. PA. J. CONST. L. 402, 460–67 (2024) (arguing that state constitutional rights to health could be used to protect a right to public bathrooms).

[344] Jessica Matsuda, Comment, *Leave Them Kids Alone: State Constitutional Protections for Gender-Affirming Healthcare*, 78 WASH. & LEE L. REV. 1597, 1634–1637 (2022).

[345] *Van Garderen v. State* Complaint, *supra* note 314, at 44–45 (citing MONT. CONST. art. II, § 3).

[346] *See* Robert M. Hardaway, Miranda K. Peterson & Cassandra Mann, *The Right to Die and the Ninth Amendment: Compassion and Dying after* Gluckserg *and* Vacco, 7 GEO. MASON L. REV. 313, 317–18 (1999).

[347] Annamarie Kempic, *The Right to Refuse Medical Treatment under the State Constitutions*, 5 COOLEY L. REV. 313, 313, 323 (1988); Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1264 (1991).

[348] *E.g.*, Kligler v. Att'y Gen., 198 N.E.3d 1229, 1258–59 (Mass. 2022) (collecting cases).

[349] Yeargain, *supra* note 48.

[350] *Id.*

[351] *Moe v. Yost* Complaint, *supra* note 313, at 27–28.

a case currently pending in Missouri state courts, the plaintiffs connect the "fundamental right to autonomy in healthcare" to "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[352] In *Loe v. State*, pending in Texas, the plaintiffs raise a similar claim, noting that "the parent's fundamental right to make medical care decisions for their adolescent is at its apex" when they "provide[] informed consent" and their child "assents" to a "medically necessary course of treatment that is safe and effective."[353]

Several recent state court cases feature a related argument—that the bans on gender-affirming care deny physicians the ability to practice their trade. The plaintiffs in *Noe* and *Loe* include both trans people who cannot receive care under the bans, as well as physicians now unable to provide it.[354] In support of their conclusion that the ban unconstitutionally harms the physicians, too, *the Noe* plaintiffs point to the protection in the Missouri Constitution of the right to "the enjoyment of the gains of [one's] own industry."[355] Likewise, in *Loe*, the plaintiffs argue that the ban "threaten[s] the licenses and burden[s] the livelihoods" of the physicians "who in good faith provide medically necessary treatment to transgender youth suffering from gender dysphoria," citing the Texas Constitution's due process clause.[356] To that end, when the district court in *Loe* issued a temporary injunction against Texas's ban on trans medical care, it embraced this argument.[357]

A few other state constitutions contain provisions similar to the Missouri Constitution's protection,[358] which would seemingly allow physicians to make economic substantive due process arguments. While these arguments lasted longer in state courts than they did in federal courts after *Lochner v. New York*

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[352] *Noe v. Parson* Petition, *supra* note 314, at 43 (citing MO. CONST. art. I, §§ 2, 10).

[353] *Loe v. State* Petition, *supra* note 314, at 44–45 (citing TEX. CONST. art. I, § 19); *see also* Erin Geiger Smith, *Texas Supreme Court to Hear Arguments Over Ban on Gender-Affirming Care for Transgender Minors*, STATE CT. REP. (Jan. 29, 2024), https://statecourtreport.org/our-work/analysis-opinion/texas-supreme-court-hear-arguments-over-ban-gender-affirming-care [https://perma.cc/9237-HF2E].

[354] *Noe v. Parson* Petition, *supra* note 314, at 5–8; *Loe v. State* Petition, *supra* note 314, at 7.

[355] *Noe v. Parson* Petition, *supra* note 314, at 45–46 (citing MO. CONST. art. I, § 2).

[356] *Loe v. State* Petition, *supra* note 314, at 51–54 (citing TEX. CONST. art. I, § 19).

[357] *Loe v. Texas* Preliminary Injunction Order, *supra* note 14, at 3.

[358] *E.g.*, ALASKA CONST. art. I, § 1 ("[A]ll persons have a natural right to . . . the enjoyment of the rewards of their own industry[.]"); FLA. CONST. art. I, § 2 ("All natural persons . . . have inalienable rights, among which are the right . . . to be rewarded for industry[.]"); MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include . . . the rights of pursuing life's basic necessities . . . ."); OKLA. CONST. art. II, § 1 ("All persons have the inherent right to . . . the enjoyment of the gains of their own industry.").

was discarded,[359] they have seen only limited success in recent decades.[360] Depending on the state, arguments like this might prove more successful.[361]

State constitutions contain a variety of other bespoke rights, most of which lack a federal analog, and many of which are idiosyncratic to each state.[362] Many of these rights can provide additional bases for challenging trans-discriminatory legislation. The litigants in *Van Garderen v. State*, pending in Montana, invoked rights beyond those discussed before.[363] They also argued that the ban on gender-affirming care violated the Montana Constitution's right to "dignity"[364] and right to speech and expression.[365] When the state trial court issued a preliminary injunction against the legislation, however, it relied on the equality- and privacy-based arguments, and did not address the other arguments raised by plaintiffs—including the alleged violation of parental rights, health, dignity, or free speech.[366]

C. *Amending Constitutions*

If trans litigants were to challenge the constitutionality of state laws that discriminate against them, they have some strong arguments. They could make the same arguments that they've made in federal litigation, that anti-trans discrimination is equivalent to discrimination on the basis of "sex," or that gender identity or expression should be recognized as a suspect class. In doing so, they could rely on the stronger protections afforded by state equality

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[359] *See generally* John A. C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. UNIV. L. REV. 226 (1959) (discussing decisions under state constitutions).

[360] Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Decline*, 55 AM. U. L. REV. 457, 479–88 (2006); Anthony B. Sanders, *Montana's Basic Necessities Clause and the Right to Earn a Living*, 84 MONT. L. REV. 75, 81–90 (2023) (discussing the interpretation of Montana's provision).

[361] *See, e.g.*, Thiam v. Bureau of Pro. & Occupational Affs., No. 301 C.D., 2023 Pa. Commw. Unpub. LEXIS 388, at *48–49 (Pa. Commw. Ct. July 25, 2023) (holding that occupational licensing requirements to be licensed to offer natural hair braiding services under the Beauty Culture Law "are unconstitutional as applied to her as they are violative of Petitioner's constitutional right to pursue her chosen occupation under article I, section 1 of the Pennsylvania Constitution").

[362] Bulman-Pozen & Seifter, *supra* note 68, at 1864.

[363] *Van Garderen v. State* Complaint, *supra* note 314, at 45–47 (citing MONT. CONST. art. II, § 4).

[364] *Id.*

[365] *Id*. at 47–49 (citing MONT. CONST. art. II, § 7). Their argument was that, by barring entities "receiv[ing] state funds" from "us[ing] state funds to promote or advocate [prohibited] medical treatments," the legislation "impermissibly burden[ed] the right to freedom of speech and expression protected by the Montana Constitution[.]" *Id.* at 48.

[366] *Van Garderen v. State* Order, *supra* note 14, at 45–46 (concluding that "Plaintiffs demonstrated that they are likely to succeed on the merits of at least two of their constitutional claims").

guarantees—like the review of "sex"-based discrimination for strict scrutiny, the tougher rational-basis review, or the altogether different tests that are, on balance, less deferential to the government. They could also develop substantive due process arguments rooted on violations of the right to privacy, which many state courts have established is broader than whatever analogous federal right remains after *Dobbs*.

But if all else fails, they could change the text of the state constitution that they're litigating under. This recommendation is not meant to minimize the very real costs of amending a state constitution—drafting an agreeable provision, gathering signatures, and launching a statewide campaign for a high-profile measure—but instead to offer the obvious suggestion that if litigants don't like how the state constitution is interpreted, they should try to change it.

Constitutional amendments that are deliberately designed to overturn court rulings are fairly common. From the earliest days of the initiative, voters have used their powers to draft constitutional amendments to nullify state supreme court rulings.[367] In the early twentieth century, voters responded to mini-*Lochner* decisions by simply adding to the legislature's constitutional power to regulate different aspects of the economy.[368] In the early days of new judicial federalism, voters (and legislatures) responded to expansive rulings of state supreme courts that transcended federal constitutional interpretation by requiring state courts to hew to federal precedent in certain cases.[369] In the past decade, voters in several states overturned state supreme court rulings that recognized a state constitutional right to abortion by adding a proviso to their constitution clarifying that nothing in it confers any abortion rights.[370] While the prospect of amending the U.S. Constitution to overrule a U.S. Supreme Court ruling has been virtually unthinkable since 1794,[371] 1868,[372] or 1913,[373] it is common enough in the states.

The prospect of proposing a constitutional amendment expanding trans rights—or LGBT rights generally—is admittedly risky. Polling appears inconsistent on trans issues. A consistent (and perhaps growing) share of Americans believe that sex is exclusively assigned at birth.[374] Yet this same

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[367] Dinan, *supra* note 120, at 1001.

[368] *See id.* at 991–1001.

[369] *See supra* notes 120–123 and accompanying text.

[370] *See supra* notes 123–125 and accompanying text.

[371] *See generally* U.S. CONST. amend. XI; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[372] *See generally* U.S. CONST. amend. XIV; Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[373] *See generally* U.S. CONST. amend. XVI; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

[374] KIM PARKER, JULIANA MENASCHE HOROWITZ & ANNA BROWN, PEW RSCH. CTR., AMERICANS' COMPLEX VIEWS ON GENDER IDENTITY AND TRANSGENDER ISSUES 4 (June 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/ [https://perma.cc/WSB7-JLUL]; Laura Meckler

polling shows that Americans believe that anti-trans discrimination should be outlawed in most contexts—but not sports.[375] Views on what sort of gender-affirming care should be lawful for trans people under the age of eighteen vary considerably depending on the pollster and the specific question, *e.g.*, a *Washington Post*–Kaiser Family Foundation poll taken in 2022 showed that a supermajority of Americans supported allowing trans children to receive "[g]ender-affirming counseling or therapy," but opposed "[p]uberty-blocking medication" and "[h]ormonal treatments,"[376] and a Pew Research Center poll taken at the same time found minority support for outlawing or criminalizing that therapy.[377]

Accordingly, one of the least risky strategies might be to avoid addressing any *specific* type of transphobic discrimination and to instead propose a constitutional amendment that revises a state's equality guarantee to prohibit discrimination on the basis of, among other things, "gender identity or expression." Nevada's 2022 constitutional amendment proposing just that received 59% of the vote and attracted comparatively little organized opposition.[378] Not only would a similar measure likely win majority support in most states, but it would also be *highly* effective, especially if compelled with a specific standard of review.

A narrow approach also makes sense as a matter of pushing the Overton window in the direction of trans rights. A more specific measure, like one that affirmatively guaranteed that trans students could play on sports teams aligning with their actual, not assigned, gender, would have a more limited effect—but is also less likely to win majority support. Given current polling on question like that, a dirty, fear-driven campaign against such a measure would likely prevail, perhaps further stigmatizing the trans community in the process and chilling groups from supporting other measures in the future. On the other hand, a more abstract measure that bans discrimination would put opponents in the position of arguing against equal rights.

Advocates must also be conscious that the obstacles to ratifying a constitutional amendment are legion. One of the most nefarious threats comes in the form of efforts by Republican-led state legislatures to undermine the initiative process. In Ohio, abortion-rights activists successfully placed a

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& Scott Clement, *Most Americans Support Anti-Trans Policies Favored by GOP, Poll Shows*, WASH. POST (May 5, 2023), https://www.washingtonpost.com/education/2023/05/05/trans-poll-gop-politics-laws/ [https://perma.cc/2H66-LREU].

[375] PARKER, MENASCHE HOROWITZ & BROWN, *supra* note 374, at 4, 22; Meckler & Clement, *supra* note 374.

[376] Meckler & Clement, *supra* note 374.

[377] PARKER, MENASCHE HOROWITZ & BROWN, *supra* note 374, at 6.

[378] Camalot Todd, *With Question 1, Nevada Passes Most Inclusive States Equal Rights Amendment in Nation*, NEV. CURRENT (Nov. 10, 2022), https://www.nevadacurrent.com/2022/11/10/with-question-1-nevada-passes-most-inclusive-states-equal-rights-amendment-in-nation/ [https://perma.cc/BFH4-K7WA].

constitutional amendment on the ballot for the November 2023 election that would recognize expansive abortion rights under the state constitution.[379] Prior to the election, the Republican majority in the legislature scrambled to place its own constitutional amendment on the ballot in *August* 2023 that would have raised the threshold to approve constitutional amendments to *sixty* percent, up from the simple majority then required.[380] Though the amendment's sponsors claimed that the purpose was not to specifically target abortion rights, the timing of the election was suspect[381]—and many prominent Ohio Republicans expressly framed the measure as an anti-abortion amendment.[382] In the end, Ohioans overwhelmingly rejected the last-minute move to raise the approval threshold,[383] and subsequently ratified the abortion-rights measure in a landslide.[384]

In 2022, South Dakota Republicans attempted a similar move to stymy a voter-initiated amendment to expand Medicaid. When the measure was placed on the November 2022 ballot, the legislature sent a constitutional amendment to the ballot in the June primary that would require sixty percent approval for any amendment requiring expenditures of $10 million or more, which Medicaid would.[385] Voters rejected the attempt to undermine their initiative power in a landslide,[386] and then ratified the Medicaid expansion amendment.[387]

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[379] Kate Zernike, *Ohio Will Vote on Abortion Rights*, N.Y. TIMES, (July 25, 2023), https://www.nytimes.com/2023/07/25/us/ohio-abortion-rights-amendment.html [https://perma.cc/Z6U8-XYEU].

[380] Amended Substitute S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

[381] Jo Ingles & Karen Kasler, *Ohio House Votes to Send 60% Approval Amendment to Special Election in August*, STATEHOUSE NEWS BUREAU (May 10, 2023), https://www.statenews.org/government-politics/2023-05-10/ohio-vote-60-constitutional-amendment-august [https://perma.cc/5B9G-728V].

[382] Julie Carr Smyth & Ali Swenson, *Abortion Messaging Roils Debate over Ohio Ballot Initiative. Backers Said It Wasn't About That*, ASSOCIATED PRESS (July 24, 2023), https://apnews.com/article/abortion-ohio-referendum-election-2023-7ea8656d35adce9dfb8d9a9bf8c69d60 [https://perma.cc/5B22-6FM3].

[383] Joseph, *supra* note 114.

[384] Susan Tebben & Nick Evans, *Ohio Voters Pass Issue 1 Constitutional Amendment to Protect Abortion and Reproductive Rights*, OHIO CAPITAL J. (Nov. 7, 2023), https://ohiocapitaljournal.com/2023/11/07/ohio-voters-pass-issue-1-constitutional-amendment-to-protect-abortion-and-reproductive-rights/ [https://perma.cc/K4UF-5QSH].

[385] Quinn Yeargain, *"A Systematic Assault": GOP Rushes to Change Election Rules to Block Medicaid in South Dakota*, BOLTS MAG. (May 30, 2022), https://boltsmag.org/amendment-c-south-dakota-medicaid/ [https://perma.cc/CR4C-NUDN].

[386] Daniel Nichanian, *South Dakotans Refuse to Weaken Ballot Initiatives, Keeping Hopes Alive for Medicaid Expansion*, BOLTS MAG. (June 8, 2022), https://boltsmag.org/south-dakota-amendment-c-result-medicaid/ [https://perma.cc/L855-S5AN].

[387] Megan Messerly, *South Dakota Votes to Expand Medicaid*, POLITICO (Nov. 9, 2022), https://www.politico.com/news/2022/11/09/south-dakota-expand-medicaid-health-care-coverage-midterms-00065911 [https://perma.cc/CP9B-3DN9].

D. *Applying the Strategy*

A state constitutional victory has clear benefits, even if it produces a few isolated victories. State constitutional change can help influence national constitutional change,[388] and it provides other state courts with a body of persuasive caselaw. But the risks are real, too.

In reviewing the state constitutional strategy to achieve marriage equality, Lee Carpenter and Ellie Margolis extract several lessons for advocates who are attempting to use state constitutions to achieve similar ends. In terms of developing the litigation itself, they recommend identifying rights in a state constitution that do not exist in the U.S. Constitution (or that could yield a more expansive result) and keying the arguments to how state courts interpret their state constitution.[389]

But their most important advice is realistic. They advise that any advocates "must gain a deep understanding of two interlinked conditions in any state in which they are considering litigation: public opinion toward the litigation aims and the ease of amendment of the state constitution."[390] If a lawsuit brings too radical of change too quickly, opponents might be able to persuade the electorate to amend their state constitution to nullify the decision. They point to the dramatic reversal of fortunes in Hawai'i from the tentative victory in *Baehr v. Lewin* and the 1998 constitutional amendment that ended the case, and in California from the victory in *Marriage Cases* to the ratification of Proposition 8 just a few months later.[391]

Choosing the right state to bring these claims requires careful, deliberate work,[392] so that defeats do not undermine the broader movement.[393] Accordingly, it may make sense to begin litigation in a state with a friendly legislature and governor—perhaps to challenge discriminatory practices of local governments, especially school districts. In these states, a growing number of which are establishing themselves as sanctuaries for trans healthcare, trans advocates do not have to fear about their healthcare being taken away under state law,[394] but there may be opportunities for litigation at the local level. There

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[388] *Cf.* ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS at 1, 4–5 (2021) (arguing that state constitutional amendments can help influence the adoption of national amendments).

[389] Carpenter & Margolis, *supra* note 321, at 312–13. The *Van Garderen* plaintiffs in Montana, for example, have deployed this strategy—though, as mentioned, their success came on more traditional grounds. *See supra* notes 362–366 and accompanying text.

[390] Carpenter & Margolis, *supra* note 321, at 310–12.

[391] *Id.* at 310–11.

[392] Bonauto, *supra* note 322, at 1499–505.

[393] Carpenter & Margolis, *supra* note 321, at 311–12.

[394] Dana Ferguson et al., *Minnesota to Join at Least 4 Other States in Protecting Transgender Care This Year*, NPR NEWS (Apr. 21, 2023), https://www.npr.org/2023/04/21/1171069066/states-protect-transgender-affirming-care-minnesota-colorado-maryland-illinois [https://perma.cc/CZN4-2PL6].

may also be as-applied challenges that could be raised against voter-identification requirements, especially as they relate to procedures to change a person's legally recognized name or gender.[395]

As litigants branch out into states with statewide bans on gender-affirming care, they would be well-advised to begin with states where the judiciaries have stronger reputations for ideological moderation or with well-established libertarian streaks, and where the state constitutional arguments are the strongest. In some states, including many in the Deep South, where many state constitutions are starved of individual-rights protections and the judiciaries are elected in partisan elections,[396] litigants should be very cautious before potentially creating unhelpful caselaw.

V. CONCLUSION

The tune is familiar. Individual rights and civil liberties claims fare increasingly poorly at the U.S. Supreme Court. The Court's ideological composition has changed, and its conservative, revanchist majority is pulling back from some of its older decisions. The first time, it inspired Justice William Brennan and others to call for lawyers to take to the states to vindicate their claims.[397] More recently, following the Court's decision in *Dobbs v. Jackson Women's Health Organization*, abortion-rights advocates have rushed to state courts to challenge trigger bans and new abortion restrictions on state constitutional grounds.[398]

Same as it ever was[399]—but only to a point. While lawyers and judges had to familiarize themselves with their oft-forgotten state constitutions in the 1970s and 1980s for the first time,[400] the past fifty years of state constitutional litigation has created a body of informative caselaw.[401] As the scope of protection afforded by the U.S. Constitution ebbs and flows, rights and liberties advocates can pick up this caselaw to pursue their claims in state courts.

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[395] *See* Milov-Cordoba & Stack, *supra* note 53, at 339–43; *see also* Clarke, *supra* note 53, at 963–90.

[396] *See State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUST. (Dec. 6, 2022), https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments [https://perma.cc/HGF8-PAAJ] (summarizing which State Constitutions do and do not have equal rights amendments for citizens); Quinn Yeargain, *Your State-by-State Guide to Every State Supreme Court*, BOLTS MAG. (Aug. 22, 2023), https://boltsmag.org/whats-on-the-ballot/state-supreme-courts/ [https://perma.cc/FH86-PNAF] (explaining how state judiciaries are elected and chosen).

[397] Brennan, *supra* note 24, at 491; *see supra* Part II.

[398] *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Dec. 5, 2022), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/F65W-USSY].

[399] TALKING HEADS, *Once in a Lifetime*, *on* REMAIN IN LIGHT (Sire Records 1980).

[400] Linde, *supra* note 24, at 387–92; Abrahamson, *supra* note 24, at 961–64.

[401] *See supra* Part III.

But this kind of reactive approach makes for a poor legal strategy, especially in the context of trans rights. As I have observed *ad nauseum*, the outcome of federal litigation challenging anti-trans discrimination is unclear. There are, certainly, signs for optimism, given how well the early litigation has gone.[402] But failure is a real possibility. And even success will not end federal litigation. Establishing that discrimination on the basis of gender identity as a subset of impermissible discrimination based on sex, or is entitled to its own separate prohibition, will prompt follow-up litigation to ascertain what the lines are. And, just as abortion-rights activists after *Roe*, trans-rights advocates would have to constantly defend successes from attack.

Using state constitutions to combat anti-trans discrimination is no sure thing, either. State courts may prove hostile to the claims that could be raised, and state electorates might be unwilling to ratify constitutional amendments that expand the protections of their constitutions' equality provisions. But the success of gay-rights litigation in the states—to both strike down bans on "sodomy" and achieve marriage equality—shows that it is possible. This success also shows what kind of claims are possible in state courts. Trans-rights advocates could rely on conceptions of equality in state constitutions that are more robust than the U.S. Constitution's, express and implied rights to privacy that go beyond whatever remains of the federal right, and unique constitutional rights with no analog in the federal Constitution at all.

State constitutions should not be seen as a mere backup in the event that federal litigation fails to achieve a movement's most ambitious goals. State constitutional litigation is complementary to federal constitutional litigation. It can fill the cracks in federal jurisprudence, go beyond what federal courts are willing to, and create both momentum and favorable caselaw for bigger legal changes. There is no need for trans litigants to wait for the U.S. Supreme Court to step into the fray—because our rights have multiple sources, not just the U.S. Constitution.

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[402] Eyer, *supra* note 12, at 11.