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Unlike the U.S. Constitution, many state constitutions are truly modern documents that address important social, economic, and political issues from a progressive perspective. This is due to the combination of several key features, including: socially oriented historical circumstances; democratic creation processes; significant substantive content guided by ideas of social justice; and adequate judicial enforcement that takes into account these crucial normative elements. As a result, these progressive state constitutions can become powerful allies in the search for a transformative constitutionalism in the United States that facilitates the goals of social justice and collective prosperity.

The constitutional processes in California (1880), New York (1938), Puerto Rico (1952), and Illinois (1970) are prime examples of this type of progressive constitutionalism. Their

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particular creation histories and the constitutional content they produced represent a sharp break from the experiences at the federal level. Specifically, they show that there is an available alternative route in order to achieve progressive results in the constitutional realm. Moreover, they can serve as blueprints for the eventual substitution of the U.S. Constitution with a document truly written by 'We the People' that, in turn, addresses the enormous social, economic, political, and environmental challenges facing the United States today.

INTRODUCTION

For years, progressives have looked to different parts of the U.S. Constitution in an uphill attempt to gain recognition for important social rights and policy goals. These include the right to education, labor protections, equitable wealth distribution through welfare programs, and environmental preservation, as well as the democratization of the political process.[1] Many of these efforts have been in vain.[2] And no wonder: it would be quite shocking to find explicit references to these issues—much less in a progressive direction—in an eighteenth-century legal document written by property-owning white men, at a time when the political process excluded vast portions of the U.S. population, social justice was not a mainstream idea, and constitutionalism as we know it today was still in its infancy.

Progressives have been looking in the wrong places. While some have instead opted for a purely legislative route to achieve these policy goals,[3] an untapped source awaits: state constitutions. Of course, *not all state constitutions are*

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1. Even more classic civil and political rights included in the U.S. Constitution seem to be, at least for the foreseeable future, subject to narrow interpretation at the hands of the current federal judiciary. As we will see, state constitutional provisions that address these issues, including important protections for the right of privacy, individual autonomy, and equality, seem to be likelier candidates for progressive development than those found in the federal text. This is in addition to the pursuit of substantive policy goals that are simply absent from the U.S. Constitution.

2. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lyng v. Int'l Union, 485 U.S. 360 (1988) (right to strike); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare); Concerned Citizens of Neb. v. U.S. Nuclear Regul. Comm'n, 970 F.2d 421 (8th Cir. 1992) (environment); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (political representation).

3. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power.

the same, and many suffer from some of the same deficiencies that are present in the federal text.[4] But there are others that, through a combination of socially oriented historical circumstances, democratic creation processes, substantive content, and effective judicial enforcement, have incredible potential with regard to the development of a truly progressive and transformative constitutionalism in the United States. Even if most of them cannot be described as radical documents, the contrast between these state constitutions and their federal counterpart is significant.

Among these constitutions are those of California and other western states that were adopted in the latter half of the nineteenth century, as well as New York,[5] Illinois,[6] and others.[7] Although not a state, Puerto Rico's 1952 constitution

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4. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 862 (2022) (not "all states have had identical experiences"). Another possible route that should be considered is to, at long last, replace the 1789 Constitution with a modern document that addresses substantive issues enacted through democratic processes. State constitutions can yield important lessons for this project. This is not to say that the Federal Constitution, as currently enforced, has no role to play. There can be instances of majoritarian excesses at the state level that could require legitimate minority rights protection at the federal level.

5. In particular, this Article will focus on the 1938 New York Constitutional Convention, which resulted in the adoption of many important substantive policy provisions.

6. The current Illinois Constitution was adopted in 1970 but went into effect in 1971. *See* James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 313 (2010).

7. The Montana Constitution of 1972 shares many of the characteristics identified in this Article. *See generally* Abigail R. Brown, *Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law*, 45 PUB. LAND & RES. L. REV. 41 (2022); James Park Taylor, *Intersection of Hybrid Rights: Dignity and Protection Against Excessive Punishment*, MONT. LAW., Apr. 2021, at 20; Jorge M. Farinacci-Fernós, *Curious In-Laws: The Legal Connections Between Montana and Puerto Rico*, 79 MONT. L. REV. 187 (2018); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational*

should also be added to the mix. The proper enforcement of these state constitutions will not resolve all social ills or material inequalities. State constitutions, even progressive ones, are not magical instruments. But they are not toothless or insignificant either and can prove to be valuable tools in a broader political and legal strategy to achieve transformative goals.

The historical circumstances, creation processes, substantive content, and corresponding enforcement mechanisms of these state constitutions make them indispensable tools in the pursuit of progressive change in the United States, at least until the United States replaces its anachronistic Federal Constitution with a modern one through a democratic and popular process. These experiences can also become templates for constitutional change at the federal level in the future. While the state constitutions selected for this Article do not necessarily represent the maximum or optimal articulations of these features, they constitute an important proof of concept that there is a different form of constitutionalism that is currently in existence today in the United States, and that it can be further developed in the future in a direction of real social transformation.

Part I of this Article explores the basic ingredients needed for progressive state constitutionalism: (1) socially sensitive historical circumstances that give birth to the constitution, (2) democratic and popular constitutional creation processes, (3) adoption in the text of important substantive issues—ranging "from imprisonment for debt, racial exclusion, worker's rights, gender equality, environmental rights, and many more,"[8] and (4) the availability of robust judicial enforcement that takes into account substantive content, as well as the corresponding historical circumstances and creation processes. The result

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Constitutional Discourse, 65 MONT. L. REV. 15 (2004).

8. Marshfield, *supra* note 4, at 861.

is a powerful normative cocktail that can, at least at the subnational level, produce tangible effects from a social, popular, and progressive perspective. Part II explores the application of these ingredients to four specific state constitutional projects and experiences: (1) California in 1880, (2) New York in 1938, (3) Puerto Rico in 1952, and (4) Illinois in 1970. Part III offers some comments on the future of progressive state constitutionalism—including the creation of new state constitutions—and its potential impact on the future of the current U.S. Constitution.

I. THE BASIC INGREDIENTS FOR PROGRESSIVE STATE CONSTITUTIONALISM

The key ingredients for achieving social transformation through state constitutionalism from a progressive perspective are *historical circumstances*, *creation process*, *substantive content*, and *judicial enforcement*. The latter two are historically and conceptually linked with the first two. Each one requires an individual analysis, so we can then make an assessment regarding their combined impact. I now turn to that individual analysis in the same order as given above, since it constitutes a practical and conceptually coherent sequence.

A. *Historical Circumstances: Economic Crisis, Democratically Deficient Politics, and Popular Mobilization*

Constitutions are historical phenomena. They are the result of historical circumstances and also have the ability to generate new historical possibilities by themselves. This is particularly true in the context of many, though not all, state constitutions in the United States.[9]

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9. *See* Patrick M. Garry, *The Rising Role of State Constitutional Law: An Introduction to a Series of Articles on the South Dakota Constitution*, 59 S.D. L. REV. 4, 7 (2014) ("[M]any state constitutions reflect the period during which they were adopted."); G. ALAN TARR, UNDERSTANDING

Any analysis of a particular constitutional project—including the potential transformative force that its creation process, substantive content, and adequate enforcement mechanisms may have—must start with the historical circumstances that brought it to life. Constitutions do not materialize from nothing. They reflect specific historical junctures that should be taken into account.

More importantly, the relevant historical circumstances *can directly impact the nature and significance* of the other three elements identified earlier. In other words, the search for progressive state constitutionalism starts with the historical circumstances that generate a particular state constitution in the first place. Therefore, in order to select the sort of state constitution that may possess transformative potential, we must first identify the historical circumstances that preceded it.

The case studies used in this Article all share, at least at some basic point, similar historical characteristics, specifically, a socially oriented approach to the role of state constitutional law in the development of public policy combined with popular engagement and mobilization. These characteristics also distinguish these experiences from other state constitutional creation processes that, by lacking them, offer little transformative potential.[10]

STATE CONSTITUTIONS 4 (1998) ("[S]uccessive versions of a state constitution mirror the political and social changes that have occurred in the state.").

10. History is not lineal. The success of reform movements has varied and has been dependent on the particular historical juncture that corresponds to a particular political enterprise. *See, e.g.*, Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1467–69 (2010) (identifying the different historical stages regarding the adoption of a right to education in state constitutions). By the same token, the defeat of a particular reform movement can sometimes lead to backlash. An example of this phenomenon was the arrival of the *Lochner* era after the defeat of the Populist movement at the end of the nineteenth century. *See* Gerard N. Magliocca,

A central, historically shared feature of progressive state constitutions is a distrust of the effectiveness and reliability of ordinary legislative politics to address the needs of the population adequately and consistently, particularly those of the working and popular classes. Specifically, progressive state constitutionalism has been the result of "popular frustration with existing democratic institutions."[11]

This view is based on a shared concern regarding (1) the potentially unresponsive nature of some state legislatures, (2) a belief "that corporations and political elites had captured government,"[12] and (3) a mistrust of elite-dominated courts. In other words, the apprehension that economically and politically powerful minorities would be able to co-opt the state government and make it nearly impossible for the adoption of progressive legislation, regardless of the views of the majority of the electorate.[13]

Progressive constitutions appear to share the view that "legislatures and officials cannot be trusted."[14] As a result,

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Constitutional False Positives and the Populist Movement, 81 NOTRE DAME L. REV. 821, 825 (2006).

11. Marshfield, *supra* note 4, at 909–10 (in reference to the Progressive Era); *see also* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION 29 (Oxford Univ. Press 2011) (1990) (in reference to the New Deal era and New York's 1938 process).

12. Marshfield, *supra* note 4, at 910. Marshfield also explains, in the context of antebellum United States, that "[t]he capture of government by an elite group of private firms at the expense of the public was anathema to the state conception of constitutional rights." *Id.* at 895. During the Progressive Era, there was also considerable "popular frustration with existing democratic institutions," which many felt was the result of corporate and elite capture of government. *Id.* at 909–10. Of course, this description is by no means limited to that time period. Elite capture of government is a constant threat to democracy in the United States.

13. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 84, 93 (2013).

14. Marshfield, *supra* note 4, at 860.

popular movements interested in obtaining political and legal victories needed to adopt a different strategy: *direct self-government* through the creation, or substantial modification, of state constitutions and the entrenchment of popularly favored rights and substantive provisions that had been previously shunned by co-opted state legislatures and elite-dominated courts.

This approach also explains why, as Jonathan Marshfield states, many state constitutions include "a dynamic set of substantive instructions and limitations on government that is adopted and jealously maintained by the people themselves."[15] This means that state constitutions have the potential to be "active instrument[s] of popular control over government,"[16] which force state governments "to enact reforms that the political and economic environment might render particularly challenging to achieve."[17]

In these circumstances, constitutional entrenchment is not just a vehicle for the protection of minority rights against abusive majorities. As Marshfield explains, "[t]o the contrary, they were defiant efforts to realize *majoritarian preferences* in the face of powerful special interests and elites who had rendered state government non-responsive."[18] The failure of state legislatures to adequately address popular and working-class concerns and to adopt statutory protections for their benefit prompted these forces to focus on

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15. *Id.* at 859; *see also* TARR, *supra* note 9, at 20–21.

16. Marshfield, *supra* note 4, at 860. This includes the adoption of "detailed provisions that are clearly responsive to particular government failures." *Id.*

17. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1699 (2014). In that sense, "political disputes in the states have often had a constitutional dimension, and the texts of state constitutions record those conflicts and their outcomes." TARR, *supra* note 9, at 3.

18. Marshfield, *supra* note 4, at 911 (emphasis added).

a more assertive path: the entrenchment of these concerns, goals, and protections directly in the state constitution, thus bypassing unresponsive legislatures and hostile judiciaries.[19]

The end result are state constitutions that seem "obsessed with the fear that government will be captured, not by a self-serving democratic majority, but by an elite minority."[20] This obsession is not irrational or imagined. On the contrary, it reflects historical experiences where powerful economic forces, though quantitatively minoritarian, have been able to wield enormous influence over government institutions.

Progressive state constitutions flip this paradigm. While still protecting the rights of minorities, they also ensure that majoritarian preferences will not be easily ignored by disconnected legislatures or overruled by an antagonistic judiciary. In that sense, "[c]onstitutional conventions often created a sense of opportunity among labor leaders and organizations, prompting them to pursue the creation of a new constitutional provision when they might not have otherwise."[21] Constitutional entrenchment became a political strategy in the face of institutional resistance, particularly for social movements involving labor unions and environmental activists, among others.

The result would be the enshrinement of substantive policy provisions in state constitutions, supported by a majority of the population. In other words, instead of using

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19. *See* ZACKIN, *supra* note 13, at 109 (explaining, in the particular context of labor protections, that the goal was "to force recalcitrant legislatures to pass protective statutes, and finally that constitutional provisions would facilitate political organizing within their own social movement"); Marshfield, *supra* note 4, at 883 (explaining the "belief that officials are prone to thwart democratic outputs when their personal interests do not align with the people's interests").

20. Marshfield, *supra* note 4, at 858.

21. ZACKIN, *supra* note 13, at 120.

entrenchment to illegitimately perpetuate a minoritarian view or to justifiably protect the rights of vulnerable minorities, entrenchment in this context also became an ally of politically and economically powerless *majorities* wishing to achieve and protect political victories.

Courts have also been a historic focus of state constitutionalism due to their inherent vulnerability to elite capture. Lawyers are not necessarily reflective of the overall population, which creates an inherent democratic and republican tension given the fact that they are overwhelmingly represented in an entire third of government.

The relationship between progressive state constitutions and courts operates on several levels. First, progressives have turned to state constitutions in order to thwart or overrule judicial invalidations of labor and social welfare protections.[22] By explicitly allowing for these protections in the text of the state constitution, courts are unable to declare them unconstitutional. Second, state constitutions can be used to require legislatures to enact these types of protections, recruiting courts as a failsafe in case of legislative inaction or abdication. Third, state constitutions also allow for the judicial enforcement of explicit substantive provisions, even more so if they are accompanied by statutory enactments.[23] While these levels operate independently of one another, they share a common source: turning hostile courts into involuntary enforcers of

22. *See* Marshfield, *supra* note 4, at 910; ZACKIN, *supra* note 13, at 143 ("[L]abor publications often described constitutions as the voice of the people, unmediated by legislatures and unmolested by courts."); *id.* at 109, 123.

23. For example, Galie explains that elevating existing statutory law to constitutional status "had the effect of giving legitimacy and permanency to these responsibilities, removing doubts about their constitutionality, and giving the state high court an invitation to activism not otherwise available." GALIE, *supra* note 11, at 31.

progressive policies adopted by constitutional majorities.[24]

Progressive state constitutions in the United States are historically linked with politically active and effectively mobilized labor and farmers' movements, radical political organizations, social reformists, and working-class interests. This includes organizations such as the Knights of Labor, Western Federation of Miners, United Auto Workers, and other labor unions.[25] Political forces such as the Workingmen's Party, the Farmers' Alliance movement, the Populist movement, the Suffragist movement, environmental organizations, and other similar entities and currents, were also instrumental in this endeavor.[26]

Crisis within the capitalist system also seems to be a recurrent factor in progressive state constitution making, from the Gilded Age to the Great Depression and the challenges of the latter half of the twentieth century.[27] One

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24. Historically, progressives—and particularly the labor movement—have been suspicious and skeptical of courts, because of the latter's historical hostility to labor rights. *See* ZACKIN, *supra* note 13, at 138 ("Although entrenchment theories tell us that rights are created by legislative majorities who want to extend their dominance over time and through courts, labor organizations did not want to get into courts, and in fact used constitutions in their attempt to keep courts at bay.").

25. *See* Garry, *supra* note 9, at 6 (Knights of Labor); ZACKIN, *supra* note 13, at 120 (Knights of Labor and Western Federation of Miners); Hilliard, *supra* note 6, at 308 n.325 (United Auto Workers and other unions).

26. *See* ZACKIN, *supra* note 13, at 120 (California Workingmen's Party and chapters of the American Federation of Labor and Women's Trade League); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849, 864 (1991) (Suffragist movement); Garry, *supra* note 9, at 5–6 (Farmers' Alliance movement and Populist movement).

27. *See* Marshfield, *supra* note 4, at 910–11 (in reference to the effects of industrialization and the expansion of capitalism during the Gilded Age and Progressive Era); William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 548 (1998) (in reference to the Great Depression and its impact on the notion of the state's duty to address the needs of the working classes and the poor).

possible explanation is the existence of economically and politically powerless majorities, mostly drawn from the popular classes, that become politically mobilized and decide to engage in political and constitutional action to address their needs and obtain their goals.

B. *Creation Process:Democratic and Popular*

The type of constitution-making process used to draft a particular state constitution can directly shape the nature of its substantive content and the method of interpretation and enforcement that should be used when applying it in particular circumstances. As a result, the process indirectly informs the outcome of many constitutional questions, generating results that are either compatible or in opposition to social justice and other progressive goals.

Constitutional creation processes are also historical phenomena. This requires an analysis of the social, economic, cultural, ideological, and political circumstances present when a particular state constitution is created or revised. Constitutional creation processes characterized by popular awareness, mobilization, and participation, as well as structural and economic challenges, and politically engaged social forces, are the main breeding ground for transformative constitutionalism.

In instances where constitutional creation processes are not characterized by strong democratic or popular credentials, those state constitutions will be less effective in bringing about transformative change from a progressive perspective. But when the opposite is true—that is, where the constitutional creation process was the result of significant historical forces and circumstances compatible with social transformation—then the constitutions of those states are vital tools in the pursuit of effective and transformative progressive constitutionalism.

Historical circumstances are rarely lost on the people who are tasked with framing state constitutions. In other

words, creation processes are directly impacted by the historical circumstances that generated them, particularly when those circumstances are characterized by popular mobilization and engagement.

This establishes an important link between historical circumstances and creation processes.[28] As James Hilliard explains regarding the 1970 Illinois Constitution, "convention delegates were well aware of the historical role and underlying political theory of state constitutions" when drafting their state's constitution.[29] Something similar could be said of the state constitutions adopted during the latter half of the nineteenth century and the early half of the twentieth century.[30] In the particular context of labor rights and protections, for example, Emily Zackin observes that some state constitutional framers "were frequently quite explicit about their goal of requiring state intervention to protect laborers."[31] Likewise, many labor leaders "tried to ensure that sympathetic delegates would be elected to constitutional conventions."[32] The presence of working-class delegates in state constitutional conventions was crucial with regard to their popular nature and the social orientation of their substantive content.

The constitutional creation process, thus, is the key link between historically relevant popular mobilizations and the adoption of progressive substantive content in a state

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28. *See* Jorge M. Farinacci-Fernós, *Writing a Modern Constitution: Democratic Process and Substantive Content*, 17 REVISTA DE ESTUDIOS CRÍTICOS DEL DERECHO 199, 212–13 (2022).

29. Hilliard, *supra* note 6, at 272.

30. *See* Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RSRV. L. REV. 997, 1000–01 (2010) (noting the influence of "progressive social movements of the late nineteenth and early twentieth centuries" over many state constitutions adopted during that period).

31. ZACKIN, *supra* note 13, at 115.

32. *Id.* at 121. This included electing delegates "from among their own ranks." *Id.*

constitution.[33] In other words, historical junctures where the balance of power shifts to popular movements tends to generate democratic and open creation processes that, in turn, are able to entrench the substantive policy preferences of those movements.

Democratic and participatory processes of constitutional creation come in many shapes and sizes. But a few key features stand out.[34]

First, the process needs to be designed in such a way as to maximize popular participation and engagement, so that it can be accepted by the public as a valid exercise that will adequately represent and reflect their interests and views. This explains why many state constitutions and their bills of rights have been characterized as "'beehive[s]' of popular political activity."[35] If done correctly, then "the process will acquire *political legitimacy*,"[36] which, as we will see later on, is crucial with regard to interpretive issues.[37] Among the most important design issues are the nature, size, composition, and operation of the drafting body itself.[38]

Second, the selection of the delegates should be carried out by mechanisms that encourage popular participation, as opposed to those that are easily susceptible to elite capture. One key practice has been to prohibit elected officials from also serving on the drafting body.[39] Another mechanism that has been used are nonpartisan elections.[40] A more difficult

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33. *See* Farinacci-Fernós, *supra* note 28, at 213.

34. For a more in-depth discussion on the operation of a democratic and participatory constitutional creation, see generally Farinacci-Fernós, *supra* note 28.

35. Marshfield, *supra* note 4, at 869.

36. Farinacci-Fernós, *supra* note 28, at 211.

37. *See infra* Section II.E.

38. Farinacci-Fernós, *supra* note 28 at 215.

39. *See id.* at 219.

40. This was true of the 1970 Illinois Constitution. *See* Hilliard, *supra*

issue relates to the period between the calling of the convention and the election of delegates. On the one hand, a short period can avoid the problems of the influences of excessive spending on election campaigns. On the other hand, a short period can hinder the public's ability to identify which delegates best represent their policy views. The social composition of the drafting chamber will be a key factor in determining the body's popular character.

Third, the drafting process should be as open, transparent, and participatory as possible. While there should be space, of course, for informal bargaining and exchanges, the main deliberations of the drafting body should be public and accessible. This includes adopting mechanisms that allow for direct involvement by citizens who wish to participate. The use of citizen petitions, as well as mechanisms that allow for gaging popular opinion, can be very useful.

Fourth, the ratification of the constitution should be preceded by significant public debate, followed by a referendum where the People have the final say. This will strengthen its democratic credentials, particularly if the drafting process was able to accurately represent majoritarian preferences.

C. *Substantive Content: Progressive, Expansive, and Transformative*

Socially oriented historical circumstances and democratic creation processes, of course, do not always guarantee progressive substantive content or the identification of an adequate method of interpretation that facilitates their practical enforcement. But it is a crucial starting point and, as a historical and conceptual matter, these characteristics do tend to have a cognizable impact over content and method. The key initial variable will be the

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note 6, at 310 & n.341.

popular and participatory nature of the creation process and the historical circumstances that gave it life.[41]

As we saw from the previous section, historical circumstances can also have a direct impact on the issues addressed and positions adopted in state constitution-making processes. U.S. history is indicative of this phenomenon, as different historical moments have produced different priorities,[42] which are then reflected in individual state constitutions.

Workers' rights have been at the forefront of progressive state constitutionalism for decades.[43] At the head of these rights are constitutional provisions dealing with the minimum wage, the eight-hour workday and five-day workweek, unionization, collective bargaining, workers' compensation, and safety in the workplace.[44] As we saw previously, the struggle to obtain constitutional rank for these rights had several complementary goals, including the neutralization of hostile courts and indifferent legislatures, as well as serving as rallying and organizing points for the

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41. Other important characteristics are its democratic, public, and socially transcendental nature. For a more detailed analysis of each one of these features, see Farinacci-Fernós, *supra* note 28, at 201–05; Jorge M. Farinacci-Fernós, *Constitutional Law—Original Explication: A Democratic Model for the Interpretation of State Constitutions*, 42 W. NEW ENG. L. REV. 1, 5–6 (2020) [hereinafter Farinacci-Fernós, *Original Explication*]. For the sake of efficiency and brevity, all of these characteristics can be bundled up in the "popular and participatory" label, or other similar ones used in this Article.

42. For example, Zackin suggests that labor rights were front and center during the Gilded Age and Progressive Era, while education rights and policy had been present in different moments throughout the nineteenth and twentieth centuries. *See* ZACKIN, *supra* note 13, at 3. Finally, during the 1960s and 1970s, environmental issues and protection were high on the agenda. *See id.*

43. *See* Marshfield, *supra* note 4, at 910–11 (Gilded Age and Progressive Era).

44. *See* Versteeg & Zackin, *supra* note 17, at 1683; Marshfield, *supra* note 4, at 911, 915–18.

labor movement as a whole.[45] This allowed labor to show and flex its political and electoral muscle.

As Zackin explains, while the first known constitutionalized labor protection can be found in Louisiana's 1864 constitution,[46] the big push for the adoption of labor rights through state constitutions was experienced from 1890 until 1915, in other words, "during the Gilded Age and Progressive Era."[47] Originally thought of as "industrial rights,"[48] labor protections soon became a staple of progressive state constitutionalism. As we saw, the Gilded Age and the Progressive Era were one of the early grounds zero for the adoption of state constitutions with transformative potential from a progressive perspective. It is no wonder, then, that labor rights gained constitutional status during that period.

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45. *See* ZACKIN, *supra* note 13, at 109.

46. *See id.* at 119. This refers to a provision of that state's constitution regarding a nine-hour workday and minimum wage guarantees for laborers employed in public works. *See id.* As we will see later on when discussing California's constitutional process during the latter half of the twentieth century, racism unfortunately still accompanied the struggle for labor rights. With respect to the Louisiana Convention that produced the 1864 constitution, Zackin observes that "while the constitutional convention was composed largely of delegates who were themselves white laborers, thousands of the state's white laborers formed an informal lobby to ask that their policy preferences be written into the new fundamental law." *Id.* at 119–20.

47. *Id.* at 112. Zackin identifies several state constitutions that, for example, successfully adopted maximum working hours provisions. They were first adopted in states like Montana, North Dakota, Wyoming, Washington, and Idaho. *See id.* at 111 tbl 6.2. They were later joined by Kentucky, Utah, and South Carolina, followed by Virginia, Colorado, Oklahoma, California, Missouri, New Mexico, Arizona, Ohio, Vermont, New York, and Pennsylvania. *See id.* A latecomer was Texas during the 1930s. *See id.*; *id.* at 118. Zackin concludes, "[i]n total, thirty-six labor protections (in nineteen different states' constitutions) contained this kind of direct declaration of state policy." *Id.* at 113. Puerto Rico should also be included in this tally.

48. *See id.* at 117–18.

While the New Deal was also a source for the adoption of constitutional labor rights, as we will see with regard to the 1938 New York Constitutional Convention, "the Progressive Era saw the most coordinated attempts to establish protective legislation related to hours, wages, working conditions, and workmen's compensation, and witnessed attempts to safeguard this type of legislation through constitutions."[49] And because of the general mistrust regarding governmental capture by corporate interests, labor rights advocates did not want to leave their victories in the hands of state legislatures. Instead, they opted to entrench these majoritarian preferences in the constitutional text.[50] According to Zackin:

> The statements of labor leaders, progressive lawyers, and constitutional convention delegates make it clear that these [worker's rights] provisions were intended to create obligations on government to intervene, placing itself between employers and laborers, and providing protection from the often brutal conditions market capitalism had created.[51]

This was also true of labor unions: "At the turn of the nineteenth century, for example, labor unions advocated constitutional change in order to secure protective labor regulations from state governments, which were thought to be captured by large business interests."[52] In the end, "[t]he

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49. *Id.* at 112–13.

50. *See id.* at 113 ("By establishing these protective policies through constitutions, constitutional provisions removed democratic and legislative discretion on these issues, thereby creating a right."). Zackin further explains that "laborers, labor leaders, and other advocates of protective regulation devoted significant resources to the creation of constitutional protections." *Id.* at 119. In that sense, labor protections are the perfect example of majoritarian interests that are not always favored by legislatures. While the working classes represent a significant chunk of the population, their interests have been historically underserved in certain legislative arenas.

51. *Id.* at 108–09.

52. Versteeg & Zackin, *supra* note 17, at 1699.

campaign to create positive labor rights was widespread, long-lived, and often successful."[53]

Social welfare and protections for the poor are another issue that clearly distinguish state constitutions from their federal counterpart.[54] Unlike the federal text, many state constitutions explicitly address the issue of social welfare and establish the state's duty to address the needs of the poor.[55] Another important constitutional protection afforded to the poor are bans on imprisonment for debt.[56] Depending on the language that was ultimately used in each individual constitutional text, these provisions range from merely permissive to potentially enforceable. As Usman explains, "[t]oday, the state constitutions of at least fifteen states expressly address poverty."[57]

Education has also been a constant of state constitutionalism.[58] Depending on the particular historical situation, its specific substantive content has varied. As Zackin explains, "[t]he movement to add these [education-related] provisions to state constitutions emerged in a political context that is difficult to imagine today."[59]

Yet the idea that education is an appropriate constitutional issue is no longer a controversial one, with the first state constitution recognizing the right as far back as

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53. ZACKIN, *supra* note 13, at 144.

54. *See* Rava, *supra* note 27, at 548 (in reference to the attempts to locate and define a "Federal Constitutional right to welfare").

55. *See* Versteeg & Zackin, *supra* note 17, at 1683.

56. *See* Marshfield, *supra* note 4, at 899–902.

57. Usman, *supra* note 10, at 1470. These include Alabama, California, Hawaii, Indiana, Kansas, Louisiana, Missouri, Mississippi, Montana, New Mexico, New York, North Carolina, Oklahoma, West Virginia, Texas, and Wyoming. *Id.* at 1470–71.

58. *See* Versteeg & Zackin, *supra* note 17, at 1688–90.

59. ZACKIN, *supra* note 13, at 68.

1780.[60] As Usman explains, "every state constitution contains a clause expressly addressing education."[61] A more controversial topic has been the role of courts in enforcing these clauses, particularly with regard to funding issues.[62] Curiously, the two biggest pushes to incorporate education into state constitutions came after the Civil War and during the heydays of the Populist movement between 1886 and 1895.[63]

Finally, we should note that environmental protections have also been incorporated in many state constitutions.[64] According to Zackin, the most visible push for the inclusion of these protections in state constitutions was during the

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60. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 928 (2011) (in reference to Massachusetts).

61. Usman, *supra* note 10, at 1465. As many as five of these were adopting during the Revolutionary War. *Id.* at 1466.

62. *See, e.g.*, Soohoo & Goldberg, *supra* note 30, at 1001; John Robb, Alan Rupe & Jessica Skladzien, *The Current State of School Finance in Kansas: The Kansas Legislature's Occasional Negative Approach to its Positive Constitutional Duty*, 27 KAN. J.L. & PUB. POL'Y 329 (2018).

63. *See* ZACKIN, *supra* note 13, at 71 tbl.5.1. Among the states Zackin mentions as part of this latter push are Montana, North Dakota, Wyoming, South Dakota, Washington, Idaho, Kentucky, New York, and Vermont. *Id.*

64. *See* Usman, *supra* note 10, at 1474 (listing Kansas, Nevada, New Hampshire, North Dakota, Ohio, Tennessee, and Wisconsin); Sylvia Ewald, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 COLUM. J. ENV'T L. 413, 414 (2011); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENV'T L. REV. 333 (1993). There are other social rights and substantive policy issues that have been incorporated into state constitutions, such as the right to healthcare. *See* Usman, *supra* note 10, at 1473; Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 398 (2016) ("Another new right emerging in state constitutions involves health care.").

1960s and 1970s.[65]

An important clarification is warranted here. Many scholars in the United States continue to insist that substantive rights, particularly of a socioeconomic nature, are inherently positive and vertical.[66] In other words, that they are always directed at state action. This approach is incomplete and fails to adequately grasp the breadth and potential of progressive state constitutional provisions.[67]

First of all, not all socioeconomic rights are positive. Positive rights "compel action," while negative rights prohibit it.[68] In other words, the former is a sword while the latter acts like a shield. The constitutional right of workers to engage in a strike is not a positive right. It is clearly a negative one.[69]

Second, not all socioeconomic rights are vertical. Vertical rights are opposable to the state, while horizontal rights are opposable to private parties and entities.[70] For example, the right to engage in collective bargaining can be exercised against a private employer, as well as the state.

The same thing can be said about civil and political

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65. ZACKIN, *supra* note 13, at 3.

66. *See, e.g.*, Marshfield, *supra* note 4, at 918–22 (describing various positive economic rights that were debated at state constitutional conventions); Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868–76 (2008); Hershkoff & Loffredo, *supra* note 60, at 927–30; Usman, *supra* note 10.

67. For a more in-depth analysis of the differences between types of rights, including positive and negative, as well as horizontal and vertical, see Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMPAR. L. REV. 31 (2018); Versteeg & Zackin, *supra* note 17, at 1681–82.

68. *See* Farinacci-Fernós, *supra* note 67, at 42–43.

69. Soohoo and Goldberg characterize health and reproductive rights as negative rights. *See* Soohoo & Goldberg, *supra* note 30, at 1057.

70. *See* Farinacci-Fernós, *supra* note 67, at 46–48.

rights. They are not all negative or horizontal. For example, the right to access public information is positive, and anti-discrimination provisions can be directed at private action.

Moreover, not all progressive content found in state constitutions is articulated as rights, whether in their negative or positive manifestations. They can also come in the form of direct policy instructions or more flexible policy directives that authorize and encourage particular legislative actions.[71] While the latter allows for greater legislative discretion, the former does not. These provisions are generally not articulated in rights language.

Both types of provisions are adopted in order to avoid judicial invalidation of popular measures in the future as being contrary to the constitution. This is the substantive consequence of the historical goal of neutralizing elite-controlled courts that attempt to strike down progressive legislation, particularly on economic matters that have redistributive tendencies.

The first type of provision—direct policy instructions—has the effect of "forcing [state] governments to enact reforms that the political and economic environment might render particularly challenging to achieve" in the ordinary legislative process where the economic power of elites can defeat the numerical advantage of popular movements.[72] The second type—flexible policy directives that authorize and encourage particular legislation—tend to "embody popular commitments to an active, interventionist, and

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71. The wording of a particular provision directly impacts the level of discretion left to the legislature. Sometimes, there is a constitutional requirement to act but no instructions as to how. Other times, the constitution is quite explicit as to the what and the how. But even in the first approach, legislatures lose one fundamental discretion: the option of not acting in the first place. *See* Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977) ("What [the Legislature] may not do is to shirk its responsibility . . . .") (quoting 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2126 (1938)).

72. Versteeg & Zackin, *supra* note 17, at 1699.

protective state."[73] In other words, progressive constitutionalism is not exclusively about rights against government or third parties—whether negative or positive—but also about empowering a democratized state to enact transformative legislation that complements constitutional policy.

In addition to the substantive issues, "[p]rogressives pursued various *structural* reforms."[74] In other words, mindful of the fact that constitutional politics could not be exercised permanently by popular movements, and that state legislatures and courts were still susceptible to corporate or elite capture, progressives also opted for the adoption of *participatory mechanisms meant to democratize the ordinary political process*. This was particularly true during the Progressive Era. It is the structural and procedural byproduct of the view that state legislatures and officials are susceptible to elite and corporate capture, and thus cannot be relied upon with regard to important policy matters where the actions of these institutions may not always reflect popular preferences.

These measures include the adoption of democratic mechanisms such as automatic consultation for the periodic review of state constitutions, the need for popular referenda to adopt constitutional amendments, the recall of elected officials, and the initiative process, both for statutory enactments and constitutional modifications.[75]

Finally, we should address state constitutional protections for civil and political rights that, unlike their substantive brethren mentioned above, are present in the U.S. Constitution as well. Examples of these rights are privacy and personal autonomy,[76] as well as constitutional

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73. ZACKIN, *supra* note 13, at 48.

74. Marshfield, *supra* note 4, at 910 (emphasis added).

75. *See* Versteeg & Zackin, *supra* note 17, at 1669–79.

76. *See* John Christopher Anderson, *The Mysterious Lockstep Doctrine*

protections for freedom of expression.[77]

The distinction between state constitutions and the U.S. Constitution in this area comes in two forms: (1) the contrasting interpretations given by state and federal courts to *identical* provisions found in both texts,[78] and (2) the existence of *similar* state provisions that, nonetheless, have their own independent normative content.[79] This separation is mostly the result of deliberate historical, structural, and textual divergences between state and federal experiences as to similar matters.

Many of these state provisions were *intentionally* designed to have different outcomes than their federal counterparts, particularly after the latter had been interpreted narrowly or regressively by federal courts.[80]

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and the Future of Judicial Federalism in Illinois, 44 LOY. U. CHI. L.J. 965, 990 (2013) (explaining that Illinois state constitutional protections of privacy "exceeded those first recognized by the United States Supreme Court"); *see also* TARR, *supra* note 9, at 13 (stating that, as of 1998 at least, eleven state constitutions included provisions that expressly protected a right to privacy).

77. *See* Anderson, *supra* note 76, at 1009–11; Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 902 (2011).

78. *See* Nathan Yanchek, Comment, *Independent Interpretation of the Wyoming Constitution's Declaration of Rights: A More Open and Traditional Approach to Asserting Rights*, 20 WYO. L. REV. 395, 407–08 (2020) (referencing parallel provisions regarding criminal procedure guarantees as an example of this phenomenon).

79. *See* Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 174 (2018) ("In addition to more generous judicial conceptions of parallel rights provisions, state constitutions also explicitly furnish grounds for recognition of rights not afforded by the federal Constitution.").

80. The first manifestation of this phenomenon was the object of the now famous article by Justice William Brennan regarding the interpretation of state constitutional provisions that mirrored the federal text. *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The second instance stands for something somewhat different: intentional divergences adopted by state constitutional framers with the explicit intent of being

Textual differences and historical sources will be key in identifying and respecting these important divergences.

In general, the most likely outcome of these differences will be that state constitutional provisions will tend to produce more progressive and rights-protecting results.[81] This may explain why, even in the presence of a considerable body of federal case law on the issue of discrimination, eleven of the fifteen explicit state equal protection clauses were actually added after 1960.[82] As Marshfield explains, "it is clear that these provisions were intended to signal contemporary popular preferences regarding equality and anti-discrimination."[83] The remaining hurdle is whether there are willing courts and interpretive approaches that account for these important historical, structural, conceptual, and textual features.

D. *Interpretive Method: Accounting for Process and Content*

The link between process on the one hand, and content and method on the other, is not automatic. This means we must also analyze a state constitution's substantive content—and its effect over method—in order to make sure that all the adequate ingredients for progressive transformation are present. In that sense, the presence of a popular and participatory creation process is a necessary, but insufficient, condition for the development of progressive state constitutionalism.

As discussed previously, highly popular and

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free from the approach taken by the U.S. Constitution and the federal courts.

81. *See* Garry, *supra* note 9, at 7 ("[S]tate constitutions often provide broader protections for individual rights than does the more process-oriented U.S. Constitution."). In those instances where state constitutions or state courts fail to offer adequate protection for vulnerable minorities, the Federal Constitution can function as a failsafe.

82. Marshfield, *supra* note 4, at 922.

83. *Id.* at 923.

participatory processes of constitutional creation tend, as a historical matter, to produce constitutions that contain progressive substantive provisions meant to achieve social transformation. While there is no inherent link between the two, it should not be controversial to suggest that elite-driven constitutional processes are more likely to produce constitutions that protect and entrench the interests of those elites, while popular-driven constitution-making processes are more likely to produce constitutions that protect the interests of working people and other numerically significant, but politically anemic, social forces.

With regard to interpretive method and enforcement, as a normative matter, democratic and popular creation processes require approaches that recognize the central role of the drafting body with regard to constitutional meaning and enforcement. This means that process influences substance historically and justifies method normatively. Depending on the process, and subsequently on the substance adopted and the method used to enforce it, different outcomes are possible. Some facilitate social justice, while others hinder it.

The nature of the provisions found in progressive state constitutions also requires a reevaluation of how courts should approach and enforce them. This includes considering whether it is an individual right or policy instruction, a positive entitlement or negative protection, and so on. The contrast between more progressive state constitutions and the U.S. Constitution is very illustrative as to this issue.

The creation process of the Federal Constitution, when analyzed through modern democratic standards and after considering the relevant historical circumstances, explains both the bareness of its content and the arguable illegitimacy of enforcing it through intent-based methods of interpretation or other similar mechanisms that privilege adoption history. Its secret deliberations, elite nature, democratic shortcomings, and empirical deficiencies with regard to the existence of reliable sources of its inner

workings make for a considerably weak case in favor of this type of interpretive approach. This is quite different from the type of state constitutionalism analyzed in this Article.

The federal experience also shows the problems with attempting to enforce progressive state constitutions using the same approach deployed for the Federal Constitution, particularly with regard to more substantive provisions that address socioeconomic issues. For example, federal-made doctrines such as justiciability in general, and political questions in particular, can be found to be incompatible with the designs of state constitutional drafters and can lead to unjustified underenforcement.

The choice of an interpretive method and enforcement mechanisms depends on many factors.[84]

First, the level of legitimacy and authority that a particular constitution is able to acquire. Both refer to the public's willingness to accept the constitution as legally binding and deserving of obedience. The constitutional creation process is a key factor for how much legitimacy and authority an individual constitution can obtain, particularly during its early years. The more democratic, popular, and participatory the process was, the more likely it is to obtain high levels of legitimacy and authority.

Second, the level of connection and fidelity the constitution is able to garner from the public. Both refer to the community's continued allegiance and general agreement with the basic content of the constitutional project as a whole. While it does not require agreement with each and every aspect of the text, for a constitution to survive it needs continued popular acceptance. The only way that the dead can truly govern the living is through the latter's, at least tacit, acceptance.

This means that the choices regarding an interpretive

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84. *See generally* Farinacci-Fernós, *Original Explication*, *supra* note 41.

method are in constant flux and are also context dependent. This explains why, for example, it would be normatively justified to consider the class characteristics of California's 1880 constitution and its subsequent amendments, while discarding the unfortunate nativist sentiment that accompanied them during the creation process.[85]

As it relates to progressive constitutions that were the results of highly democratic creation processes and whose substantive content still reflects the policy preferences of the majority of the population, intent-based interpretive methods are normatively justified, even compelling. This includes taking into consideration the historical circumstances that generated the constitutional project. It also entails treating the adoption history of the constitution as possibly outcome determinative in many cases.

When this type of interpretive method is warranted, intent and history take center stage. This requires adequately identifying the corresponding empirical sources and historical factors that will be relevant for this endeavor.

As to the substantive-oriented provisions of the constitutions, this entails more assertive involvement on the part of courts as they enforce them, particularly with regard to important social and economic policy issues that were entrenched in the constitutional text.[86] Here the contrast between progressive state constitutions and the federal text is at its greatest, which means that state courts should resist the temptation of looking to federal courts for guidance in terms of enforcement.

State courts should keep in mind that, when they vigorously enforce their respective constitutions, even if it means striking down a statute adopted by the state

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85. *See infra* note 117 and accompanying text.

86. *See* Jorge M. Farinacci-Fernós, *Constitutionally Required Judicial Activism: Re-Examining the Role of Courts in Modern Constitutional Adjudication*, 28 KAN. J.L. & PUB. POL'Y 36 (2018).

legislature, *they are acting in a wholly majoritarian fashion*.[87] While courts do engage in necessary counter-majoritarian review when they strike down ordinary legislation that violates the rights of minorities or the structural limits placed on majority rule, they also engage in *majoritarian* review when they impede an elected legislator from thwarting the will of the constitutional legislator. Courts should not shy away from the role constitutional drafters imposed on them when incorporating substantive provisions in the constitution. In fact, when a court refuses to adequately enforce the constitution, it is acting in an illegitimate manner by undermining and ignoring the will of the People as expressed in the constitution.

E. *Combined Effect*

The combination created by these four elements—history, process, content, and method—makes some state constitutions important allies in the search for social transformation. Again, the contrast with the Federal Constitution is illustrative.

The U.S Constitution was the result of an elite-led process of constitutional creation that suffered from significant democratic deficiencies.[88] It was also hardly popular or participatory. Moreover, the historical circumstances of its creation and the prevailing ideological persuasions of the ruling elite all but exclude the current Federal Constitution as an adequate vehicle for effective social transformation from a progressive perspective.

On the other hand, some state constitutions in the United States are ground zero for this perfect storm of progressive constitutionalism, precisely because of the

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87. *See* Jorge M. Farinacci-Fernós, *Constitutional Courts as Majoritarian Instruments*, 14 VIENNA J. ON INT'L CONST. L. 379 (2020).

88. *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

combination produced by their historical circumstances, creation processes, substantive content, and the use of appropriate interpretive methods in terms of their enforcement. Of course, as Galie explains, "[t]he impact of constitutional change depends on the reaction of the courts, legislative implementation, and executive enforcement. None of these can be taken for granted."[89] As we will see in Part II, state courts have a mixed record in this regard. While there are promising instances where a court embraces the distinct features of their respective state constitution, the general tendency is one of underenforcement and lockstep repletion of federal constitutional doctrine. It is here that constitutional progressives should push hardest.

II. STATE CONSTITUTIONALISM AND ITS TRANSFORMATIVE POTENTIAL: CONCEPTUAL CONSIDERATIONS AND HISTORICAL EXPERIENCES

A. *In General*

We start with an obvious fact: state constitutions are not replicas of the U.S. Constitution.[90] Due to historical and ideological reasons, the Federal Constitution is mostly procedural and framework oriented, while many state constitutions tend to be substantive in nature.[91] This is particularly true of more recent state constitutions,[92] as well

89. GALIE, *supra* note 11, at 30.

90. *See, e.g.*, Rava, *supra* note 27, at 546 ("State constitutions are, of course, different than the Federal Constitution."); Soohoo & Goldberg, *supra* note 30, at 1000 ("State constitutions are very different from the federal Constitution."); TARR, *supra* note 9, at 11–13.

91. *See* Hershkoff & Loffredo, *supra* note 60, at 924. This includes the inclusion of "highly self-conscious policy goals." Usman, *supra* note 10, at 1461 (quoting Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 18 (1993)).

92. *See* Usman, *supra* note 10, at 1461 ("Like the constitutions of many countries, especially those adopted after 1945, state constitutions have

as those that were enacted during moments of heightened political and social engagement by popular movements, particularly "progressive social movements of the late nineteenth and early twentieth centuries."[93] The state constitutions that will be analyzed in this Article share these important features.

Another interesting distinguishing factor between federal and state constitutionalism in the United States is the approach to rights protection.[94] While the commonly held view is that, for the most part, the federal text mainly focuses on the protection of the rights of vulnerable minorities, state constitutions also protect the rights of politically powerless majorities. Put another way, the Federal Constitution protects against abuses by the majority, while many state constitutions protect majorities from economically and politically powerful minorities.[95]

The contrasting approaches to rights protection also entails a marked tendency for broader protection of civil and political rights by state constitutions, and for the recognition of socioeconomic rights that simply have no counterparts in

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charted a different course. Unlike their federal counterpart, state constitutions unambiguously confer positive constitutional rights.") (footnote omitted); Versteeg & Zackin, *supra* note 17, at 1666 (noting the similarities between state constitutions and some foreign constitutions); Farinacci-Fernós, *Original Explication*, *supra* note 41, at 20. For a more in-depth analysis about substantive constitutions, see Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 1 (2018).

93. Soohoo & Goldberg, *supra* note 30, at 1000.

94. *See* Rava, *supra* note 27, at 547 ("Many state constitutions also expressly protect specific rights not provided for in the Federal Constitution.").

95. *See* Marshfield, *supra* note 4, at 859. As we saw, the Federal Constitution still has an important role regarding the protection of vulnerable minorities, particularly those that some state constitutions fail to protect. One would hope that a truly progressive constitution would strike an adequate balance between majoritarian policy preferences and the protection of minority rights.

the U.S. Constitution. In other words, even when it comes to the protection of the rights of minorities, state constitutions are currently better equipped for that task than the Federal Constitution.

These differences are particularly true with regard to certain state constitutions that share the characteristics identified in the previous section. Many U.S. states currently have constitutions that were (1) the result of socially sensitive historical circumstances, (2) generated through highly popular and democratic processes of creation,[96] (3) incorporate important substantive policy provisions,[97] and (4) should be interpreted and enforced through intent-based and historically sensitive methods. This sets them apart, not only from the Federal Constitution, but also from other state constitutions.[98]

For many years, state constitutionalism was mostly ignored, or even ridiculed, by scholars and jurists.[99] The recent rolling back of federal constitutional protections has changed this equation.[100] State constitutional protections and provisions now play a vital role in the progressive

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96. *See* Farinacci-Fernós, *Original Explication*, *supra* note 41, at 2 (referencing the important differences between state constitutions and the Federal Constitution "particularly as to the *process of their creation*").

97. *See* Rava, *supra* note 27, at 546 ("[State constitutions] are concerned more with the details of governance and include many provisions that the Framers of the Federal Constitution would certainly have considered legislative by nature, not of constitutional import.") (footnote omitted).

98. *See* Soohoo & Goldberg, *supra* note 30, at 1000 ("State constitutions often reflect different, more local values than the federal Constitution and may have been influenced by different political ideas when they were drafted and amended."); *id.* at 1036 ("State constitutions have different histories, both from the U.S. Constitution and from each other.").

99. *See* Marshfield, *supra* note 4, at 857; TARR, *supra* note 9, at 3 ("[T]he disdain for state constitutions is unfortunate . . . .").

100. *See* Marshfield, *supra* note 4, at 862–63 (expressing concern about this possibility).

development of constitutionalism in the United States.[101] Fortunately, "[o]ver the last several decades, the field of state constitutional law has become both more prominent and influential."[102] As a result, "[s]tate constitutions are becoming more and more relevant both legally and politically."[103]

One significant challenge will be rolling back decades of state constitutional underenforcement due, in part, to the unfortunate practice of state courts to mirror their federal counterparts.[104] But the potential has always been there,[105] even in moments when federal constitutional rights seemed to be on the rise.[106]

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101. *See* Rava, *supra* note 27, at 547; TARR, *supra* note 9, at 4. Many scholars have long acknowledged how state constitutions offer greater rights protection, particularly with regard to socioeconomic or positive rights. *See* Usman, *supra* note 10, at 1459–61.

102. Garry, *supra* note 9, at 4; *see also* Soohoo & Goldberg, *supra* note 30, at 1036 (in reference to the renewed attention now given to state constitutional provisions "to more fully vindicate individual rights").

103. Williams, *supra* note 77, at 901.

104. *See* Hershkoff & Loffredo, *supra* note 60, at 925; Soohoo & Goldberg, *supra* note 30, at 998 ("[S]tate socio-economic rights provisions remain dramatically under-enforced."). According to Garry, there has been "more judicial attention" to state constitutions in recent years. Garry, *supra* note 9, at 4.

105. As early as 1776, state constitutions were instrumental in the recognition of individual rights. As Marshfield explains in the context of Virginia's 1776 constitution, it "was the first state constitution to separately enumerate rights." Marshfield, *supra* note 4, at 882. This was due to a shared belief that "state bills of rights emphasize that popular involvement in government is the best protector of liberty and the best antidote to wayward government officials." *Id.* at 884. Moreover, Hershkoff and Loffredo note that, while "[s]ome of the [substantive socioeconomic] provisions entered state constitutions in the twentieth century with the rise of the modern administrative welfare state . . . *many of them trace back to the state's entrance into the Union or shortly after*." Hershkoff & Loffredo, *supra* note 60, at 928 (emphasis added).

106. *See* ZACKIN, *supra* note 13, at 147 ("Even in the period of the most extensive expansion of federal rights and responsibilities in America's

The proposed approach discussed in this Article is somewhat different from the call made by Justice Brennan several decades ago regarding state constitutions and their potential use for the recognition and protection of individual rights.[107] While acknowledging the important differences between state constitutions and their federal counterpart, Justice Brennan's approach seemed to focus on using state constitutions and state supreme courts as stopgaps for the failures of the U.S. Supreme Court when it came to rights protection.[108]

As a result, state constitutionalism seemed limited by what *could* have been accomplished at the federal level, instead of focusing on the independent potential of state constitutions.[109] This is particularly true with regard to substantive rights and provisions that simply don't have a federal counterpart. State constitutions are not just a safety net for when the U.S. Supreme Court 'gets it wrong'.[110] Their history, creation processes, and substantive content require a wholly different conceptual approach, regardless of who is able to muster five votes in the Supreme Court, even when on issues addressed by both constitutions.

I now turn to the case studies. Each of the four features identified in the previous paragraph will be analyzed through at least four distinct experiences. First, the California Constitution of 1880. Because of geographical, historical, and ideological similarities, the experiences of

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history, we still see movements to add positive rights to state constitutions.").

107. *See* Brennan, *supra* note 80; TARR, *supra* note 9, at 161.

108. *See* Brennan, *supra* note 80, at 491, 502–03; Marshfield, *supra* note 4, at 873, 932.

109. Of course, there is a basic relationship between constitutional protections that are incorporated in a state constitution as well as the U.S. Constitution. In these instances, the federal provisions constitute the normative minimum that can be recognized. *See* Rava, *supra* note 27, at 547.

110. *See* Soohoo & Goldberg, *supra* note 30, at 1034.

other western states, including South Dakota and Wyoming, will be addressed jointly with California. Second, the 1938 New York Constitutional Convention which successfully proposed several amendments to that state's constitution. Third, the Puerto Rico Constitution of 1952. Although a U.S. Territory—and thus not a state—the history, structure, and content of Puerto Rico's constitution is very similar to those of states in general, and the states identified in this Article in particular. We should not forget that many of the first—or even current—state constitutions date back to their transition from territories to admitted states. The final case study is the Illinois Constitution of 1970.

As previewed, this Article does not claim that these state constitutions are the optimal manifestation of the features identified in Part I. Yet, they incorporate them, at least more comprehensively than does their federal counterpart. More importantly, I also do not suggest that each one of the features identified in Part I work as a categorical checklist. On the contrary, these characteristics and their different possible combinations function as a *spectrum* that allows for great internal diversity.

One final note: throughout our analysis, there will be references to other states' experiences. Some, like Montana's 1972 constitution, share similar traits with Illinois and Puerto Rico.[111] Other states are mentioned due to their approach to substantive issues, such as the incorporation of labor rights, the right to education, environmental protections, and social welfare in their respective state constitutional texts.

B. *Historical Circumstances*

1. California (1880) and Other Western States

Any analysis of the 1880 California Constitution, and

111. *See* Farinacci-Fernós, *supra* note 7; Usman, *supra* note 10, at 1475–76.

those of other western states written during the same period, must include the visible role of the Populist movement, in the context of "a populist revolt in response to the power of the railroads" that eventually found its way into the 1878 Constitutional Convention.[112] In other words, the original California Constitution was enacted during a period of significant political engagement by popular and working-class movements against the accumulated power of corporate entities.

In the particular case of the California constitution-making process, any serious approach must account for the contributions of the Workingmen's Party of California (WPC),[113] itself an offshoot of the First International.[114] It was the time of the Gilded Age and the start of the Progressive Era, where "there was growing popular concern about workers' rights as well as elite capture of state government."[115] As the California Supreme Court has acknowledged, "[t]he general mood was one of

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112. Dennis Hernandez, *Constitutional Governance and Judicial Power: The History of the California Supreme Court*, 40 L.A. LAW., June 2017, at 38, 38 (book review). This coincides with the sort of substantive constitutionalism that characterized nineteenth century constitution making. *See* TARR, *supra* note 9, at 94 ("In no period is the divergence between the state and federal constitutional experiences clearer than in the nineteenth century.").

113. *See* Brett A. Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause*, 41 PEPP. L. REV. 587, 596 n.60 (2014) (stating that the WPC was "a major political force in the [California] convention"); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use*,*"* 32 SW. U. L. REV. 569, 632 (2003) (explaining that "the party was a major presence at the convention").

114. *See* Sandefur, *supra* note 113, at 632, n.351 ("The Workingmen's Party was largely composed of remnants of the International Workingmen's Association, also known as the 'First International,' which Karl Marx founded in London in 1864.").

115. Marshfield, *supra* note 4, at 911; *see also* TARR, *supra* note 9, at 99, 115.

disillusionment and anger and the state was swept by radical political movements. It was thus in an atmosphere of economic and political crisis that the delegates to the Constitutional Convention set to work in 1878."[116]

Unfortunately, this radical movement was also characterized by very intense anti-immigrant sentiment, where "[p]rogressives sought to restore government to popular control and address economic inequality for the white working class."[117] Sadly, the aforementioned Populist revolt was based on an "anti-immigrant sentiment against the Chinese [that] led to the formation of the Workingmen's Party . . . [which] dominated the state constitutional convention in 1878 that adopted the California Constitution still in effect today."[118]

Notably, though, it was also an era where women's suffrage and the struggle against sex discrimination in the workplace were top of the WPC's radical agenda.[119] As we will see when addressing judicial interpretation and enforcement of state constitutions, there are principled mechanisms that can be used to separate those substantive issues that should be thoroughly enforced by courts, while shedding off those—like nativism—that no longer command sufficient authority or fidelity to require obedience. The Federal Constitution also has a role to play in terms of

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116. Westbrook v. Mihaly, 471 P.2d 487, 493 (Cal. 1970).

117. Marshfield, *supra* note 4, at 910. This seems to be anathema to the tenets of solidarity preached by the First International. We should remember that nativist sentiment was rampant in the United States during this historical stage. This may explain why the WPC has been characterized as radical socialist, anti-capitalist, and anti-immigrant, specifically, anti-Chinese. *See* Babcock, *supra* note 26, at 851, 858, 862. Timothy Sandefur characterizes the WPC as a "national socialist political party" that had an "anti-corporation, Populist platform." Sandefur, *supra* note 113, at 632.

118. Hernandez, *supra* note 112, at 38. Hernandez adds "with about 480 amendments along the way." *Id.*

119. *See* Babcock, *supra* note 26, at 864, 878, 891.

addressing some of these deficiencies.

In any event, the presence of the WPC at the California Convention had tangible progressive effects, as the Convention "immediately began to debate radical proposals for wealth distribution."[120] In the end, for many people, "[r]eform was not enough; the people wanted rebirth."[121] This is the type of substantive constitutionalism—subject to the adjustments alluded to in the previous paragraph regarding the wholly undesirable byproducts of historical circumstances, like nativism—that is meant to result in transformative change that cannot, and should not, be ignored by state courts.

Elsewhere in the American West, state constitutions were also being framed under similar circumstances. For example, as Garry explains, "[t]he history of the South Dakota Constitution is one of prolonged political struggle."[122] At a time where government and the law were dominated by "railroad and corporate conglomerates,"[123] the state constitution became a favorable battle ground for popular forces. While the Workingmen's Party was the leading radical force in the California constitutional process, it was the Populist movement that stood out with regard to other western states at the time.

Although the Populist Party itself would not be founded until 1890, the Populist movement has its origins in the 1870s.[124] This eventually "led to the Farmers' Alliance Movement in the 1880s throughout the western and southern states, which then led to the populist movement."[125] As Magliocca explains, "[r]ising from the

120. Sandefur, *supra* note 113, at 632.

121. Babcock, *supra* note 26, at 864.

122. Garry, *supra* note 9, at 5.

123. *Id.*

124. *See id.* at 5–6.

125. *Id.* at 5.

heartland like a prairie fire, this coalition of agrarian interests and disaffected industrial workers went from a group of rabble-rousers to the brink of power in only ten years."[126] This movement was particularly active in South Dakota between 1886 and 1888.[127] Similar to the experience in California regarding corporate interests, Populist sentiment was directed at the railroads and banks that working-class people felt were "exploiting them."[128]

In summary, the California Constitution of 1880 was adopted at a historical juncture where popular movements were attempting to reign in the power of corporate interests. This historical context has several normative implications. First, it informs the content, meaning, and scope of the entire constitution. This cannot be ignored by state courts when interpreting its particular provisions. Instead of reading them in isolation, courts should take into account the historical goals of the California Constitution. Second, it directly influenced the creation process that resulted in the adoption of the constitutional text, which should inform how courts interpret and enforce it.

2. New York (1938*)*

As we will see in greater detail in the next section, New York's state constitution is subject to periodic revision. Most of these revisions have not resulted in significant changes to the text. But there is one revision process that stands out, precisely because of the factors identified earlier in this Article: the 1938 Constitutional Convention, also known as

126. Magliocca, *supra* note 10, at 823–24. The Populist movement set its sight on the development of progressive constitutionalism. *See id.* at 840.

127. *See* Garry, *supra* note 9, at 5–6. In fact, "[i]n 1890, representatives of the Farmers' Alliance and Knights of Labor formed the Populist Party, making South Dakota the nation's first state to possess an active Populist Party." *Id.* at 6.

128. *Id.* at 6; *see also* TARR, *supra* note 9, at 148.

the *People's Convention*.[129]

As the New York Court of Appeals has noted, the amendments introduced during the 1938 process were adopted "in the aftermath of the great depression."[130] This constitutional revision process is the result of historically significant circumstances characterized by economic crisis and popular lack of satisfaction with the political and economic system then in place.

Thus, like California in 1880—and 1976 when several substantive provisions were added by way of constitutional initiative—New York's 1938 constitutional process was characterized by a shared consensus regarding the need to address social ills, including the plight of the working classes. The constitutional provisions that resulted from this process are inherently linked with the energy of the New Deal. They are also connected to the strength and political awareness of the labor movement at the time.

3. Puerto Rico (1952)

After four centuries of Spanish domination, Puerto Rico became a territory of the United States in 1898. For more than 50 years, Puerto Ricans were governed by officials appointed by Washington D.C., instead of being elected by the Puerto Rican people.[131] After it became clear that the

129. Peter J. Galie & Christopher Bopst, *A Global Context: The New York State Constitutional Convention of 1938*, HIST. SOC'Y OF THE N.Y. CTS. (Oct. 18, 2017), https://history.nycourts.gov/a-global-context-the-new-york-state-constitutional-convention-of-1938.

130. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977). In many ways, the Great Depression and the New Deal are the historical sequel to the Gilded Age and the Progressive Era. Similar historical circumstances and focus on similar issues—particularly regarding social welfare and labor rights—confirm the connection between these periods and the constitutional processes they engendered.

131. JORGE M. FARINACCI-FERNÓS, PUERTO RICO'S CONSTITUTIONAL PARADOX: COLONIAL SUBORDINATION, DEMOCRATIC TENSION, AND PROMISE OF PROGRESSIVE TRANSFORMATION 32 (2023).

colonial system set up in 1900 and updated in 1917 did not meet the basic democratic aspirations of the population, Congress authorized the Puerto Rican people to draft their own constitution, with the primary goal of facilitating democratic self-government over local matters.[132] While this did not end the colonial relationship between Puerto Rico and the United States, it did provide some important measures of proto-democratic self-rule.

Puerto Rico's 1952 constitution was written at a time when class politics were strong and social ills were great.[133] The result was the creation of a social consensus that favored state intervention in the economy and the recognition of important labor and other socioeconomic rights. Although the shadow of colonialism would dominate the creation process, the fact remains that between 1951 and 1952, Puerto Ricans engaged in a constitutional exercise meant to strengthen home rule and, more importantly, broaden constitutional protections both for civil and political rights, as well as for social and economic rights.

The 1952 Puerto Rico Constitution remains the only one ever written by the Puerto Rican people for themselves. Regardless of its shortcomings, given its territorial or colonial nature, it still possesses transformative potential. This, at least, was the atmosphere that existed when the drafters first met in 1951.

The Puerto Rican framers were particularly influenced by the human rights discourse that dominated post-World War II thinking. The concept of human dignity, individual liberties, and collective well-being became a driving force during the drafting process. This explains, for example, why there are so many provisions in the 1952 constitution that

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132. *Id.* at 37.

133. For a more in-depth analysis of the 1952 Puerto Rico constitutional project, see Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REVISTA JURÍDICA U.P.R. 203, 220–21 (2016).

mirror international instruments, such as the Universal Declaration of Human Rights.[134]

4. Illinois (1970)

The proposal to call a constitutional convention to replace Illinois' 1870 constitution "was beginning to gain momentum" in the late 1960s.[135] The 1970 constitution was written at a time of state fiscal difficulty and politically engaged popular groups, such as the feminist and environmental movements.[136] Among the most pressing substantive topics of the time were education and environmental preservation.[137]

By the early 1970s, the political power of unions was waning across the United States. This made union leaders in Illinois particularly worried about what sort of constitution would result were a convention to be called in the state.[138] According to Frank Deale, "[t]he AFL-CIO argued that the convention would result in a *regressive* constitution, which would weaken the Illinois Bill of Rights,"[139] due to concerns "that the convention would be controlled by business interests seeking to control revenue provisions."[140] But while the AFL-CIO opposed the calling of the convention, the UAW "and a few smaller unions endorsed [it]."[141]

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134. *See id.* at 249, n.180.

135. ELMER GERTZ & JOSEPH P. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3 (1980).

136. *See id.* at 4, 22–23, 140, 309.

137. *See id.* at 10.

138. Still, labor unions were not wholly devoid of political power in Illinois at the time the Constitutional Convention met. *See id.* at 30–31.

139. Frank E.L. Deale, *The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal*, 43 HOW. L.J. 281, 331 (2000) (emphasis added).

140. *Id.*

141. Hilliard, *supra* note 6, at 308 n.325; GERTZ & PISCIOTTE, *supra*

As stated earlier, "convention delegates were well aware of the historical role and underlying political theory of state constitutions," which included the accumulated experiences of previous state constitutional processes in the United States.[142] This experience differed in terms of process, structure, and content from the Federal Constitution.

C. *Creation Processes*

1. California (1880) and Other Western States

While the WPC "did not originate the call for a new constitution," many of the radical impulses that resulted in the convening of a constitutional convention "supported the referendum vote and the rise of the WPC."[143] The end result was the calling in 1878 for the election of a constitutional convention charged with writing a new constitution, which would then be submitted to voters in a referendum.

The elections for the Constitutional Convention yielded an interesting political and social composition. While the California Constitutional Convention of 1878 "was dominated by lawyers and farmers,"[144] other important social groups were also represented. This included merchants, carpenters, physicians, miners, journalists, plumbers, and clerks.[145] In terms of political affiliation, fifty-one delegates belonged to the Workingmen's Party and seventy-seven were non-partisan, along with eleven

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note 135, at 30–31.

142. Hilliard, *supra* note 6, at 272.

143. Babcock, *supra* note 26, at 863.

144. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1182 (1998).

145. According to Babcock, there were fifty-seven lawyers, thirty-nine farmers, eight merchants, five carpenters, five physicians, four miners, three journalists, two plumbers, and two clerks. Babcock, *supra* note 26, at 875.

Republicans, ten Democrats, and three Independents.[146] Although the WPC dominated the San Francisco area, they were not as successful in the at-large races.[147] Still, they were the main organized force at the Convention.

Unfortunately, the democratic and popular credentials of the California Constitutional Convention are significantly hampered by the notable absence of important social groups. Particularly racial minorities, including Mexicans and Chinese immigrants, as well as women in general.[148] However, as Babcock explains, "the Convention delegates were *more representative than most legislative bodies of the time*."[149]

The Convention that met in 1878 deliberated in "an atmosphere of economic and political crisis" to the point that one Convention delegate from San Francisco—a member of the WPC—emphasized "the social conditions which had led to the calling of the convention" in the first place.[150] This shows the link between historical circumstances and creation process.

In the end, the text, including many of the constitutional reforms sought by the Populist movement and the WPC, was adopted in a referendum. This followed a vigorous ratification debate process before the public.[151] The deliberations of the Convention also produced an official record that is accessible by courts.[152] While not identical by any stretch, the constitutional creation processes in nearby

146. *See id.* at 874–75. While there have been other estimates, determining the exact makeup of the delegates' political affiliations is a secondary matter.

147. *See id.* at 875.

148. *See id.*

149. *Id.* (emphasis added).

150. Westbrook v. Mihaly, 471 P.2d 487, 493 & n.11 (Cal. 1970).

151. *See* Babcock, *supra* note 26, at 901.

152. *See Westbrook*, 471 P.2d at 493 n.11.

western states mirrored some of the same general characteristics, particularly with regard to the influence of the Populist movement.

One very important final issue deserves mention. Since 1880, the California Constitution has been amended *hundreds of times*. In other words, the constitutional creation process *did not end in 1880*; it has been an ongoing project.

One consequence of this rather elevated use of the amendment power has been the loss of conceptual continuity between the *original* constitution and the one that is in existence today. Evidently, there comes a moment where there have been so many changes that one could conclude that the original entity no longer exists. Admittedly, this makes the task of analyzing the impact of the original creation process over the current text considerably more difficult. But there is still an important role for the original creation process, *particularly when there is a historical or substantive link between the original project and the current version of the constitutional text*. Once again, provisions related to workers' rights are illustrative.

In 1911, progressives were able to amend the constitution and introduce the initiative mechanism.[153] While one may wonder whether the initiative process—meant to evade corporate capture of state governmental institutions—has, itself, become the object of frequent capture by powerful economic interests, the truth remains that the initiative mechanism can also be used by the same sort of popular forces that gave birth to the state constitution in the first place. The next example may be illustrative as to this possibility and its relation with the argument made in the previous paragraph.

In 1976, several proposals were put before the people of

153. Debra Bowen, *The California Initiative Process at its Centennial*, 47 CAL. W. L. REV. 253, 253 (2011).

California for inclusion into the state constitution.[154] These proposals were significantly popular and progressive in nature, including issues such as the minimum wage, maximum working hours, and workmen's compensation.[155] These proposals carried by a whopping 68-32 margin.[156]

This use of the amendment power to incorporate these important labor rights offers two important lessons.

First, that there has been substantive continuity between the 1880 constitution and the current text. While the 1878 Convention and the 1976 referendum are distinct and evidently separate historical events, they share sufficient traits to link them for analytical purposes. Furthermore, it confirms an important tendency in state constitutionalism: substantive protection for the rights of the working classes. This tendency should be a relevant factor in any judicial analysis of these provisions.

Second, that the direct democracy measures adopted earlier by the constitution can be used in the future to further protect popular rights. In other words, the same type of democratic mechanisms adopted by progressive forces at the beginning of the twentieth century (1911) allowed for progressive policies to be directly adopted by the people in a later period. This constitutes an important achievement, both in terms of process and substance, by progressives.

The 1878 Convention, the 1976 referendum, and many other amendments processes in between offer an interesting lesson: the adequate mobilization of popular interests through democratic mechanisms can result in the inclusion of progressive substantive content into the constitutional text that should not be ignored by courts.

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154. *See Miscellaneous Constitutional Provisions, California Proposition 14 (1976)*, U.C. L. S.F. SCHOLARSHIP REPOSITORY, https://repository.uclawsf.edu/ca_ballot_props/835/ (last visited May 19, 2023).

155. *Id.*

156. *Id.*

2. New York (1938)

New York's constitutional system is based on periodic consultations so that the people can determine whether they wish to revise their state constitution. This process occurs automatically every twenty years.[157] In 1936, the question was put to voters regarding the calling of a new convention: "With no groundswell of discontent and no single issue to focus interest," the referendum was characterized by a low turnout and the issue was adopted by a margin of under 250,000 votes.[158]

On its face, this does not seem to line up with the historical circumstances identified in Part I. But sometimes the weight of social conditions is so great that it is able to impose itself over constitutional drafters and take on a life of its own.

In the specific context of New York's 1938 Convention, Peter Galie notes that, even though "few expected any significant changes" in terms of the revision of the state constitution, "there were factors that would make it difficult for delegates to ignore social and economic issues as they had in 1894 and 1915."[159] He further explains that "[t]he Great Depression had forced public officials to reevaluate their understanding of the role of government in society, labor was a more potent force than it had been in 1915, and the New Deal was in full swing both in the state and nation."[160]

As to the election of delegates, "[f]or the third consecutive convention, Republicans gained control."[161] The Democrats were divided between anti-New Deal and pro-New Deal factions.[162] It should also be noted that the 1938 Convention

157. N.Y. CONST. art. XIX, § 2.

158. GALIE, *supra* note 11, at 29.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

was "the first convention in New York to seat women."[163] But party affiliation would not be the defining factor of the delegates' deliberations. As Galie explains, "delegates recognized the real problems facing New York and reflected the spirit of the time in responding to them."[164] This meant that social ills and class interests would be a central feature of the Convention's deliberations.[165]

One important factor—which we will see again pop up in the Illinois context—was the "absence of a party position on many of the issues" facing the Convention.[166] Specifically, the "resulting lack of direction allowed interest groups to play a major role at the convention."[167] This included popular forces that would ordinarily be ignored by political elites.

Another important byproduct of this lack of partisan direction was that the activities of the different groups that participated in the Convention were "open, pervasive, and intense."[168] This is consistent with the type of democratic and participatory creation process that is associated with the sort of progressive state constitutionalism described in Part I.

The issues and proposals brought up during the Convention's deliberations heightened public interest in the review process. As a result, "[d]eficiencies of the [then current] Constitution which were forgotten or ignored have been brought into public view."[169] The end result was a democratic process that helped engage the public in the product of the Convention's deliberations:

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163. *Id.*

164. *Id.* at 32.

165. *See* William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 19–20 (1995).

166. GALIE, *supra* note 11, at 31.

167. *Id.*

168. *Id.*

169. *The State Convention*, N.Y. TIMES, Aug. 6, 1938, at 12.

> There is probably no resident of the State, however casually he may have read the news from Albany, who does not know something more, and something more of value to him, about the complex public business of the government community in which he lives.[170]

3. Puerto Rico (1952)

The delegates to the Convention that drafted Puerto Rico's 1952 constitution were elected after a months-long campaign where candidates made statements regarding the sort of constitution that they would write and the rights they would include.[171] Top on the agenda were public education, labor protections, and robust protections for rights in general.[172] This is the stuff of progressive constitutionalism.

The Convention was composed of "thirty-two lawyers, thirteen farmers, nine labor leaders, six teachers, six merchants, five manufacturers, four physicians, and three journalists, among others."[173] Its deliberations were public and accessible. Citizens were encouraged to send proposals directly to the Convention. Many did.[174]

Three political parties participated in the drafting body. The dominant force was the Popular Democratic Party ("PPD"), a then reformist party that appealed to the interests of urban and rural workers.[175] It managed to elect all of its candidates.[176] But the election was designed to ensure the participation of minoritarian parties in the Convention. For example, each party was guaranteed, at least, three at-large delegates.[177] In addition, a single party could only win a

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170. *Id.*

171. FARINACCI-FERNÓS, *supra* note 131, at 49.

172. *Id.*

173. Farinacci-Fernós, *supra* note 133, at 221.

174. *See id.* at 213.

175. FARINACCI-FERNÓS, *supra* note 131, at 50.

176. *Id.* at 52 n.17.

177. *Id.* at 52.

maximum of seven of the nine seats distributed in eight different districts.[178] In other words, at least sixteen delegates would be elected by minority parties.

As a result, the PPD elected a total of seventy delegates.[179] The conservative Republican Statehood Party won fifteen seats, while the leftist Socialist Party obtained seven.[180] Because the PPD did not want the constitution to be seen as a PPD creation, the minority parties were able to have a greater influence over the content of the constitution than their numbers would suggest.[181] In the end, and notwithstanding the opposition of three delegates and the absence of a fourth, all the remaining ninety-one delegates affixed their signature to the proposed text that would be taken to the People.[182] In the referendum that followed, the constitution was approved by almost eighty-two percent of voters.[183]

However, the text still needed to be approved by the U.S. Congress, given Puerto Rico's territorial status. The conservative Congress removed some of the more radical provisions of the constitution, particularly Section 20 of the Bill of Rights which recognized a broad array of human rights.[184] Congress' deletions were then accepted in a second referendum.[185]

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178. *Id.* at 48.

179. *Id.* at 52.

180. *Id.* The then second largest political party, the Puerto Rican Independence Party (PIP) boycotted the Convention, since it believed the process was too mired by colonialism. *See* Farinacci-Fernós, *supra* note 133, at 220–21. As a social-democratic organization, the PIP is hardly an enemy of the 1952 constitution's more progressive-minded provisions.

181. *See* FARINACCI-FERNÓS, *supra* note 131, at 48–49.

182. *Id.* at 54.

183. *Id.*

184. *See id.* at 118–19.

185. *See id.* at 119.

Puerto Rico's constitutional creation process is mired by contradictions. On the one hand, it was a limited exercise, given the inherent limits of Puerto Rico's colonial condition. On the other hand, it was a significant democratic exercise by the Puerto Rican people that managed to incorporate many of the widely held policy preferences of the majority, particularly its popular classes.

4. Illinois (1970)

Like New York, Illinois has automatic consultations every twenty years regarding the possibility of calling a new constitutional convention.[186] The state has had a preexisting culture of constitutional renewal, which explains the fact that Illinois adopted constitutions in 1818, 1848, and 1870.[187] By 1970, calls for the convening of a new constitutional convention had been around since the turn of the twentieth century.[188]

The constitutional creation process that resulted in the 1970 constitution started with a proposal made by a constitutional revision committee which recommended to the electorate the convening of a constitutional convention.[189] Sixty percent of voters accepted the proposal.[190] As a result, 116 delegates were elected in a non-partisan election held in 1969.[191]

The Convention worked through its committees and individual delegates presented proposals sent in directly by

186. *See* Hilliard, *supra* note 6, at 270.

187. *See id.* at 293.

188. *See id.* at 304.

189. *See* Deale, *supra* note 139, at 331.

190. *Id.*; GERTZ & PISCIOTTE, *supra* note 135, at 9.

191. Hilliard, *supra* note 6, at 310. Two delegates were selected in each one of the state's fifty-eight senatorial districts. *See* Deale, *supra* note 139, at 331; GERTZ & PISCIOTTE, *supra* note 135, at 10.

ordinary citizens.[192] Some 582 proposals were presented to the Convention.[193] The committees "publicly debated these delegate proposals" through regional meetings in seventeen cities.[194] According to Hilliard, "[a] total of seven thousand citizens attended these regional hearings, at which over one thousand witnesses testified."[195] This was done "to keep the convention before the public as an open deliberative body, truly considering the issues as they were presented, not acting on decisions already made in back room party caucuses."[196] These deliberations were formally recorded.[197]

This is consistent with the sort of democratic, public, and participatory creation process that is associated with progressive state constitutionalism: "The built-in safeguards, the public attention focused upon the deliberations, the desire of each delegate to express himself fully and frankly, the general atmosphere that is part of a constitutional convention, all contributed to a result in which virtually every delegate took pride."[198]

As Gertz and Pisciotte observe, the delegates at the Illinois Constitutional Convention "had a strong sense of history."[199] This included a nod to posterity and the instinct to develop a hefty record of their thinking process. As the authors note, the delegates were quite talkative.[200]

Because "[n]o single faction controlled the

192. *See* Deale, *supra* note 139, at 331–32.

193. Hilliard, *supra* note 6, at 311.

194. *Id.*

195. *Id.*

196. *Id.* (quoting JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818–1870 152 (1972)).

197. *See id.* at 307, n.305.

198. GERTZ & PISCIOTTE, *supra* note 135, at 103.

199. *Id.* at 90.

200. *Id.* at 91.

convention",[201] the delegates were able to operate with considerable freedom from partisanship and had as their goal the drafting of a constitution that would be accepted by a broad segment of the public.[202] The social composition of the Convention would also be relevant to its work.[203]

The Convention was not entirely free from the influences of outside groups. Delegates were well aware that they needed to engage with these currents in order to strengthen popular support for the text.[204]

Ratification soon followed with fifty-six percent of the electorate approving the new constitution.[205] The Convention also decided to take before the people four separate provisions for their approval or rejection.[206] While the proposal to lower the voting age to eighteen was defeated, other proposals were approved.[207] In the end, a total of four sequential elections were held as part of the constitutional creation process.[208] As Ann Lousin suggests, "[m]any, perhaps most, of the people who voted to adopt the Constitution in 1970 hoped that it would help solve the political, economic and social problems of that day and of the future."[209] This is consistent with the conceptual foundation of transformative state constitutionalism.

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201. *Id.* at 92.

202. *See id.* at 11.

203. *See id.* at 99–101.

204. *See id.* at 139.

205. Hilliard, *supra* note 6, at 313; GERTZ & PISCIOTTE, *supra* note 135, at 329 (noting more than 1.1 million votes in favor with a little more than 830,000 votes against).

206. *See* Hilliard, *supra* note 6, at 313.

207. *Id.*

208. *See* GERTZ & PISCIOTTE, *supra* note 135, at 22 (in reference to the election to call a convention, the primary and general elections for delegates, and the ratification referendum).

209. Ann Lousin, *The 1970 Illinois Constitution: Has it Made a Difference?*, 8 N. ILL. U. L. REV. 571, 574 (1988).

D. *Substantive Content*

1. California (1880) and Other Western States

The California Constitutional Convention of 1878 resulted in the imposition of "severe restrictions on corporations."[210] This included several provisions designed to curtail their power and allow for legislative regulation of their operations.

As Marshfield observes as to the Progressive Era in general with regard to workers' rights, "[t]he convention debates where these rights were forged are striking because proponents of these reforms were explicit in their use of state constitutional rights to realign government with popular preferences."[211] In other words, workers' rights were the convergence point for progressive substantive content and political democratization. These rights had been the continued target of legislative inaction and judicial invalidation, regardless of their popular support.[212] Their entrenchment in state constitutions is the direct result of the failures of ordinary politics.

The goal of entrenching the right to unionize in a state constitution did not stop with California. It was also included in the 1889 Wyoming Constitution.[213] And social welfare provisions for the poor have also been incorporated into the Alabama, Kansas, and Oklahoma constitutions,[214] as well as in the Wyoming state constitution.[215] While the WPC was not able to succeed with regard to women's suffrage, they were able to achieve the adoption of language banning sex

210. Manheim & Howard, *supra* note 144, at 1182.

211. Marshfield, *supra* note 4, at 911.

212. *See id.*

213. *See id.* at 916 n.403. Florida also incorporated the right into its state constitution in 1885. *Id.*

214. Pascal, *supra* note 66, at 869.

215. *See* Usman, *supra* note 10, at 1472.

discrimination in employment.[216]

As previewed, the American West was very much ground zero for what Zackin describes as the big push regarding the elevation to constitutional status of basic labor protections, such as maximum working hour provisions.[217] Among the state constitutions that adopted these provisions were California, Montana, North Dakota, Idaho, Washington, Wyoming, Arizona, and Utah.[218]

Water usage and rights have been a constant element of state constitutions in the western United States.[219] Once again, Wyoming stands out as an example.[220] Another feature were constitutional provisions requiring "legislatures to establish caps on railroad rates" during the late nineteenth century.[221]

As we saw earlier, entrenching substantive policy on social and economic matters was not the only constitutional goal of radicals or progressives. The democratization of the political process—in order to permanently prevent, or at least bypass, corporate capture of government institutions—was also a goal of progressive reformers. This included the introduction of mechanisms of direct democracy such as initiative, referendum, and recalls.[222]

It is also worth mentioning that an amendment to include the referendum and initiative mechanisms into the South Dakota Constitution was adopted in 1898 "by a

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216. *See* Babcock, *supra* note 26, at 878, 891.

217. *See* ZACKIN, *supra* note 13, at 112–13.

218. *See id.* at 111 tbl.6.2.

219. *See* Versteeg & Zackin, *supra* note 17, at 1683–84; Soohoo & Goldberg, *supra* note 30, at 1039.

220. *See* Usman, *supra* note 10, at 1476.

221. Versteeg & Zackin, *supra* note 17, at 1683–84.

222. *See* Garry, *supra* note 9, at 5 ("Initiative and referendum was one of the hallmark causes of the populism movement in the late nineteenth century"); Williams, *supra* note 77, at 906–07.

significant margin."[223] The Populist movement had included both as "a central part of its platform."[224]

Both goals—substantive entrenchment of policy and the adoption of direct democracy mechanisms—share an important feature: allowing popular majorities to enact their preferences as positive law. This was done (1) directly in the constitutional text by way of substantive provisions on important matters such as labor rights and social welfare, and (2) through the availability of political tools to directly impact public policy in a way that evaded impenetrable corporate control.

As discussed earlier, California's 1880 constitution has been amended hundreds of times, making it difficult to identify a direct link between the original creation process and its current content. However, some of these more recent provisions share many characteristics with the original constitutional project so as to constitute a coherent whole. For example, California's current constitutional text addresses important substantive matters such as water access,[225] labor rights,[226] and education.[227]

Yet, there are other instances where the amendment process has resulted in somewhat regressive language. For example, Section 24 of Article I of the constitution explicitly prohibits state courts from interpreting the rights of criminal defendants broader than what the U.S. Constitution affords them. Ironically enough, the first sentence of this provision reads: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[228]

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223. Garry, *supra* note 9, at 7.

224. *Id.* at 6.

225. CAL. CONST. art. X.

226. *Id.* art. XIV.

227. *Id.* art. IX.

228. *Id.* art. I, § 24.

It should be noted that, in fact, there are instances of provisions in the California Constitution that offer greater rights protection, even with regard to civil and political rights. One important example is the explicit recognition of a right to "privacy" in Article I, Section 1. Not to mention the initiative and recall provisions that have no counterparts in the Federal Constitution.[229]

2. New York (1938)

As we saw earlier, many state constitutional processes were guided by a *lack* of activity by recalcitrant legislatures or *excessive* activity on the part of hostile courts. This helps explain the choices made by the delegates to the Constitutional Convention: "In almost all cases, provisions were written so *as to require legislative implementation*."[230] In other words, the goal was not to completely bypass the legislative process, *but to actively guide it*. With regard to courts, the main objective was to remove all doubts about the constitutional validity of those now-entrenched favored legislative measures.[231]

The labor movement was able to achieve important victories during the 1938 Convention, as demonstrated by a headline from the New York Times in August of that year, which read: "Labor Principles Carried at Albany[:] Third-Reading Order Assures Putting Public Works Rights Into the Constitution."[232] This included significant triumphs such as the eight-hour workday and five-day workweek, as well as collective bargaining rights.[233]

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229. *See id.* art. II.

230. GALIE, *supra* note 11, at 30 (emphasis added).

231. *See id.* at 31.

232. *Labor Principles Carried at Albany*, N.Y. TIMES, Aug. 5, 1938, at 5.

233. *Id.*; *see also* GALIE, *supra* note 11, at 30 ("The most striking features of the revised constitution were the additions of a statement of labor's rights of political and economic action . . . .").

As the New York Court of Appeals has stated, the various labor protections incorporated during the 1938 constitutional process represented "one of the major achievements of organized labor."[234] This established a crucial link between working class participation in the drafting of state constitutions and the social nature of the content that is eventually adopted in the constitutional text itself.

For example, according to Section 17 of Article I: "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed." After making this explicitly ideological statement, the provision established maximum working hours per day and working days per week. It also explicitly granted the right to organize and engage in collective bargaining.

While the 1938 Convention "did not inaugurate a new social democracy,"[235] it did adopt measures than can be described as socially and popular oriented. In that sense, "by committing the state to a new set of social responsibilities involving labor, welfare, housing, and health insurance, the revised constitution was more progressive than the national Constitution or the U.S. Supreme Court."[236]

Another key aspect of the New York Constitution's substantive content refers to social welfare and housing. New York is one of many states that have adopted constitutional provisions requiring the government "to provide for the poor."[237]

While workers' rights and social welfare were at the forefront of the labor movement's agenda, labor also fought

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234. Brukhman v. Giuliani, 727 N.E.2d 116, 119 (N.Y. 2000) (quoting 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2203–04 (1938)).

235. GALIE, *supra* note 11, at 31.

236. *Id.*

237. Pascal, *supra* note 66, at 869; Usman, *supra* note 10, at 1470–71.

for the expansion of civil and political rights that were being denied by state courts. One of the greatest—and historically significant—victories of the labor and progressive movement in this regard was the adoption of a broad and wide-reaching provision that dealt with discrimination. This provision was meant to transcend traditional notions of constitutional protections against discrimination that were limited to only state action.[238] The text that resulted from the 1938 Convention prohibited discrimination on the grounds of race, color, creed or religion with regard to his or her "civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[239]

Another example relates to searches and seizures, and the operation of the exclusionary rule: the representatives of "urban labor and immigrant groups continued their fight and made *Defore* [a state court decision regarding the operation of the exclusionary rule] a special target at New York State's 1938 Constitutional Convention."[240] As Nelson explains, at the behest of the president of the state chapter of the Federation of Labor, a proposed was made to constitutionalize the exclusionary rule. The issue was "hotly debated," but the proposal was eventually defeated by a vote of seventy-two in favor and eighty-nine against.[241]

3. Puerto Rico (1952)

Puerto Rico's constitution of 1952 is full of substantive content. This is the direct result of the political atmosphere that characterized its creation process, the social composition of the Convention that drafted it, and the popular forces that sustained it. This content is articulated

238. *See* GALIE, *supra* note 11, at 30.

239. N.Y. CONST. art. I, § 11 (amended 2001).

240. Nelson, *supra* note 165, at 20 (referencing People v. Defore, 150 N.E. 585 (N.Y. 1926)); *see also* GALIE, *supra* note 11, at 30.

241. Nelson, *supra* note 165, at 20.

in three principal ways: (1) an expansive approach to civil and political rights, (2) the inclusion of justiciable socioeconomic rights, and (3) the adoption of public policy instructions meant to guide legislative action. There are also important ideological statements spread around the text that give context to its individual provisions.

With regard to the latter, we can point to both the Preamble and the ill-fated Section 20 of the Bill of Rights.[242] While the Preamble speaks of a democratic society and the enjoyment of human rights, Section 20 made explicit references to a just distribution of wealth and the importance of collective cooperation.

However, the main ideological force of the 1952 constitution can be found in the first sentence of Section 1 of the Bill of Rights, which states that "human dignity is inviolable." This is not a symbolic statement of constitutional aspiration. The framers were quite explicit that the dignity clause would not only have independent normative force, but that every other provision in the constitution in the general, and the Bill of Rights in particular, would need to be interpreted *through* the dignity clause.

The scope and breadth of the Puerto Rican constitution's protection of civil and political rights clearly exceed those found in the text of the Federal Constitution. For example, while the U.S. Constitution only makes vague statements regarding equal protection and the prohibition against cruel and unusual punishment, the Puerto Rican text, while it

242. As noted earlier, Section 20 was explicitly rejected by Congress and was formally excluded from the final version of the draft. *See supra* text accompanying note 184. However, this is not the end of the story. First, nearly all published versions of the constitution, particularly those that are accessible to the general public, include Section 20 in its entirety. *See* FARINACCI-FERNÓS, *supra* note 131, at 119. For most Puerto Ricans, Section 20 is an integral part of the constitutional text. Second, the Puerto Rico Supreme Court has, from time to time, "revived" Section 20 through judicial interpretation, finding its content in other constitutional provisions. *See id.*

includes this type of language, also has an explicit provision identifying proscribed forms of discrimination and banning the death penalty.[243]

The Puerto Rico Bill of Rights also includes explicit recognition of rights that are, at best, inferred at the federal level. Chief among these is Section 8's express declaration of an enforceable right to privacy.[244] More importantly, the privacy provision applies both to state action and to private parties. It is a far-reaching view of the right of personal autonomy.

Enforceable socioeconomic rights are ubiquitous in the Puerto Rico Constitution of 1952. These include a right to a free primary and secondary public education,[245] and a ban on imprisonment for debt and child labor.[246] It also recognizes important labor and employment rights, such as a reasonable minimum wage, overtime pay for work in excess of eight hours per day, equal pay for equal work, as well as

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243. With regard to the anti-discrimination language found in Section 1 of the Bill Rights, both the drafters and the Puerto Rico Supreme Court have made clear that the list therein included is not a closed one. The list bans discrimination on the basis of race, color, sex, birth, social origin and condition, as well as political ideology and religious beliefs. P.R. CONST. art. II, § 1. The ban on the death penalty is written in absolute terms. *See id.* art. II, § 7. While the death penalty had been abolished by statute prior to the drafting of the 1952 constitution, the framers decided to entrench this policy directly in the constitutional text. There are other instances where the Puerto Rico Constitution offers greater protection than the Federal Constitution on civil and political rights. For example, Section 10 of the Bill of Rights includes an explicit reference to the exclusionary rule for illegal searches and seizures. *See id.* art. II, § 10.

244. *See* P.R. CONST., art II, § 8. It should be noted that the constitutional protection is broader than the concept of "privacy." The Spanish word used by the framers (*intimidad*) refers to a *broader space of personal autonomy that cannot be invaded*. *See* Hiram A. Meléndez-Juarbe, *Privacy in Puerto Rico and the Madman's Plight: Decisions*, 9 GEO. J. GENDER & L. 1, 40–50 (2008).

245. PR CONST. art. II, § 5.

246. *Id.* art II, §§ 11, 15.

the right of private sector workers to form and join unions, engage in collective bargaining, and to go on strike.[247]

As previewed, the main source of socioeconomic rights would have been Section 20 of the Bill of Rights, which recognized a series of human rights. These rights were not meant to be directly enforceable. But once legislation was adopted on any matter mentioned in Section 20, both the executive and judicial branches were constitutionally required to interpret and enforce said legislation *through a constitutional lens*.

The 1952 constitution also includes general policy provisions that possess normative effect. This includes a policy with regard to environmental conservation and the rehabilitation of convicted persons.[248] There is also a provision that limits the amount of land that a corporation may directly or indirectly possess.[249]

Where the 1952 constitution fails to live up to the promise of progressive state constitutionalism is with regard to the lack of inclusion of direct-democracy mechanisms. The Puerto Rican constitutional structure is based on a very positive view of the Legislative Assembly. As a result, the Constitutional Convention soundly rejected proposals that would have allowed for citizen-initiated referenda.[250] Moreover, all amendments to the constitution must first be

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247. *Id.* art II, §§ 16–17. The right to form unions, engage in collective bargaining, and go on strike does not extend to government employees, with the exception of state-owned entities that function as private businesses. *See id.* art. II, § 17. The workers of these entities, even though they are considered public employees because of state ownership, are treated like those in the private sphere. This is a peculiar instance where a constitutional right is mostly available when there is a *lack* of state action.

248. *See id.* art. VI, § 19.

249. *Id.* art. VI, § 14.

250. *See* FARINACCI-FERNÓS, *supra* note 131, at 85.

approved by a supermajority in the legislature.[251] This could be explained by the fact that the dominant party at the Constitutional Convention, which could at the time muster majorities well over sixty percent of the electorate, was not quite willing to cede its power to shape the political agenda.[252]

4. Illinois (1970)

One of the most striking substantive parts of Illinois' 1970 constitution is the Preamble, which "was incorporated through a concerted effort by numerous delegates to the [1970] Illinois Constitutional Convention to include minimum welfare provisions."[253] It is one of the most radical preambles in American constitutional law. Among other things, the Preamble identifies as one of the goals of the constitution to "eliminate poverty and inequality" and "assure legal, social and economic justice . . . ."[254] As Gertz and Pisciotte observe, these "are resounding phrases, reflecting great aims even if they are not operative but simply hortatory, constitutional sermons."[255]

In addition to the Preamble, there was debate on the incorporation of broad economic rights directly into the constitution.[256] As Deale explains, the Convention defeated a proposal made by the Committee on the Bill of Rights that would have established a "basic needs requirement."[257] This

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251. *See id.*

252. *See id.* at 48.

253. Deale, *supra* note 139, at 330–31.

254. ILL. CONST. pmbl.

255. GERTZ & PISCIOTTE, *supra* note 135, at 12–13.

256. *See* Deale, *supra* note 139, at 332–34.

257. *Id.* at 334. This provision shares some similarities with Puerto Rico's ill-fated Section 20. Interestingly enough, one of the objections raised against the proposal during the deliberations of the Illinois Constitutional Convention was that "there were no comparable provisions in any other state constitution." *Id.* If the Illinois delegates

would have considerably expanded the scope of positive socioeconomic rights in the United States. But the defeat of this potentially expansive provision should not be interpreted as constitutional indifference with regard to social rights and policy.[258]

Labor rights are also present in the Illinois Constitution, albeit in a subtler way as compared to other state constitutions. For example, Section 17 of Article I explicitly prohibits discrimination in the workplace and with regard to the sale and rent of property.[259] Moreover, the text explicitly states that "[t]hese rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation."[260]

The language of Section 17 is striking, since it breaks with the notion that substantive rights are always dependent on legislative action. The Constitutional Convention was quite explicit regarding the *ex proprio vigore* nature of this provision.[261] While the text does give the legislature an important role—both with respect to "reasonable exemptions" and "additional remedies"—it allows citizens to bypass a potentially inattentive state legislature. This is a prime example of self-government through the entrenchment of directly enforceable substantive rights.

This was not the first time that labor rights found their way into Illinois' state constitution. For example, the 1870 Constitutional Convention adopted rights for mine

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would have taken a page from their Montana brethren, they could have found Puerto Rico's Section 20, even after the U.S. Congress had stricken it from the official text. *See* Farinacci-Fernós, *supra* note 7, at 202–03.

258. *See, e.g.*, ILL. CONST. art. I, § 14 (prohibiting imprisonment for debt).

259. *See* GERTZ & PISCIOTTE, *supra* note 135, at 13; Lousin, *supra* note 209, at 600.

260. ILL. CONST. art. I § 17.

261. *See* Lousin, *supra* note 209, at 600.

workers.[262] This was done at a time, similar to what we saw with the constitutions of western states at the end of the nineteenth century, when there was growing concern regarding excesses of capitalism, which required affirmative state intervention on behalf of workers.[263]

Another interesting feature of the Illinois Constitution is its approach to environmental policy. The state constitution has a provision "expressly providing that environmental rights are held individually and are *enforceable against governmental and private actors*."[264] This provision, unlike other proposals, did not meet significant opposition during the deliberations of the Constitutional Convention and proved to be quite popular.[265]

With regard to non-socioeconomic issues, the Illinois Constitution adopted protections for privacy, which "exceeded those first recognized by the United States Supreme Court."[266] According to Judge John Christopher Anderson, this approach was "consistent with public opinion."[267] It also explicitly recognized human dignity,[268] although this turned out to be slightly "more

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262. *See* ZACKIN, *supra* note 13, at 1; GERTZ & PISCIOTTE, *supra* note 135, at 4.

263. *See* ZACKIN, *supra* note 13, at 115.

264. Usman, *supra* note 10, at 1475 (emphasis added). Usman makes a connection between this provision and the Montana Constitution. *See id.* at 1476. In turn, both the Montana and Puerto Rico constitutions share a similar approach to environmental policy and rights. *See* Farinacci-Fernós, *supra* note 7, at 197–98.

265. *See* GERTZ & PISCIOTTE, *supra* note 135, at 309.

266. Anderson, *supra* note 76, at 990.

267. *See id.* at 991. Anderson notes that this broader view with regard to privacy could also be extended to issues such as free speech and criminal procedural protections. *See id.* at 1010–13.

268. ILL. CONST. art. I, § 20. Montana and Puerto Rico also have explicit dignity clauses. *See* Farinacci-Fernós, *supra* note 7, at 192.

controversial."[269] Finally, sex was explicitly incorporated into the equal protection provision.[270]

Also present in the Illinois state constitution are direct democracy mechanisms meant to empower the citizenry in case of legislative malpractice. Several provisions of the text allow for citizen-led initiatives and referenda, both at the statutory and constitutional levels.[271]

E. *Interpretive Approaches and Enforcement Mechanisms*

The state supreme courts charged with enforcing the constitutions examined previously have a mixed record with regard to their consideration of the features and characteristics that distinguish them from their federal and state counterparts. As Soohoo and Goldberg suggest, state courts "need to look beyond federal models for enforcing state constitutional rights."[272] Unfortunately, not all do.

This is particularly true when it comes to adequately accounting for historical considerations in their analysis and enforcing constitutions' more substantive provisions, consistently settling for the minimum required by them.[273]

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269. Lousin, *supra* note 209, at 595.

270. *See* GERTZ & PISCIOTTE, *supra* note 135, at 140.

271. *See* ILL. CONST. art. VII, § 11; *id.* art XIV, § 3.

272. Soohoo & Goldberg, *supra* note 30, at 1001. This means that state courts should "develop their own jurisprudence for enforcing state constitutional rights," after acknowledging the "[d]ifferences in constitutional scope, purpose, and historical context." *Id.* at 1002. For his part, Tarr suggests that "the success of the federal Constitution has endowed it with a normative dimension," which could partially explain why state court judges approach their respective state constitutions as they would the U.S. Constitution. TARR, *supra* note 9, at 2. This is so, even though there are obvious textual and historical differences between state constitutions and their federal counterpart, including the availability of reliable sources that would make intent-based interpretation more empirically viable with regard to many state constitutions. *See id.* at 194–96.

273. *See* Pascal, *supra* note 66, at 863–64; Usman, *supra* note 10, at

One constant debate seems to center on whether many of these substantive provisions are justiciable, and thus, enforceable by courts.[274] Another source of debate relates to the interpretive approach that should be made when it comes to state constitutional provisions that are considerably similar to the federal constitutional text. This refers to the dichotomy between the lockstep approach and the independent analysis model.[275]

On the other hand, these state courts have sometimes expressed the importance of looking to the historical record of the creation processes that resulted in the adoption of a particular constitutional provision,[276] albeit quite timidly and seemingly oblivious to their historical dimensions.[277] This is particularly disappointing, since state courts have considerably more operational freedom to act as compared to federal courts.[278] In the end, it is important for courts to remember "that state constitutions will differ both from the national Constitution and from each other, *and also that state courts will take different approaches in interpreting*

1516; TARR, *supra* note 9, at 194.

274. *See* Hershkoff & Loffredo, *supra* note 60, at 924. An important byproduct of this issue is the approach of state courts to the political question doctrine, which seems much more difficult to apply to constitutions that explicitly adopt substantive policy provisions. *See* Soohoo & Goldberg, *supra* note 30, at 999.

275. *See* Yanchek, *supra* note 78, at 396, 402; Lousin, *supra* note 64, at 388, 392–95.

276. *See* Usman, *supra* note 10, at 1481. For a more detailed survey on how state supreme courts have addressed their own versions of "originalism," see generally Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341 (2017).

277. *See* Marshfield, *supra* note 4, at 859 (explaining the need to analyze state rights provisions "in the context of the convention debates where . . . state bills of rights were discussed," in reference to the 105 conventions that have been convened from 1818 to 1984).

278. *See* Pascal, *supra* note 66, at 870.

state documents,"[279] which, hopefully, will result in a comprehensive interpretive endeavor that accounts for the distinguishing features we analyzed in Part I and that breaks free from the federal stranglehold when it comes to interpretive and enforcement questions.[280]

1. California (1880) and Other Western States

The deliberations of the California drafting body were recorded in the 1878-1879 Constitutional Convention transcript.[281] And, in general, the discussions and statements made during those deliberations have not been lost on the California Supreme Court when conducting constitutional analysis.[282]

As a general matter, the California Supreme Court has stayed away from the lockstep approach with regard to the U.S. Supreme Court.[283] This is the result of what the California Supreme Court calls "basic principles of federalism which illuminate our responsibilities in construing our state Constitution,"[284] and it includes acknowledging the important textual and historical differences, even on matters where there is overlap between both constitutions, such as the right to privacy.[285]

But the court still approaches many issues as if it were a

279. Hershkoff & Loffredo, *supra* note 60, at 925 (emphasis added); *see also* Usman, *supra* note 10, at 1477 (describing some of the differences between state and federal constitutional interpretation).

280. *See* Hershkoff & Loffredo, *supra* note 60, at 968.

281. *See* Babcock, *supra* note 26, at 911.

282. *See* Westbrook v. Mihaly, 471 P.2d 487, 493 n.11 (Cal. 1970).

283. *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 781 (Cal. 1981).

284. *Id.* at 783.

285. *See id.* at 784. The court emphasized the significance of the 1972 referendum when "the people of this state specifically added the right of 'privacy' to the other inalienable rights of individuals enumerated in article I, section 1 of the state Constitution." *Id.*

federal court.[286] This includes treating extratextual sources, including historical context, as a secondary interpretive device. For example, the California Supreme Court has stated that "[w]hen interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the *intent of those who enacted the constitutional provision at issue*.'"[287] While this may vary depending on whether the provision was the result of popular initiative or the work of the original drafters, the court has been quite assertive that the best source for the identification of intent *is the text itself*.[288] This would seem to dismiss, at least partially, the importance of historical sources and circumstances as key factors in constitutional analysis, particularly for the discerning of intent.

Specifically, the court has stated that "resort[ing] to extrinsic aids to interpret a constitutional provision is justified only when the Constitution's language is ambiguous."[289] This signals a somewhat ahistorical approach to constitutional analysis, particularly in a state with a rich history regarding its constitutional provisions. However, there have been instances in which the California Supreme Court has, in fact, recognized the importance of history in general, and adoption history in particular, when construing a constitutional provision: "[W]e examine the

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286. *See id.* at 791–97 (applying a classic balancing approach that was quite common during the 1980s in U.S. federal courts).

287. Bighorn-Desert View Water Agency v. Verjil, 138 P.3d 220, 223–24 (Cal. 2006) (emphasis added) (quoting Richmond v. Shasta Cmty. Servs. Dist., 83 P.3d 518, 522 (Cal. 2004)); s*ee also* Powers v. City of Richmond, 893 P.2d 1160, 1162 (Cal. 1995) ("In construing constitutional provisions, the intent of the enacting body is the prominent consideration.").

288. *See Verjil*, 138 P.3d at 223–24.

289. *Powers*, 893 P.2d at 1163; *see also* Cal. Redevelopment Ass'n v. Matosantos, 267 P.3d 580, 603 (Cal. 2011) ("Where the text is ambiguous we must turn to extrinsic sources, such as the context of adoption and the ballot materials presented to the voters.").

historical backdrop against which the provision was drafted and adopted to discern its meaning."[290]

With regard to substance, the California Supreme Court has shown considerable passivity, even when there are textual and historical considerations that support a more assertive stance.[291] For example, in *Golden Gateway Center v. Golden Gateway Tenants Ass'n*,[292] the court held that the state constitutional right to free speech was limited to state action, even though the text, unlike the First Amendment, did not make any reference to that requirement. Moreover, the court acknowledged that "[t]he breadth of this language combined with the framers' arguable understanding of its ramifications *suggest an intent to protect the right to free speech against private intrusions*."[293] Still, the court stated that this was "not dispositive."[294] After noting that "the debates over the California Constitution do not show an intent to extend the reach of its free speech clause to private actors,"[295] the court engaged in familiar free speech analysis. Maybe, instead of looking for a specific reference to the issue at hand, a historical approach, including the skepticism regarding private power that permeated the California Constitutional Convention, would have been more helpful.

Another interesting example is the California Supreme Court's decision in *Sands v. Morongo Unified School District*.[296] There, the court split regarding the meaning of its state free exercise of religion clause. What is particularly

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290. *Cal. Redevelopment Ass'n*, 267 P.3d at 604.

291. The court has sometimes referred to the important combination of text and history. *See* People v. Teresinski, 640 P.2d 753, 761 (Cal. 1982) (finding "nothing in the language or history of the California provision" to suggest rejecting federal jurisprudence).

292. 29 P.3d 797 (Cal. 2001).

293. *Id.* at 803 (emphasis added).

294. *Id.*

295. *Id.* at 804.

296. 809 P.2d 809 (Cal. 1991).

interesting is that both sides of the issue resorted to the adoption history of the California Constitution. The concurring opinion stressed that "in 1879, the delegates to the state constitutional convention of that year amendment Article I, Section 4, to provide that in California the free exercise of religion shall be 'guaranteed,' not simply 'allowed.'"[297] The concurrence went on to quote from a member of the Convention and emphasized that "[t]he strong desire of the framers of the California Constitution for governmental neutrality in matters of religion is also evidenced by the adoption in 1879 of what is now article XVI, section 5, of the California Constitution."[298] For its part, the dissent also dedicated several pages to an analysis of the legislative history of the 1879 Convention, only to come to a very different conclusion.[299]

Surprisingly, the supreme courts of other western states whose constitutions were significantly influenced by the Populist movement and that incorporated important substantive provisions have opted, generally, for the lockstep approach.[300] And like the California Supreme Court, there are instances of resorting to adoption history when the court concludes that the language in the text is unambiguous, even when the general rule calls for using that history only when facing ambiguous language.[301]

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297. *Id.* at 838 (Mosk, J., concurring).

298. *Id.*

299. *See id.* at 856–58 (Panelli, J., dissenting).

300. *See, e.g.*, Saldana v. State, 846 P.2d 604, 611 (Wyo. 1993).

301. *See* Powers v. State, 318 P.3d 300, 303–04 (Wyo. 2014). After stating that "[i]n cases of constitutional interpretation, '[w]e are guided primarily by the intent of the drafters,'" *id.* at 303 (quoting Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2, 133 P.3d 983, 985 (Wyo. 2006)), the court explained that the best evidence of intent is the language in the text itself, *id.* at 304. See also *Cid v. South Dakota Department of Social Services*, 598 N.W.2d 887, 889–91 (S.D. 1999), where the South Dakota Supreme Court held that, since welfare benefits did not exist at the time the state constitution was adopted, then the term "property" used in an

2. New York (1938)

The delegates to the 1938 Convention may have failed in being sufficiently explicit as to the consequences of the content they were proposing. As Galie explains, "[t]he impact of constitutional change depends on the reaction of the courts, legislative implementation, and executive enforcement. *None of these can be taken for granted*."[302] Perhaps due to the historical mistrusts of courts as adequate forums for the vindication of popular rights, the 1938 Convention did not include explicit language regarding judicial interpretation and enforcement of the substantive content they were adopting. But that should not serve as an excuse for courts to ignore the relevant historical circumstances of the constitutional creation process or to be unnecessarily shy when enforcing its more progressive and transformative provisions.

The New York Court of Appeals has sometimes acknowledged the role of the historical circumstances that generated state constitutional provisions have during judicial interpretation and enforcement. For example, in the context of the state constitutional provision as to searches and seizures, which is considerably different than the Fourth Amendment of the U.S. Constitution, one member of the court stated in *In re 381 Search Warrants Directed to Facebook, Inc.*:

> In 1938—after an 'epochal debate' among the delegates to that year's constitutional convention that aroused the interest of newspaper editorial boards, the letter-writing public, the Governor, and a slew of labor organizations and law enforcement officers—the People approved what became article I, § 12.[303]

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explicit anti-discrimination provision was not applicable. Hardly what the Populists had in mind.

302. GALIE, *supra* note 11, at 30 (emphasis added).

303. *In re* 381 Search Warrants Directed to Facebook, Inc., 78 N.E.3d 141, 156 (N.Y. 2017) (Wilson, J., dissenting) (citation omitted). The dissent explicitly stated that the state constitutional provision "did not

In the *Facebook* case, the dissent made explicit reference to the rich historical sources related to the state constitutional provision, particularly with regard to intent and purpose. It seems that the intent of the delegates was outcome determinative: "The delegates who drafted section 12, *whose discussions thereof stretched over more than three weeks of the convention and nearly five hundred pages of the revised record of its proceedings*, agreed . . . ."[304] But sometimes that history is used to support a narrow application of a substantive provision, such as labor protections.[305]

With regard to the broad anti-discrimination language adopted by the 1938 constitutional process, the New York Court of Appeals has considerably narrowed the language's operative scope, opting instead for guidance from the U.S. Supreme Court's decisions on the issue.[306] This represents an obvious disconnect from the history, purpose, intent, and explicit language of the state constitutional provision. It can even be seen as an instance of judicial activism disguised as passivity and restraint.[307]

As we saw, one of the most significant substantive contributions made by the 1938 Convention to New York's constitution was the inclusion of labor rights. In *Hernandez v. State of New York*,[308] the state appellate court had to discern whether a statute that excluded farm laborers from its definition of "employees" was compatible with Article I,

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merely incorporate verbatim" the Fourth Amendment. *Id.* at 156.

304. *Id.* (emphasis added); *cf.* 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 340, 530 (1938).

305. *See* Brukhman v. Giuliani, 727 N.E.2d 116, 119 ("The Record of the 1938 Constitutional Convention of the State of New York is replete with references that limit the breadth of the prevailing wage provision.").

306. *See* GALIE, *supra* note 11, at 70.

307. *See* Farinacci-Fernós, *supra* note 86, at 70.

308. 99. N.Y.S.3d 795 (N.Y. App. Div. 2019).

Section 17 of the state constitution.

In keeping with the approach taken by other state courts, the New York intermediate court emphasized the role of text and its role with regard to the ascertainment of intent. The court explained that the language used in the provision led to the "inescapable conclusion that the choice to use the broad and expansive word 'employees' without qualification or restriction, was a deliberate one that was meant to afford the constitutional right to organize and collectively bargain to any person who fits within the plain and ordinary meaning of the word."[309]

The court also went on to explain when resorting to the legislative history is appropriate, again, in a similar manner as done by other state courts. In this case, that history confirmed the textual reading: "However, were the provision's wording unclear, a review of the relevant historical material would lead us to the same conclusion."[310] Specifically, the court found that "[i]t is evident from the revised record of the Constitutional Convention of 1938 that the drafters of [the provision] were eminently aware of the statutory right to organize and collectively bargain . . . ."[311]

Interestingly, this history not only coincided with the so-called plain meaning of the text, but it also confirmed the provision's substantive content and significant normative force. The court concluded that the right to organize and bargain collectively was a *fundamental right* under the state constitution: "A review of the record of the Constitutional Convention of 1938 confirms that the provision's drafters intended to confer fundamental status upon the right to organize and bargain collectively."[312]

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309. *Id.* at 800 (citation omitted).

310. *Id.* at 801.

311. *Id.*

312. *Id.* at 802. The court took note that "several convention delegates repeatedly described the right as 'fundamental.'" *Id.*

As to social welfare, the New York courts' record is a mixed bag. While they "have most frequently taken up the state's affirmative duty to 'care for the needy,'" they have adopted very deferential standards of review that are very similar to the federal approach to equal protection questions.[313]

In *Tucker v. Toia*, a state statute that imposed additional eligibility requirements on persons under 21 was challenged as being unconstitutional.[314] The New York Court of Appeals was well aware of the constitutional status of welfare rights: "In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."[315] The court also recognized the *historical circumstances* that led to the adoption of that constitutional command.[316]

This led the court to resort to the legislative history of the provision under review: "The legislative history of the Constitutional Convention of 1938 is indicative of a clear intent that State aid to the needy was deemed to be a fundamental part of the social contract."[317] Specifically, the court quoted from the Report of the Committee on Public Welfare, as well as from comments from some of the delegates themselves: "Here are words which set forth a definite policy of government, a concrete social obligation *which no court may ever misread*."[318]

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313. *See* Pascal, *supra* note 66, at 871.

314. Tucker v. Toia, 371 N.E.2d 449, 449–50 (N.Y. 1977).

315. *Id.* at 451.

316. *See id.* ("in the aftermath of the great depression").

317. *Id.*

318. *Id.* (emphasis added) (quoting 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2126 (1938)); *see also* Lee v. Smith, 387 N.Y.S.2d 952, 954–55 (N.Y. Sup. Ct. 1976), *aff'd* 394 N.Y.S.2d 1201 (N.Y. App. Div. 1977), *aff'd* 373 N.E.2d 247 (N.Y. 1977) ("While many decisions have been rendered reviewing the intent and meaning of the quoted provision, an excerpt from the debates at the

This represents a clear convergence of the factors identified in Part I. Here we have a court accounting for a provision's historical circumstances, recognizing the important role of the drafters during a highly democratic creation process, and not shying away from the assertive enforcement of its substantive content. The court held that the state constitutional provision established a *binding mandate* on the legislature, leaving to it only the choice of means to achieve the stated goal.[319] This goes to the heart of the basis for progressive constitutionalism: the People set out the goal, only leaving to their elected representatives the appropriate means to reach them. As the New York Court of Appeals explained in *Tucker*: "What [the Legislature] may not do is to shirk its responsibility . . . ."[320]

3. Puerto Rico (1952)

Since 1952—the same year the current constitution came into effect—the Puerto Rico Supreme Court has, for the most part, adopted a relatively strong intent-based approach to constitutional interpretation.[321] The court's opinions are full of direct reliance on the statements made by the framers during the Constitutional Convention's deliberations, including the official reports of its committees. If a particular legal question is answered by either of these, then the court will normally look no further.[322]

1938 Constitutional Convention best states its essential purposes.").

319. *See Tucker*, 371 N.E.2d at 452.

320. *Id.* (citing 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2126 (1938)).

321. For a more in-depth analysis of the historical practice of the Supreme Court of Puerto Rico as it pertains to constitutional interpretation, see Farinacci-Fernós, *supra* note 133.

322. An interesting example of this phenomenon is the word "birth," with regard to one of the forbidden classifications included in the anti-discrimination provision of Section 1 of the Bill of Rights. Instead of looking to dictionaries, the court took note that, during the Convention's deliberation, there was a consensus regarding the meaning of the term "birth." *See* RAFAEL COX ALOMAR, THE PUERTO RICO CONSTITUTION 63–

But the court has sometimes failed to develop the substantive content of the 1952 constitution to its fullest potential. While it has not shied away from enforcing explicit policy commands that leave little room for doubt on whether a court is required to act, it has mostly adopted a passive role for itself, leaving much of the constitution's substantive potential on the cutting room floor. In that sense, the Puerto Rico Supreme Court has assigned itself a purely negative-legislator role, leaving to the political branches most of the policy questions. The court will only intervene when the political branches act outside the bounds of what the constitution allows.

Still, the Puerto Rican experience offers many interesting lessons with regard to intent-based and historical-sensitive constitutional interpretation, and the need to enforce substantive provisions—including socioeconomic rights. Where the Puerto Rico Supreme Court is lacking has been on the *level* of enforcement, not whether enforcement is warranted. This, at least, is a good starting point that may yet allow for the adequate enforcement of the 1952 constitution's progressive content.

4. Illinois (1970)

The fact that the current Illinois Constitution was adopted relatively recently means that there are reliable records to explore. With regard to the specific language found in the Preamble, there "exists a rich documentation of how this language found its way into the preamble to the foundational law of the state."[323] This should undoubtedly have great relevance at the point of judicial interpretation

64 (2022). Specifically, the framers rejected the more mainstream meaning—that is, the place of a person's birth—and adopted a very particular definition: the civil status of a person's parents. *See id.* This provision was included in the 1952 constitution in order to address what was then considered a legal injustice: the inferior status of children born from unwed parents. *Id.* at 64.

323. Deale, *supra* note 139, at 330–31.

and enforcement. However, it seems that the Illinois state courts have generally underenforced its constitution's most substantive provisions,[324] while the Supreme Court of Illinois has mostly adopted the lockstep approach in relation to the U.S. Supreme Court.[325] This has resulted in an underenforcement of the state constitution's most potentially transformative provisions.[326]

According to Anderson, "[a]dvocates on both sides of Illinois's dependent-independent debate, including members of the Illinois Supreme Court, regularly and repeatedly point to the legislative history behind the Illinois Constitution of 1970 and, in particular, comments made by the constitutional delegates."[327] While the Supreme Court of Illinois has also opted for the lockstep approach in many instances,[328] this is part of a wider debate regarding the Convention's stated independence as to federal issues.[329]

This indicates that there are, in fact, compelling normative factors for a different type of interpretive approach when it comes to the state constitution, particularly with regard to those issues on which there is sufficient historical evidence to conclude that a more progressive and rights-protective approach is required.

Once again, the issue of the application of the right of free speech against private intrusion becomes ground zero for this analysis. In *People v. DiGuida*,[330] the Supreme Court of Illinois held that its state free speech provision was not opposable against private intrusion as the result of its

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324. *See id.* at 335.

325. Anderson, *supra* note 76, at 966.

326. *See* Deale, *supra* note 139, at 335.

327. Anderson, *supra* note 76, at 989.

328. *Id.* at 966; *see, e.g.*, Hampton v. Metro. Water Reclamation Dist. Of Greater Chi., 57 N.E.3d 1229, 1234 (Ill. 2016).

329. *See* Anderson, *supra* note 76, at 989–90.

330. 604 N.E.2d 336 (Ill. 1992).

lockstep approach. When it came to adoption history, the court stated that it could not find evidence of a *different* intent.[331] In other words, that the burden of proof rested on those who argued against the lockstep approach. Finding none in the records of the 1970 Constitutional Convention, the court held on to the lockstep approach.[332]

With regard to the use of adoption history in general, the Supreme Court of Illinois has imitated the practice of other state courts, stating that it will resort to that history only when dealing with ambiguous language. Only then is it "appropriate to consult the debates of the delegates to the constitutional convention to ascertain the meaning they attached to [a] provision."[333] This seems to minimize the normative force of a constitution-making process, treating it as if it were an ordinary legislature enacting a statute. But constitutional framers are not ordinary legislators and are not subject to separation of powers concerns.

In the specific context of the state constitutional provision regarding education, the court split in *Committee for Educational Rights v. Edgar*. The majority held that the state provision was basically unenforceable, using adoption history in support of its conclusion: "The framers of the 1970 Constitution grappled with the issue of unequal educational funding and opportunity, and chose to address the problem with a purely hortatory statement of principle."[334]

The partial dissent disagreed and insisted on the importance of considering the historical circumstances behind the substantive provision: "[I]n construing the

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331. *See id.* at 342 ("[W]here the language of the State constitution, or where debates and committee reports of the constitutional convention show that the Framers *intended a different construction*, [the court] will construe similar provisions in a different way from that of the [United States] Supreme Court.") (emphasis added).

332. *See id.* at 345.

333. Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1184 (Ill. 1996).

334. *Id.* at 1187.

meaning of a constitutional provision, it is appropriate and helpful to examine it *in light of the history and condition of the times*, and the practical problem which the convention sought to address by incorporating in the document the questioned provision."[335] The dissent concluded that the provision was not entirely directive and was, thus, judicially enforceable.[336]

Finally, in *Hope Clinic for Women, Ltd. v. Flores*,[337] the Supreme Court of Illinois relied on adoption history to adopt a *narrow* interpretation of a constitutional provision, in this case, the reproductive rights of women. Even though the state constitution makes explicit reference to "privacy," unlike the U.S. Constitution, the court explained that "[h]aving reviewed the committee reports and transcripts of the debates at the constitutional convention, we find a variety of reasons were given for adding this privacy language,"[338] and concluded that they were of a limited nature and excluded a right to an abortion.[339] In other words, for an expansive reading of the text, the statements of the drafters are not enough. But they are enough when it comes to adopting a narrow reading.

III. LOOKING FORWARD: ADEQUATE ENFORCEMENT AND THE CREATION OF NEW CONSTITUTIONS IN THE UNITED STATES

There are several lessons that can be extracted from the experiences discussed above. This is in addition to the main proposal made in this Article regarding the proper

335. *Id.* at 1198 (Freeman, J., concurring in part and dissenting in part) (emphasis added) (quoting Client Follow-Up Co. v. Hynes, 390 N.E.2d 847, 850 (Ill. 1979)).

336. *See id.* at 1199.

337. 991 N.E.2d 745 (Ill. 2013).

338. *Id.* at 756.

339. *Id.* at 756–57.

interpretation and enforcement of progressive state constitutions. As we saw, when a state constitution shares the characteristics described above, its adequate enforcement can yield significant transformative effects and results. This reinforces the potential of progressive state constitutionalism, particularly in light of the regressive experiences that have recently occurred at the federal level. One of the remaining obstacles is recalcitrant state courts that have so far failed to enforce their constitutions' more substantive provisions to their fullest potential or to adequately consider the importance of the historical circumstances that generated them, as well as those provisions that overlap with the Federal Constitution.

The first lesson relates to future processes of state constitutional creation or modification. Future state constitutional designers and drafters should learn from the experiences in the processes analyzed in Part II and build on them. This includes accounting for the historical circumstances, interests, and goals of key social and popular forces. It also points to the importance of designing constitutional revision or creation processes that are highly democratic, public, and participatory. Finally, constitutional drafters should consider incorporating into the constitutional text the widely held policy preferences of the population, including on substantive issues. Other institutional actors, such as law schools and judicial bodies, should also take note of these important developments at the state constitutional level so that the full potential of state constitutionalism can be achieved and is not thwarted by inadequate tools and approaches.

More importantly, *popular movements should embrace state constitutionalism as an effective mechanism for the achievement of their goals*. In addition to grassroots organizing, popular mobilizations, and legislative strategies, these forces should also push for state constitutional revision processes, particularly in states whose constitutions no longer articulate the views and beliefs of significant portions

of the population or that fail to address pressing social issues such as privacy, discrimination, or socioeconomic rights.

The second lesson is a byproduct of the first: identifying key factors that can guide a process of constitutional renovation at the federal level. This sort of constitutional renewal would greatly benefit from the adoption of democratic and participatory mechanisms that can produce a modern constitution that addresses the needs and interests of the general population. This would be particularly compelling if a significant number of states carry out constitutional revision or creation processes that mirror the ones analyzed in this Article. The effective overhauling of state constitutions across the United States could create a critical mass that, in the end, forces change at the federal level.

While the drafting of a federal constitution has important structural differences from that of a unitary state, there are compelling reasons for sharing some similarities as well. Top on the list is to design a creation or revision process that is highly democratic and participatory, which would be a significant departure from the historical experience that culminated in the adoption of the current U.S. Constitution. The great demographic, political, legal, and ideological changes that have occurred since the late eighteenth century should almost guarantee a more diverse drafting body, including the participation of women, racial minorities, and the popular classes.

Potential future federal constitutional drafters should also take note of the substantive deficiencies of the U.S. Constitution, including its unbearable silence regarding issues such as education, privacy, environmental protection, workers' rights, personal autonomy, and human dignity. One can wonder how federal constitutional law would develop in the future if—instead of applying a text adopted more than two hundred years ago though a process that excluded significant portions of the population and was characterized by secrecy—it were based on a modern constitution, created

through comprehensive democratic mechanisms, that is able to address substantive issues that are relevant to the lives of millions of people. State constitutionalism can again point the way.