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CONSTITUTIONAL INTERPRETATION AND ZOMBIE PROVISIONS

Michael L. Smith*

ABSTRACT

The United States Constitution and state constitutions contain numerous zombie provisions, including language restricting marriage to relationships between one man and one woman, voter literacy test requirements, disqualification of atheists from serving in office or testifying as witnesses, and pervasive gendered language restricting rights and offices to men alone. Though these provisions are unenforceable due to subsequent amendment, determinations of federal unconstitutionality, or preemption by federal laws, they live on in constitutional text.

This Article addresses the danger of these zombie provisions that has, thus far, been overlooked—the prospect that zombie provisions may influence the interpretation of still-living constitutional provisions. The United States Supreme Court and the vast majority of states require contextual analysis when interpreting constitutions—requiring that provisions be read in light of the document as a whole rather than in isolation. Many constitutional rights' guarantees are written in an abstract, undefined manner. And numerous state constitutions include broad, non-exhaustive guarantees of individual rights. These provisions demand clarification through context, and it is here that zombie provisions may continue to live on by limiting the scope of equal protection, due process, and individual rights

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guarantees. For example, how much protection can a set of abstract inalienable rights truly provide to LGBTQ people if it appears alongside a constitutional provision restricting the definition of marriage to a union of one man and one woman?

Though removing zombie provisions would best solve this problem, I argue that an alternate rule of avoidance may mitigate these provisions' interpretive impacts. Courts may continue to engage in contextual analysis but should actively exclude zombie provisions from consideration when doing so. Exclusion sheds light on these provisions' invalidity and prevents them from influencing the interpretation of still-living constitutional provisions.

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INTRODUCTION

American laws are littered with outdated, inactive, and unconstitutional provisions. At the statutory level, these are known as "zombie laws," with unconstitutional or preempted laws that remain on the statute books analogized to the living dead.[1] At the constitutional level, similar "zombie provisions" persist as historical remnants that have been rendered irrelevant by subsequent amendments, self-imposed expiration dates, or federal statutory or judicial federal preemption.[2]

Need examples? To start, the United States Constitution still contains a provision relating to Congress's power to regulate the slave trade—specifically, limiting Congress's ability to restrict the importation of slaves.[3] Twenty-nine state constitutions define marriage in a manner that restricts it to relationships between one man and one woman.[4] Multiple state constitutions continue to prohibit atheists from holding office or testifying as witnesses.[5] And several state constitutions continue to require literacy tests for voters, even though these provisions are impermissible in the wake of the Voting Rights Act.[6] If we were to take the gendered language of the U.S. and most state constitutions seriously, women would be precluded from enjoying many individual rights as well as from holding office.[7]

Discussion of zombie laws and constitutional provisions tends to focus on a set of standard dangers.[8] There is the worry that the law may be revived by a change in federal law or a reversal of precedent.[9] There is the concern that a law continues to express disapproval toward

1. *See generally* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047 (2022).
2. Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1065–66, 1068 (2021).
3. *See* U.S. CONST. art. I, § 9, cl. 1.
4. *See infra* Section II.B.2.
5. *See infra* Section II.B.5.
6. *See infra* Section II.B.4.
7. *See infra* Section II.B.6.
8. *See* Brady, *supra* note 2, at 1081–85.
9. *Id.* at 1081.

protected groups.[10] And there is the possibility that judges and other government officials may rely on zombie laws to support their opinions or actions.[11]

Zombie constitutional provisions pose a danger that, until now, has generally gone undiscussed: the danger that zombie provisions may exert an influence on the interpretation of separate constitutional provisions. When interpreting constitutions, the United States Supreme Court and the vast majority of state supreme courts frequently require that provisions be read in the context of the whole constitution rather than in isolation.[12] Requiring contextual interpretation creates the risk that zombie provisions will influence how active provisions of constitutions are read and interpreted, thereby exerting an influence on state and federal constitutional law despite their invalidity.

Until now, this danger has gone unrecognized. Indeed, the only commentator to briefly suggest that zombie provisions may influence constitutional interpretation generally has cast this influence in a positive light—suggesting that zombie provisions may provide interpretive resources to better understand constitutional meaning.[13] In this Article, I argue that zombie provisions pose a threat to constitutional interpretation more broadly because the context they provide can reduce the scope of other constitutional rights protections and indirectly accomplish zombie provisions' goals of targeting disadvantaged communities.[14] Through their impact on constitutional interpretation more broadly, zombie provisions may covertly live on.

Though zombie provisions pose a danger to the process of constitutional interpretation, this danger may be easier to mitigate than

10. *Id.* at 1084.

11. *Id.* at 1085.

12. *See infra* Section III.A.

13. *See* Brady, *supra* note 2, at 1085.

14. For information on how zombie provisions target disadvantaged communities, see generally Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 LEWIS & CLARK L. REV. 1151 (2018) (describing unconstitutional, preempted, and inactive state constitutional provisions and arguing that many of these provisions represent "badges of inferiority" that target various marginalized and disadvantaged groups and communities).

the typical concerns of revival, expressive impact, and error. I argue for courts to adopt a rule of avoidance when engaging in contextual interpretive analysis, by which courts refuse to consider zombie provisions and the light they may shed on the meaning of other constitutional provisions. To be sure, the repeal and removal of zombie provisions from constitutional text is a preferable outcome. But a judicial rule of avoidance circumvents the drawbacks of a repeal strategy, which include concerns about whitewashing history or spending scarce political resources on deleting largely inactive constitutional provisions while facing more active threats to the rights of marginalized groups.[15]

Part II provides background on the existing literature on zombie laws.[16] Part III then shifts to zombie constitutional provisions.[17] I first address the limited discussion of zombie provisions in the legal academic literature. I then set forth a list of zombie provisions. Some of the provisions that I list have been flagged by other commentators, but others have not. Zombie provisions do not just include provisions that are found unconstitutional—they also include provisions in state constitutions that are preempted by federal statutory law, as well as provisions that expire on their own terms. Additionally, several of the zombie provisions I discuss are recent creations of fast-evolving Supreme Court doctrine regarding the free exercise of religion.[18]

The meat of the discussion regarding zombie provisions' impact on constitutional interpretation takes place in Part IV.[19] I begin by surveying the federal and state law of constitutional interpretation, noting that the vast majority of states and the United States Supreme Court urge a contextual analysis when determining the meaning of constitutional provisions. Provisions are not meant to be read in isolation: the interpreter must consider how they fit into the

15. *See* Brady, *supra* note 2, at 1087–89 (discussing concerns about whitewashing history and political resources in response to the prospect of reforming and eliminating zombie provisions).

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Section II.B.7.

19. *See infra* Part IV.

constitution's structure as a whole, as well as consider the meaning of terms based on how those, or similar terms, are used in other constitutional provisions.[20]

I then discuss examples of how zombie provisions may fit into this contextual analysis. State provisions, in particular, demand a resort to constitutional context because many state constitutions contain abstract provisions—including provisions that mirror federal constitutional rights as well as broad declarations of individual rights. Zombie provisions that restrict rights and offices to men, limit the right to marry to heterosexual couples, and impose religious tests for witnesses and officeholders all create the risk that these broad, abstract provisions will be read more narrowly.

Part IV discusses potential solutions to the problem of zombie provisions.[21] Though reform discussions tend to focus on the benefits and drawbacks of removing zombie laws and provisions from the books, I argue that zombie provisions' interpretive impacts may be mitigated through judicial practices. Specifically, courts may adopt a rule of avoidance for zombie provisions when engaging in contextual interpretive analysis. Courts can still follow their precedent, demanding consideration of constitutions as a whole, but add the caveat that this contextual analysis does not include provisions that are invalid as a result of federal statutory or constitutional law, subsequent amendment, or expiration. Though removing zombie provisions remains a preferable solution, judicial reform avoids drawbacks of that approach, including concerns over whitewashing history and the allocation of scarce political resources.

20. This builds on work by Akhil Amar, who refers to such contextual analysis as "intratextualism," by demonstrating that such intratextualist methodology takes place not just at the federal constitutional level but across many of the states as well. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

21. *See infra* Part IV.

I. ZOMBIE LAWS: A BACKGROUND

Howard Wasserman defines "Zombie laws" as laws that remain on the books "even if a court has declared that the law is inconsistent with the Constitution."[22] The laws still appear in the statute books, but "they are dead in that enforcement efforts are dead-on-arrival in court, where courts follow precedent to declare that the law is constitutionally invalid and that enforcement against this new rights-holder cannot proceed or succeed."[23] Zombie laws exist because a decision by the court that finds a law invalid does not "erase or suspend the challenged law," it only creates a precedent that halts future enforcement of the law while leaving the law in place absent legislative efforts to repeal or revise it.[24]

Though Wasserman's definition focuses on laws inconsistent with the U.S. Constitution, zombie laws also exist when state laws are inconsistent with federal statutes. Article VI, Clause Two of the U.S. Constitution provides that the "Constitution, and the laws of the United States . . . shall be the supreme Law of the Land" under which all states are bound, "Laws of any State to the Contrary notwithstanding."[25] As a result, where there is a conflict between federal laws and state laws, federal laws preempt.[26] But even if a controlling federal statute preempts a state statute or state constitutional provision, that state law or provision may remain on the books as an unenforceable zombie law if state lawmakers do not take measures to update their state code to remain consistent with federal law.[27]

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22. Wasserman, *supra* note 1, at 1050.

23. *Id.* at 1051.

24. *Id.* at 1054.

25. U.S. CONST. art. VI, cl. 2.

26. *See* I. Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of* Roe v Wade *and New Legal Frontiers on the Constitutional Right to Abortion*, 328 JAMA 325, 325 (2022).

27. As an example, federal statutory law prohibits the use of literacy tests to qualify people as eligible voters. *See* 52 U.S.C. §§ 10101(a)(2)(C), 10303(e)(2). Yet several state constitutions retain provisions that contradict this statutory prohibition. *See, e.g.*, DEL. CONST. art. V, § 2 (requiring that a person eligible to vote "be able to read this Constitution in the English language and write his or her name"). For further examples in this vein, see *infra* Section III.B.

I will primarily reference Wasserman's formulation of zombie laws throughout this Article. At least one U.S. court has adopted this phrasing as well. In *Pool v. City of Houston*, the Fifth Circuit used "zombie law" terminology to describe a provision in Houston's city charter that only registered voters could circulate petitions for initiatives and referenda, "even though the Supreme Court held a similar law unconstitutional twenty years ago."[28]

But Wasserman's definition of zombie laws is not the only definition out there. David Law, for example, describes "zombie provisions" as provisions that "endure in a formal sense but are, for all intents and purposes, dead."[29] Others may use the term to label laws that they view as likely to face a successful constitutional challenge, even if no such challenge has been brought to the law at issue or related laws in separate jurisdictions.[30] I avoid these alternate definitions, although the concepts they describe are likely relevant to the zombie laws discussed. Laws that are effectively dead due to lack of use or obscurity may well be "dead," but lack the extra nail in the coffin of a contrary ruling of unconstitutionality or preemption that takes them into true "zombie" territory.[31] The same is true of laws that have not

28. 978 F.3d 307, 309 (5th Cir. 2020). This usage of the phrase is not to be confused with a similar phrase pertaining to "zombie properties," which require the duty to inspect and maintain vacant and abandoned properties. *See* Federiconi v. M&T Bank, No. 2019-708, slip op. at 2 (N.Y. Sup. Ct. Dec. 22, 2022) (referring to N.Y. REAL PROP. ACTS. LAW §§ 1307, 1308 (Consol. 2021) as "the zombie laws"); *see also* Justin Mertz, Ben Payne & Kail Decker, *Foreclosures in Limbo: Zombie Properties*, 88 WIS. LAW. 22, 22 (2015); *Zombie Property Maintenance*, N.Y. DEP'T OF FIN. SERVS., https://www.dfs.ny.gov/apps_and_licensing/mortgage_companies/zombie_prop_home#:~:text=The%20Duty%20to%20Inspect%2C%20Secure,mortgagees%20or%20their%20servicing%20agents [https://perma.cc/7FST-RMT8].

29. David S. Law, *The Myth of the Imposed Constitution, in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239, 248 (Denis Galligan & Mila Versteeg eds., Cambridge Univ. Press 2013).

30. *See, e.g.*, Jim Jones, *Zombie Laws, Designed to Intimidate, Clutter Idaho's Statute Books*, IDAHO CAP. SUN (Oct. 5, 2022, 4:00 AM), https://idahocapitalsun.com/2022/10/05/zombie-laws-designed-to-intimidate-clutter-idahos-statute-books/ [https://perma.cc/7DMP-MH42] (using the phrase "zombie law" to label Idaho's ban on teaching topics purportedly related to critical race theory and Idaho's law prohibiting the dissemination of material harmful to minors—arguing that both laws will be struck down as unconstitutional if challenged).

31. For those confused by the metaphor, in which "dead" is used to describe laws that have not been outright deemed unconstitutional or preempted, while the more active "zombie" term describes laws that have been directly or indirectly ruled unconstitutional or preempted, I apologize—but these are the labels the academic literature has chosen.

yet been determined to be unconstitutional—either through a direct challenge or through a challenge to a sufficiently similar law in a separate jurisdiction. Although these laws may be on death row, they are not true zombies until that determination of unconstitutionality or preemption is made.

With this terminological background and tortured metaphor extravaganza completed, I now turn to constitutional provisions—the subject of this Article. Although lessons from zombie laws generally inform the discussion, I focus on constitutions rather than statutes, regulations, precedents, or other sources of legal authority.

II. ZOMBIE CONSTITUTIONAL PROVISIONS

A. Prior Work Regarding Zombie Constitutional Provisions

Drawing on prior zombie law literature summarized above, Maureen Brady discusses the phenomenon of zombie provisions in state constitutions. Similar to zombie laws, "a state constitutional provision can become a zombie when a court declares its enforcement against the law, usually the Federal Constitution, or when a provision becomes obviously unlawful in light of a federal decision declining to enforce or order the enforcement of a similar provision."[32] Brady employs this definition to identify "core cases" of zombie provisions.[33]

But Brady also identifies "peripheral cases" where provisions toe the line of zombiehood.[34] These include provisions that appear permissible on paper but were enacted for "an unlawful purpose."[35] Brady also notes the "related monsters" of provisions that are "openly flouted" have not been applied in many years and are otherwise obsolete—such as bans on dueling, provisions relating to obsolete technology like telephone and telegraph lines, state prohibitions on the

32. Brady, *supra* note 2, at 1067.
33. *Id.* at 1067–69.
34. *Id.* at 1069–74.
35. *Id.* at 1069–70.

quartering of soldiers, and financing provisions that have never been updated and which are now simply ignored.[36]

Brady relies on work by Allan Vestal, who surveys "badges of inferiority" that remain in numerous state constitutions.[37] Although Vestal does not use the zombie label, many of the provisions he discusses fit the definition because they have been directly or indirectly deemed unconstitutional.[38] Examples of these provisions include religious tests to hold office, Alabama's former constitutional provisions authorizing segregated schools, marriage definitions that exclude same-sex couples, and religious tests for witness competency.[39] Vestal goes further and identifies provisions that are "symbolically exclusionary as enacted and are redolent of a prejudiced past," including provisions with gendered language, provisions that differentiate by gender, and provisions that differentiate by religion—including constitutional preambles, oaths of office, witness oaths, religious freedom provisions, and references to rebellion.[40] Though legislators did not enact these provisions in a substantive manner like Vestal's initial list of provisions, he argues that they are symbolically exclusionary and constitute badges of inferiority for women, non-Christians, and African Americans.[41]

Vestal takes a strong stance on the provisions he discusses, arguing that each is a badge of inferiority that ought to be removed from the state constitutions.[42] He acknowledges that removal is not an easy fix because some changes would likely be "highly controversial," and

36. *Id.* at 1075–78.

37. *See generally* Vestal, *supra* note 14.

38. *Id.*

39. *Id.* at 1156, 1159, 1161, 1163. Since the publication of Vestal's article, Alabama has enacted a new state constitution that finally removes the provisions that Vestal flags. John H. Glenn, *Alabama Voters Approve New Constitution, 10 Amendments on Ballot*, ALA. POL. REP. (Nov. 9, 2022, 8:22 AM), https://www.alreporter.com/2022/11/09/alabama-voters-approve-new-constitution-10-amendments-on-ballot/ [https://perma.cc/9CR6-NZER] ("The allowance of slavery as a form of punishment, a ban on interracial marriage, and other instances of white supremacist belief present within the document will be removed.").

40. Vestal, *supra* note 14, at 1164–77.

41. *Id.*

42. *Id.* at 1181.

others, like removing gendered language from constitutions, "would be wholly symbolic" because the provisions are "simply redolent of a prejudiced past."[43] Still, Vestal notes that some states have removed gendered language from their constitutions and argues that it should be a noncontroversial fix.[44] And although Vestal devotes a lot of room to discussing the racist provisions that remain in Alabama's constitution and the failed attempts to remove those provisions, the State finally did so with the adoption of its constitution in 2022.[45]

Brady is more nuanced in her prescriptive treatment of zombie provisions. Brady notes three primary harms that may result from zombie provisions: (1) revival—where federal law or Supreme Court precedent changes, causing the zombie provision to come back to life; (2) signaling—where the presence of a zombie provision conveys a message of inferiority or unworthiness toward a particular group; and (3) error—where a judge relies on a zombie provision under the mistaken belief it is still valid.[46] Despite recognizing these harms, Brady acknowledges possible benefits of zombie provisions as well.[47] They may "shed light on the meaning of other provisions," providing interpretive value, and provisions that now seem obsolete may still be helpful if there are drastic changes to federal laws.[48] Brady references Idaho's constitutional prohibition on children under fourteen working in mines.[49] Although Idaho's constitutional provision seems irrelevant today in light of child labor laws, it may still be worth keeping around if federal legislators decide that children do indeed "yearn for the mines" and reverse course.[50] Brady also considers whether removing

43. *Id.*
44. *Id.* at 1181–82.
45. *Id.* at 1183; Glenn, *supra* note 39.
46. Brady, *supra* note 2, at 1081.
47. *Id.* at 1085–86.
48. *Id.*
49. *Id.* at 1068; IDAHO CONST. art. XIII, § 4. Utah's constitution contains a similar prohibition. *See* UTAH CONST. art. XVI, § 3 ("The Legislature shall prohibit: (1) The employment of children under the age of fourteen years, in underground mines.").
50. *See* @Froggenthusias1, X (Feb. 7, 2022, 1:21 PM), https://twitter.com/Froggenthusias1/status/1490752695044554756 [https://perma.cc/AC7A-EHAY] ("Minecraft proves that abolishing child labour was a mistake. The children yearn for the mines.").

zombie provisions "artificially whitewashes history" and removes reminders of prior mistakes by governments.[51]

Brady considers the practical political costs of removing zombie provisions. To start, state constitutions are neglected by lawyers, judges, and the general public, many of whom may not even know their state has a constitution in the first place.[52] There are also serious questions over whether "scarce legislative and other resources" should "be directed toward removing them" rather than expending political resources on more urgent and impactful concerns.[53] In light of these costs and concerns, Brady considers not only relying on political efforts but also on judicial tools like the doctrine of desuetude, in which laws (and potentially constitutional provisions) may be deemed ineffectual after a certain period of disuse.[54]

This last point fits in with related research regarding desuetude in the constitutional and criminal contexts.[55] Richard Albert identifies constitutional desuetude as a form of informal amendment, stating that "constitutional desuetude occurs when an entrenched constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors."[56] Drawing on work by Hans Kelsen, Cass Sunstein, and Ronald Allen, Albert sets forth three elements of desuetude: "the (1) sustained (2) conscious nonuse of a rule that has been (3) publicly repudiated by political actors."[57] Albert notes instances of constitutional desuetude in Canada and discusses the possibility of desuetude in the United States, acknowledging its

51. Brady, *supra* note 2, at 1087.

52. *Id.* at 1086.

53. *Id.* at 1088.

54. *Id.* at 1091–92.

55. In the context of criminal law, Joel Johnson discusses the possibility of desuetude as a means of undoing the pernicious implications of criminal laws that remain on the books, but which are no longer enforced. *See generally* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95 (2022).

56. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641, 643–44 (2014).

57. *Id.* at 651.

complex implications for interpretation and democratic legitimacy.[58] The notion of desuetude is worth considering in the face of zombie provisions—particularly in light of the political difficulties of constitutional reform—and Part IV therefore contemplates it in greater detail below.[59]

B. Examples of Zombie Provisions

Building on Brady and Vestal's work, this section identifies zombie provisions in constitutions that may have bearing on how other parts of constitutions may be interpreted. Some of these categories overlap with what Brady and Vestal identify—such as marriage provisions, gendered language, and religious tests. This section identifies and discusses other categories of zombie provisions, including voter literacy tests, prohibitions on the funding of religious activities, and time-limited provisions. This section is descriptive and focuses on identifying, rather than evaluating, the provisions. I evaluate these zombie provisions and their potential implications for constitutional interpretation in the following section.[60]

1. The Migration or Importation Clause

The typical zombie provision is a state-level provision that is directly or indirectly invalidated by federal law.[61] But an alternate version of a zombie provision exists where a subsequent amendment limits or contradicts earlier language in a constitution without striking or repealing it.

The U.S. Constitution's Migration or Importation Clause is an example of such a provision. Article I, Section Nine, Clause One of the Constitution provides that:

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58. *Id.* at 680–84.
59. *See infra* Part IV.
60. *See infra* Section II.B.
61. *See supra* Part I.

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[62]

Relatedly, Article I, Section Two, Clause Three of the Constitution provides for the division of congressional representatives and direct taxes among the states in a manner "which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[63] And Article IV, Section Two, Clause Three provides that "[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[64]

The Constitution does not contain the word "slavery," but these provisions reflect the existence of slavery in founding-era America and the compromises reached by the framers of the Constitution to allow the institution of slavery to persist.[65] Though the Thirteenth Amendment was later enacted to prohibit slavery (with a significant exception for those being punished for crimes),[66] and though the Fourteenth and Fifteenth Amendments set forth rights to equal protection and prohibitions on barring people from voting based on

62. U.S. CONST. art. I, § 9, cl. 1.

63. *Id.* § 2, cl. 3.

64. *Id.* art. IV, § 2, cl. 3.

65. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1877 (1993) (describing the Migration or Importation clause as "[o]ne of the United States Constitution's infamous compromises with slavery"); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518–19 (2011) (describing these provisions as "direct accommodations for slavery"); *see also* KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 77–78 (Univ. of Chi. Press 2022).

66. *See* U.S. CONST. amend. XIII.

race,[67] those amendments did not strike out or remove slavery-related provisions from the text of the Constitution itself. They remain, perpetually, as zombie provisions—their text overshadowing the gradual, troubled efforts of implementing the ideals of freedom, equality, and suffrage set forth in the text of the Reconstruction Amendments.[68]

2. *Marriage Provisions*

Turning to state constitutions, some of the most pervasive examples of zombie provisions forbid same-sex marriage by restricting the definition of marriage to a relationship between one man and one woman. Twenty-nine state constitutions include this restrictive definition of marriage: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.[69] Hawaii's constitution does not mandate a definition of marriage but gives the legislature permission to impose a definition restricting marriage to opposite-sex couples.[70]

Many states' restrictive marriage provisions are relatively brief. Arizona's, for example, states, "Only a union of one man and one

67. *See id.* amend. XIV, § 1; *id.* amend. XV.

68. *See* Brady, *supra* note 2, at 1068 (recognizing the Three-Fifths Clause as a zombie provision); *see also* Albert, *supra* note 56, at 678 ("The practice of adding formal amendments to the constitutional text but keeping the existing text unaltered is a peculiar feature of the United States Constitution.").

69. ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. LXXXIII; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

70. HAW. CONST. art. I, § 23.

woman shall be valid or recognized as a marriage in this state."[71] But, others include language elaborating on the reason for restricting the definition of marriage. Alabama's constitutional marriage provision is notably lengthy and includes the following remarks:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
>
> Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.[72]

Michigan's constitutional marriage provision prefaces its restrictive definition of marriage with the language "[t]o secure and preserve the benefits of marriage for our society and for future generations of children."[73] Tennessee adds language that characterizes marriage as a "historical institution and legal contract solemnizing the relationship of one man and one woman" and proclaims "[a]ny policy or law or judicial interpretation" that defines marriage otherwise as "contrary to the public policy of this state."[74] Oklahoma's constitution adds teeth to its definition of marriage as "only of the union of one man and one

71. ARIZ. CONST. art. XXX, § 1; *see also* CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); OR. CONST. art. XV, § 5a ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

72. ALA. CONST. art. I, § 36.03(b)-(c).

73. MICH. CONST. art. I, § 25.

74. TENN. CONST. art. XI, § 18. Tennessee's marriage provision is also the only one that helpfully includes parenthetical numbers to clarify just how many people can get married to one (1) another.

woman" by making it a misdemeanor to knowingly issue a marriage in violation of the provision.[75]

In *Obergefell v. Hodges*, the United States Supreme Court took up challenges to multiple state laws restricting marriage to unions between one man and one woman, including challenges to state constitutional provisions in Michigan, Kentucky, and Tennessee.[76] Justice Kennedy, writing for the majority, surveyed the Court's precedents and concluded that the Fourteenth Amendment's Due Process and Equal Protection Clauses protected a fundamental right to marry, and that this right to marry "appl[ied] with equal force to same-sex couples."[77] As a result, states were prohibited from "bar[ring] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."[78]

Because the *Obergefell* Court reached its decision based on the U.S. Constitution and confirmed that its opinion applied to all states, all of the constitutional provisions listed above became zombie provisions.[79] Although there has been some outcry against these provisions in the wake of *Obergefell*, they have yet to be repealed. In early 2022, Virginia's legislature rejected a measure seeking to remove its restrictive marriage language from Virginia's constitution.[80] In early 2023, several Iowa legislators introduced a resolution calling for an amendment to Iowa's constitution that would state: "In accordance with the laws of nature and nature's God, the state of Iowa recognizes the definition of marriage to be the solemnized union between one human biological male and one human biological female."[81]

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75. OKLA. CONST. art. II, § 35(A), (C).

76. 576 U.S. 644, 653–54 (2015).

77. *Id.* at 664–65, 675.

78. *Id.* at 680.

79. *See id.* at 681 (confirming that the ruling applies to all states).

80. *See* Brooke Migdon, *What Your State Constitution Says About Same-Sex Marriage*, THE HILL (July 20, 2022), https://thehill.com/changing-america/respect/equality/3566836-what-your-state-constitution-says-about-same-sex-marriage/ [https://perma.cc/59R8-4TGS].

81. *See* Matt Lavietes, *Iowa Legislators Propose a Ban on Same-Sex Marriage*, NBC NEWS (Feb. 28, 2023, 7:48 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/iowa-lawmakers-propose-ban-sex-marriage-rcna72759 [https://perma.cc/6FJ8-8NRG]; H.R.J. Res. 8, 90th Gen. Assemb. (Iowa 2023).

Despite the failed efforts to repeal in Virginia and Iowa's attempt to add unconstitutional content to its own constitution, the news is not all anti-*Obergefell*. Nevada enacted its own constitutional provision pertaining to marriage in 2020 that took *Obergefell* into account while leaving avenues open for religious objectors.[82] Article 1, section 21 of Nevada's constitution provides:

> 1. The State of Nevada and its political subdivisions shall recognize marriages and issue marriage licenses to couples regardless of gender.
> 2. Religious organizations and members of the clergy have the right to refuse to solemnize a marriage, and no person has the right to make any claim against a religious organization or member of the clergy for such a refusal.
> 3. All legally valid marriages must be treated equally under the law.[83]

In early 2023, legislators in California introduced a bill to repeal "Prop 8"—the ballot initiative that resulted in California's restrictive marriage provision.[84] In April 2023, Democratic legislators in Oregon introduced legislation proposing to amend Oregon's constitution to protect the rights of same-sex marriage and abortion.[85]

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82. *See* Associated Press, *Nevada Becomes First State to Protect Same-Sex Marriage in Its Constitution*, L.A. TIMES (Nov. 16, 2020, 5:07 AM), https://www.latimes.com/world-nation/story/2020-11-16/nevada-first-state-protect-same-sex-marriage-constitution [https://perma.cc/Z62D-RENY].

83. NEV. CONST. art. 1, § 21.

84. *See* Cynthia Laird, *Wiener, Low Introduce Prop 8 Repeal Amendment*, BAY AREA REP. (Feb. 14, 2023), https://www.ebar.com/story.php?ch=news&sc=latest_news&id=322888 [https://perma.cc/QX7G-6DJ9]; *see also* Press Release, Off. of Governor Gavin Newsom, Governor Newsom Statement on Constitutional Amendment to Repeal Prop. 8 (Feb. 14, 2023), https://www.gov.ca.gov/2023/02/14/governor-newsom-statement-on-constitutional-amendment-to-repeal-prop-8/ [https://perma.cc/AR6Z-AYSE] (urging the repeal of Prop 8).

85. Amelia Templeton, *Oregon Democrats Propose Constitutional Amendment on Abortion, Same-Sex Marriage, Gender-Affirming Care*, OR. PUB. BROAD., https://www.opb.org/article/2023/04/19/oregon-constitutional-amendment-proposal-abortion-gender-affirming-care-marriage-election-2024/ [https://perma.cc/2YCK-BKEH] (Apr. 19, 2023, 2:08 PM).

In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overturned the longstanding precedents of *Roe v. Wade* and *Planned Parenthood v. Casey* and ruled that the Constitution did not protect a right to abortion.[86] In the wake of *Dobbs*, some advocates now urge revisiting restrictive marriage language in state constitutions to avoid the revival of those provisions should the Court choose to revisit *Obergefell*.[87] The Court's apparent willingness to revisit longstanding precedent, coupled with Justice Thomas's explicit call for the Court to revisit *Obergefell*, among other rulings, may give newfound urgency to these reforms.[88]

3. Anti-LGBTQ Language

Marriage provisions are not the only state constitutional provisions taking aim against LGBTQ individuals. Colorado's constitution still includes language from "Amendment 2," a voter initiative passed in 1992 that amended Colorado's constitution to state:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected

86. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

87. *See* Migdon, *supra* note 80 (noting that Virginia's efforts to remove its language were a reaction to Justice Thomas's concurring opinion in *Dobbs* in which he urged the Court to revisit *Obergefell*).

88. *See Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

> status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[89]

As with *Obergefell*, this amendment was challenged in a case that ultimately made its way to the Supreme Court.[90] And as with *Obergefell*, Justice Kennedy's majority opinion struck down Colorado's law on Fourteenth Amendment grounds.[91] The Court concluded that Amendment 2 failed the most lenient of constitutional scrutiny, which requires a law to bear a "rational relation to some legitimate end."[92] The Court dismissed Colorado's claim that Amendment 2 sought to protect citizens' freedom of association and the ability to uphold the "liberties of landlords or employers who have personal or religious objections to homosexuality," finding the amendment "so far removed from these particular justifications that we find it impossible to credit them."[93] Instead, the Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else," a classification that violated the Equal Protection Clause.[94]

Despite this strong language, which foreshadowed Justice Kennedy's reasoning in *Obergefell* nearly two decades later, Amendment 2 remains on the books as a zombie provision.[95] Ironically, Colorado's state civil rights statute prohibits discrimination not just based on race, religion, and sex, but on sexual orientation as well—a protection that has drawn the attention of the Supreme Court once again as challengers argue that these protections infringe upon

89. COLO. CONST. art. II, § 30b; *see also* Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1057–58 (1994) (describing the passage of Amendment 2).

90. *See* Romer v. Evans, 517 U.S. 620, 623 (1996).

91. *Id.* at 631–32.

92. *Id.*

93. *Id.* at 635.

94. *Id.*

95. COLO. CONST. art. II, § 30b.

the rights of those who seek to discriminate on religious grounds.[96] Despite Colorado's attempts to protect LGBTQ people at the statutory level in recent years, Amendment 2 remains as a reminder of its not-so-distant past, demanding the opposite.

4. Voter Literacy Tests

This section's earlier discussion of the Migration or Importation Clause notes that the Clause was rendered a zombie provision as a result of the Thirteenth, Fourteenth, and Fifteenth Amendments.[97] Although this was the case on paper, in practice, the ideals of equal protection and participation in government regardless of race took a long time to realize.[98] During the Jim Crow era, southern states reacted to initial progress in political representation of African Americans by enacting a host of laws to continue to oppress, marginalize, and exclude African Americans from participation in most walks of life, including the political process.[99] These laws remained in place for decades.[100] As Michal Klarman notes:

> By the late 1880s southern race relations had commenced a long downward spiral. The annual number of black lynchings rose dramatically, peaking early in the 1890s. The same Democratic politicians who in the early 1880s had actively campaigned for the black vote were by the 1890s

96. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168–70 (10th Cir. 2021) (detailing a challenge to Colorado's Anti-Discrimination Act by a web designer who is unwilling to create websites for same-sex couples' weddings), *rev'd*, 600 U.S. 570 (2023); *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 627–29 (2018) (detailing a challenge to Colorado's Anti-Discrimination Act by a bakery that refused to prepare a cake for a same-sex wedding).

97. *See supra* Section II.B.1.

98. Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 309 (1998).

99. *See* Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 611–14 (2011).

100. *See* R. Volney Riser, *Disenfranchisement, the U.S. Constitution, and the Federal Courts: Alabama's 1901 Constitutional Convention Debates the Grandfather Clause*, 48 AM. J. LEGAL HIST. 237, 240 (2006) ("In its own time, disfranchisement seemed like a gamble to many white (and avowedly white supremacist and Democratic) southerners, and the disfranchisers wagered that the nation would not intervene. They won. Jim Crow reigned from the 1890s until the 1950s and 1960s . . . .").

> demanding black disfranchisement and white political supremacy. Beginning around 1890, southern states adopted legal measures such as poll taxes and literacy tests to supplement the substantial de facto disfranchisement of blacks already accomplished through violence and fraud.[101]

Among the efforts that states employed to prevent African Americans from voting were literacy tests—measures that disproportionately impacted African Americans who, in the decades following Reconstruction, suffered far higher illiteracy rates than white people.[102] These measures were typically enacted through constitutional amendments that also included poll taxes.[103] In *Guinn v. United States*, the Supreme Court approved of literacy tests—concluding that while "grandfather clauses" that effectively exempted white people from the tests were not permissible, the test itself was "but the exercise by the State of a lawful power vested in it."[104]

Voter literacy tests are now largely illegal under federal law, limited initially by the Civil Rights Act's restrictions on how literacy tests may be conducted, and limited far more strictly by the Voting Rights Act, which prohibits requiring that anyone prove they can read or write if they demonstrate that they have completed the sixth grade in public school or in an accredited private school.[105] Commentators describe these "notorious disenfranchising devices" being "relegated to the dust bin of history" as a result of the Voting Rights Act.[106]

And yet, several state constitutions retain provisions requiring literacy tests for those who would seek to vote in elections. Literacy requirements are present in the constitutions of Delaware, North

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101. Klarman, *supra* note 98.

102. *Id.* at 353; *see also* Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 616–17 (2004).

103. Daniel Farbman, *Redemption Localism*, 100 N.C. L. REV. 1527, 1550 (2022).

104. 238 U.S. 347, 366 (1915).

105. *See* 52 U.S.C. §§ 10101(a)(2)(C), 10303(e)(2).

106. *See* Samuel Issacharoff, *Voting Rights at 50*, 67 ALA. L. REV. 387, 391 (2015).

Carolina, and Wyoming.[107] Delaware requires that voters must be "able to read this Constitution in the English language and write his or her name."[108] North Carolina requires voters to "be able to read and write any section of the Constitution in the English language."[109] Wyoming denies the right to vote to all who "shall not be able to read the constitution of this state," although it, like Delaware, makes allowances for those who are unable to do so due to physical disability.[110]

South Carolina's and Virginia's constitutions do not require that voters pass a literacy test, but explicitly permit the state legislature to enact laws requiring a literacy test as a condition to register to vote.[111] South Carolina's constitution provides that "[t]he General Assembly may require each person to demonstrate a reasonable ability, except for physical disability, to read and write the English language as a condition for becoming entitled to vote."[112] Virginia's constitution does not require voters to pass a literacy test, but it permits the state legislature to require "the ability of the applicant to read and complete in his own handwriting the application to register" as a prerequisite to register to vote.[113]

These are all zombie provisions because they are preempted by federal law. Still, they remain in the text of the constitutions, reflecting prior, pervasive efforts by states to exclude African Americans from political participation.

5. Religious Tests

Article VI, Clause Three of the United States Constitution requires federal and state legislators, executive officers, and judges to take an oath to support the Constitution but provides that "no religious Test

107. DEL. CONST. art. V, § 2; N.C. CONST. art. VI, § 4; WYO. CONST. art. VI, § 9.
108. DEL. CONST. art. V, § 2.
109. N.C. CONST. art. VI, § 4.
110. WYO. CONST. art. VI, § 9; DEL. CONST. art. V, § 2.
111. S.C. CONST. art. II, § 6; VA. CONST. art. II, § 2.
112. S.C. CONST. art. II, § 6.
113. VA. CONST. art. II, § 2.

shall ever be required as a Qualification to any Office or public Trust under the United States."[114] The First Amendment to the Constitution also guarantees the free exercise of religion—a guarantee that has since been deemed to apply to the states through the Fourteenth Amendment's Due Process Clause.[115]

Despite these federal constitutional provisions, a number of religious test provisions remain in state constitutions. States with constitutional provisions requiring religious tests for officeholders include Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas.[116] Arkansas's and Maryland's constitutions not only contain religious tests for officeholders but for witnesses as well, disqualifying those who do not believe in God from testifying.[117]

These provisions often give rise to contradictions, either within the provisions themselves or with other provisions of the constitution.

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114. U.S. CONST. art. VI, cl. 3.

115. *Id.* amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

116. ARK. CONST. art. XIX, § 1 ("No person who denies the being of a God shall hold any office in the civil departments of this State . . . ."); MD. CONST. art. XXXVII ("That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."); MISS. CONST. art. XIV, § 265 ("No person who denies the existence of a Supreme Being shall hold any office in this State."); N.C. CONST. art. VI, § 8 (disqualifying from office "any person who shall deny the being of Almighty God"); PA. CONST. art. I, § 4 ("No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."); S.C. CONST. art. VI, § 2 ("No person who denies the existence of the Supreme Being shall hold any office under this Constitution."); TENN. CONST. art. IX, § 2 ("No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."); TEX. CONST. art. I, § 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.").

117. ARK. CONST. art. XIX, § 1 ("No person who denies the being of a God shall . . . be competent to testify as a witness in any Court."). Maryland's constitution states:

> [N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

MD. CONST. art. XXXVI.

Texas, for example, in a single provision, both prohibits religious tests as qualifications for public office and requires that one "acknowledge the existence of a Supreme Being" to hold office—effectively prohibiting and requiring religious tests in a single sentence.[118] Also in a single sentence, Maryland bars religious tests for office "other than a declaration of belief in the existence of God."[119] Arkansas's constitution states that those who "den[y] the being of a God" cannot hold office "in the civil departments of this State, nor be competent to testify as a witness in any Court."[120] But in a separate section, the constitution provides that "[n]o religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief."[121] As with Texas, there is an unambiguous contradiction in Arkansas's constitutional provisions regarding religious qualifications for office and witness competency—albeit a contradiction that exists across two sections rather than within a single sentence.

These are zombie provisions because they run afoul of the United States Constitution's ban on religious tests for public office as well as the First Amendment's guarantee of the free exercise of religion. When the issue arises, courts readily recognize this. Citing the Religious Test Clause and the First Amendment's Free Exercise and Establishment Clauses, the United States Supreme Court ruled that Maryland's constitutional requirement of a "declaration of belief in the existence of God" for those seeking public office was unconstitutional.[122] South Carolina's Supreme Court ruled that South Carolina's provision that "[n]o person who denies the existence of the Supreme Being shall hold any office under this Constitution" violated both the First Amendment and the Religious Test Clause.[123] Despite their unambiguous

118. *See* TEX. CONST. art. I, § 4.
119. MD. CONST. art. XXXVII.
120. ARK. CONST. art. XIX, § 1.
121. *Id.* art. II, § 26.
122. Torcaso v. Watkins, 367 U.S. 488, 489, 496 (1961) (quoting MD. CONST. art. XXXVII).
123. Silverman v. Campbell, 486 S.E.2d 1, 2 (S.C. 1997); S.C. CONST. art. VI, § 2.

unconstitutionality, religious test provisions remain on the books in several state constitutions.

6. Gendered Language

The United States Constitution and most state constitutions contain numerous instances of gendered language. Gendered language appears in rights provisions as well as in provisions establishing public offices and describing the powers of government officials.[124] In the U.S. Constitution, the Fourteenth Amendment contained the first reference to "males" in the Constitution, providing that states' basis for representation would be reduced by an amount in proportion to the number of male inhabitants aged twenty-one who are denied the vote, in reference to the "whole number of male citizens twenty-one years of age in such State."[125] Although the use of "male" was deliberate and achieved a desired effect (only men had the vote at the time), use of gendered language preceded the Fourteenth Amendment's enactment and dates back to the Constitution's initial ratification.

Article I of the Constitution contains gendered language implying that members of the Congress and the Senate are all to be men.[126] The Vice President is assumed to be male as well.[127] Gendered language

124. *See* Vestal, *supra* note 14, at 1165–66.

125. U.S. CONST. amend. XIV, § 2.

126. *See id.* art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which *he* shall be chosen." (emphasis added)); *id.* § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which *he* shall be chosen." (emphasis added)).

127. *See id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when *he* shall exercise the Office of President of the United States." (emphasis added)).

throughout Article II implies that the President is also a man.[128] Multiple early amendments refer to rights-holders as men as well.[129]

This pattern holds true at the state level. Forty state constitutions employ gendered language in setting forth their individual rights, including general statements of human rights, speech rights, rights against unreasonable searches, rights against self-incrimination, and others.[130] Of these states, thirty-nine include gendered language in their discussions of governors, including sections regarding the qualifications and powers of governors.[131] For those curious, North

128. *See id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. *He* shall hold *his* Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows[.]" (emphasis added)); *see also id.* § 1, cl. 7–8; *id.* § 2, cl. 1–2; *id.* § 3.

129. *See id.* amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against *himself*. . . ." (emphasis added)); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against *him*; to have compulsory process for obtaining witnesses in *his* favor, and to have the Assistance of Counsel for *his* defence." (emphasis added)).

130. *See* ALA. CONST. art. I §§ 1, 4, 12; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, §§ 8, 10, 12; ARK. CONST. art. II, §§ 2, 10, 21; COLO. CONST. art. II, §§ 4, 10, 16, 18; CONN. CONST. art. I, §§ 1, 4; IDAHO CONST. art. I, §§ 1, 4, 13; ILL. CONST. art. I, §§ 1, 10; IND. CONST. art. I, §§ 7, 13, 14; IOWA CONST. art. I, §§ 4, 7; KAN. CONST. BILL OF RTS. §§ 1, 10; KY. CONST. BILL OF RTS. §§ 1, 3, 11, 13; LA. CONST. art. I, §§ 13, 16; MD. CONST. DECL. RTS. arts. 19, 21, 22; MASS. CONST. pt. 1, arts. II, XIV; MICH. CONST. art. I, §§ 2, 17, 18; MINN. CONST. art. I, §§ 2, 6–8; MISS. CONST. art. 3, § 26; MO. CONST. art. I, §§ 6, 18(a), 19; MONT. CONST. art. II, §§ 7, 24, 25, 27; NEB. CONST. art. I, §§ 11, 12; NEV. CONST. art. I, §§ 1, 4, 9; N.H. CONST. pt. 1, arts. 1, 2, 5, 6, 15, 19; N.J. CONST. art. I, paras. 3, 6, 10; N.M. CONST. art. II, §§ 11, 14, 15, 17; N.C. CONST. art. I, § 19; N.D. CONST. art. I, §§ 4, 9, 12, 15; OHIO CONST. art. I, §§ 1, 7, 10; OKLA. CONST. art. II, §§ 20, 21, 26; OR. CONST. art. I, §§ 1, 2, 6, 11, 12; PA. CONST. art. I, §§ 1, 3, 4, 7, 9, 16; S.C. CONST. art. I, §§ 12, 14; S.D. CONST. art. VI, §§ 1, 3, 7; TENN. CONST. art. I, §§ 3, 8, 9; TEX. CONST. art. I, §§ 3, 4, 6, 10; VA. CONST. art. I, §§ 1, 8, 11, 12; WASH. CONST. art. I, §§ 7, 9, 11; W. VA. CONST. art. III, §§ 1, 14; WIS. CONST. art. I, §§ 3, 7, 9; WYO. CONST. art. I, §§ 10–12.

131. *See* ALA. CONST. art. V, §§ 122, 126, 131; ALASKA CONST. art. III, §§ 2, 16–19; ARIZ. CONST. art. V, § 4; ARK. CONST. art. VI, §§ 7, 8, 15; COLO. CONST. art. IV, §§ 4, 5, 7–11; CONN. CONST. art. IV, §§ 9–12, 15; IDAHO CONST. art. IV, §§ 3, 4, 8, 10; ILL. CONST. art. V, §§ 12, 13; IND. CONST. art. V, §§ 1, 13, 14; IOWA CONST. art. IV, §§ 8, 9, 12; KAN. CONST. art. I, §§ 5, 6; KY. CONST. §§ 75, 78, 79, 81; LA. CONST. art. IV, §§ 2, 5; MD. CONST. art. II, §§ 1, 5, 9, 10, 16, 19; MASS. CONST. pt. 2, ch. 2, § 1, arts. II, IV, V; MICH. CONST. art. V, §§ 14, 17; MINN. CONST. art. V, § 3; MISS. CONST. art. 5, §§ 117, 124; MO. CONST. art. IV, §§ 7, 9; MONT. CONST. art. VI, §§ 3–5, 9, 10; NEB. CONST. art. IV, §§ 2, 7, 10; NEV. CONST. art. V, §§ 6, 7, 10; N.H. CONST. pt. 2, arts. 42, 44, 51; N.J. CONST. art. V, § 1, paras. 11, 12, 15; N.M. CONST. art. V, §§ 3, 4; N.C. CONST. art. III, §§ 2, 5; OHIO CONST. art. III, §§ 6, 7, 10; OKLA. CONST. art. VI, §§ 8, 9, 11; OR. CONST. art. V, §§ 10–14; PA. CONST. art. IV, §§ 2, 11, 12, 15; S.C. CONST. art. IV, §§ 4, 21; S.D. CONST. art. IV, § 3; TENN. CONST. art. III, §§ 3, 5, 6, 8, 10, 11; TEX. CONST. art. IV, §§ 4, 7–10, 14; VA. CONST. art. V, §§ 3, 5, 6; WASH. CONST. art. III, §§ 2, 6, 8, 12; W. VA. CONST. art. VII, §§ 4, 6, 10, 14; WIS. CONST. art. V, §§ 4, 6; WYO. CONST. art. IV, §§ 2, 4, 8.

Dakota is the only state that includes gendered language in its rights provisions; however, it is entirely gender-neutral when discussing the qualifications and roles of the governor.[132]

Allan Vestal critiques gendered language in constitutions as exclusionary and calls for the removal of this language from state constitutions.[133] But are these instances of gendered language zombie provisions? Maureen Brady labels them "peripheral zombie cases," positioning them as the inverse of "provisions with troubling histories."[134] Rather than provisions that appear fine on paper but have troubling histories, Brady describes gendered language provisions (among other provisions) as embodying "facially troubling text but little evidence of either explicitly discriminatory motivations or any efforts to use the provisions toward an unconstitutional effect."[135]

These provisions, if taken literally, would lead to a host of unconstitutional results. Gendered rights provisions would limit the protections of key rights to men only. And gendered provisions related to governors and other officeholders would exclude women from those offices. This is contrary to other provisions of many of the same constitutions that guarantee equal protection on the basis of sex.[136] Sometimes the tension is even more acute. For example, part 1, article 2 of New Hampshire's constitution begins by proclaiming that "[a]ll men have certain natural, essential, and inherent rights," but concludes with "[e]quality of rights under the law shall not be denied or abridged

132. *See* N.D. CONST. art. V.

133. Vestal, *supra* note 14, at 1166, 1168.

134. Brady, *supra* note 2, at 1074.

135. *Id.* at 1074.

136. *See, e.g.*, TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."). Wyoming's constitution says:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

WYO. CONST. art. I, § 3.

by this state on account of race, creed, color, sex or national origin."[137] New Hampshire's constitution proclaims the equality of rights, regardless of sex; however, within the same provision, it includes gendered language that limits the existence of those natural rights to men.[138] Taken literally, these gendered provisions violate state and federal equal protection clauses—leading to determinations of unconstitutionality or constitutional contradictions at the intra-constitutional level.

We have not seen anything this dramatic because people tend to overlook the gendered language in the U.S. Constitution and state constitutions as a meaningful barrier to women claiming rights or holding office.[139] As of 2023, multiple women serve as U.S. senators and congressional representatives. Kamala Harris is the Vice President, even though the Twelfth Amendment states that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."[140] Despite the gendered language throughout Article II, nobody contends that Vice President Harris is ineligible to be Vice President because she is a woman.[141] And there are no claims that women lack rights against self-incrimination and confrontation of witnesses against them in criminal trials despite the gendered language of the Fifth Amendment guaranteeing these rights.[142]

This disregard for gendered language in the Constitution and state constitutions strengthens the case that these are zombie provisions;

137. *See, e.g.*, N.H. CONST. pt. 1, art. II.

138. *See id.*

139. Steven Nelson, *Are Women Allowed to Be President?*, U.S. NEWS (Oct. 30, 2015, 4:28 PM), https://www.usnews.com/news/articles/2015/10/30/are-women-allowed-to-be-president [https://perma.cc/2387-JUGQ].

140. U.S. CONST. amend. XII.

141. There are other fanciful claims that, because Harris is not a natural-born citizen (despite being born in the United States), she is ineligible to be Vice President. *See, e.g.*, Michael McGough, *Opinion: Of Course Kamala Harris Is a Citizen. That Newsweek Column Was a Specious Distraction*, L.A. TIMES (Aug. 13, 2020, 4:01 PM), https://www.latimes.com/opinion/story/2020-08-13/kamala-harris-birthright-citizenship-trump [https://perma.cc/D2XA-472N]. As bad as those arguments were, even they did not attempt to invoke the Constitution's gendered language to argue for Harris's ineligibility.

142. *See* U.S. CONST. amend. V.

literal readings of gendered language are consistently ignored in practice.[143] Some classic risks of zombie provisions are missing in the case of gendered language—there's no Supreme Court precedent rejecting an attempt to operationalize this gendered language that may be overturned, for example.[144] But even if gendered language does not pose the same risks as other zombie provisions, this does not mean gendered provisions are not zombies. And the absence of those risks does not erase gendered language from constitutions, where they may be read literally by creative, if not misguided, parties, advocates, and judges.

7. Prohibitions on Funding Religious Activity

Multiple state constitutions include provisions that prohibit the use of public funds in support of religious institutions. The thirty-seven states with constitutions that include these provisions—some of which are general prohibitions on funding and some of which specify religious educational institutions only—are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.[145]

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143. *See supra* notes 140–41 and accompanying text.

144. Brady, *supra* note 2, at 1081–82 (discussing the revival of zombie provisions as one of the clearest risks that these provisions entail).

145. ALA. CONST. art. XIV, § 263 (no funding to religious schools); ALASKA CONST. art. VII, § 1 (no funding to religious schools); ARIZ. CONST. art. II, § 12 (no funding to religious institutions and religious exercise and instruction); CAL. CONST. art. XVI, § 5 (no funding to religious institutions generally); COLO. CONST. art. IX, § 7 (no funding to religious institutions generally); DEL. CONST. art. X, § 3 (no funding to religious schools); FLA. CONST. art. I, § 3 (no funding to religious institutions generally); GA. CONST. art. I, § 2, para. VII (no funding to religious institutions generally); HAW. CONST. art. X, § 1 (no funding to religious schools); IDAHO CONST. art. IX, § 5 (no funding to religious institutions generally, with exceptions for health facilities owned by "any church or sectarian religious society"); ILL. CONST.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court ruled that Missouri violated the Free Exercise Clause of the First Amendment by denying the church a grant to resurface the playground for its preschool and daycare center.[146] Missouri's constitution contained a provision that prohibited taking money from the public treasury "directly or indirectly, in aid of any church, sect or denomination of religion."[147] The Court held that the government's refusal to award a grant to Trinity Lutheran was discrimination on the basis of Trinity Lutheran's religious character, stating that the church was seeking to "participate in a government benefit program without having to disavow its religious character."[148] The Court did not address the constitutionality of Missouri's provision that prohibited funding to religious entities—a plurality of Justices signed a footnote stating that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious

art. X, § 3 (no funding to religious institutions generally); IND. CONST. art. 1, § 6 (no funding to religious institutions generally); KAN. CONST. art. 6, § 6(c) (no funding to religious schools); KY. CONST. § 189 (no funding to religious schools); MASS. CONST. amend. art. XVIII, § 2 (no funding to religious institutions generally); MICH. CONST. art. VIII, § 2 (no funding to religious schools); *id.* art. I, § 4 (no funding to religious institutions generally); MINN. CONST. art. XIII, § 2 (no funding to religious schools); *id.* art. I, § 16 (no funding to religious institutions generally); MISS. CONST. art. VIII, § 208 (no funding to religious institutions generally); MO. CONST. art. I, § 7 (no funding to religious institutions generally); *id.* art. IX, § 8 (no funding to religious schools); MONT. CONST. art. X, § 6 (no funding to religious institutions generally, with exception for federal funds); NEB. CONST. art. VII, § 11 (no funding to religious institutions generally, with exception for federal funds); NEV. CONST. art. XI, § 9 (no funding to religious institutions generally); N.H. CONST. pt. 2, art. LXXXIII (no funding to religious institutions generally); N.M. CONST. art. XII, § 3 (no funding to religious schools); N.Y. CONST. art. XI, § 3 (no funding to religious schools); N.D. CONST. art. VIII, § 5 (no funding to religious schools); OHIO CONST. art. VI, § 2 (no funding to religious schools); OKLA. CONST. art. II, § 5 (no funding to religious institutions generally); OR. CONST. art. I, § 5 (no funding to religious institutions generally); S.C. CONST. art. XI, § 4 (no funding to religious schools); S.D. CONST. art. VI, § 3 (no funding to religious institutions generally); TEX. CONST. art. I, § 7 (no funding to religious institutions generally); UTAH CONST. art. I, § 4 (no funding to religious institutions generally); VA. CONST. art. IV, § 16 (no funding to religious institutions generally); WASH. CONST. art. I, § 11 (no funding to religious institutions generally, with exceptions for chaplains at state prisons, mental institutions, or public hospitals); WIS. CONST. art. I, § 18 (no funding to religious institutions generally); WYO. CONST. art. I, § 19 (no funding to religious institutions generally); *id.* art. VII, § 8 (no funding to religious schools).

146. 582 U.S. 449, 453, 467 (2017).

147. *Id.* at 455 (quoting MO. CONST. art. I, § 7).

148. *Id.* at 463.

uses of funding or other forms of discrimination."[149] Justices Thomas and Gorsuch joined with the Court's full opinion, except for that footnote.

The Court took its approach to funding religious entities further in *Espinoza v. Montana Department of Revenue*.[150] There, the Court addressed a set of Montana laws that established a tax deduction scheme for donations to organizations that awarded scholarships to children for tuition at private schools, yet prohibited recipients from using scholarships at religious schools.[151] The Montana Department of Revenue, which implemented that prohibition, stated it was doing so to comply with Montana's constitutional provision prohibiting "any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination."[152]

Drawing on its reasoning in *Trinity Lutheran*, the Court concluded that the refusal to fund scholarships to religious schools violated the Free Exercise Clause because it was discriminating against fund recipients solely on the basis of their religious nature.[153] This time, the Court took aim at Montana's no-aid constitutional provision, ruling that it was "far more sweeping than the policy in *Trinity Lutheran*," and concluding that it discriminated against religious educational institutions.[154] The Court noted that though states "need not subsidize private education," they "cannot disqualify some private schools solely because they are religious" should they choose to provide such subsidies.[155]

149. *Id.* at 465 n.3.
150. *See generally* 140 S. Ct. 2246 (2020).
151. *Id.* at 2251–52.
152. *Id.* at 2252 (quoting MONT. CONST. art. X, § 6(1)).
153. *Id.* at 2260.
154. *Id.* at 2261.
155. *Id.*

Carson ex rel. O.C. v. Makin rounds out these decisions—presenting the question of whether states may prohibit funding to schools that are not just religious in nature but demonstrably include religious programming in their teaching.[156] There, the Court ruled that a refusal to extend state tuition assistance to parents seeking to send their children to religious schools that engaged in religious events and teaching violated the Free Exercise Clause.[157] The Court dismissed attempts to distinguish the case from *Trinity Lutheran* and *Espinoza* on the grounds that the funds would be devoted to religious uses, claiming that delving into this issue would "raise serious concerns about state entanglement with religion and denominational favoritism."[158] Giving money to those schools, however—no problem.

In the wake of *Trinity Lutheran*, *Espinoza*, and *Carson*, there is a strong argument that state prohibitions on funding religious entities are zombie provisions. The Court's recent decisions cast broad prohibitions as discriminatory against religious entities—denying them the benefit of funds or resources that other nonreligious entities may be able to enjoy. Even where those organizations engage in significant religious activity and indoctrination, states cannot refuse funding out of concern that doing so would constitute an establishment of religion.[159] A narrowly drafted state constitutional provision prohibiting the expenditure of state funds on an "essentially religious endeavor"—like a scholarship for ministerial training—could be permissible in light of the Court's prior case law approving such

156. 596 U.S. 767, 771–73 (2022).

157. *Id.* at 789. The majority opinion downplayed the religious nature of the schools' curricula—facts that the dissent emphasized in seeking to distinguish *Carson* from the Court's prior Free Exercise cases. *See id.* at 798–801 (Breyer, J., dissenting).

158. *Id.* at 787.

159. *Id.* at 781; *id.* at 798–800 (Breyer, J., dissenting) (providing details regarding the schools' religious activities).

restrictions.[160] But none of the constitutional provisions listed above are this narrow.

8. References to God and Christianity

Allan Vestal claims constitutional provisions that "differentiate by religion" treat Christianity as a dominant religion and "place a clear badge of inferiority on historically disfavored groups."[161] Vestal surveys state constitutional provisions that include these provisions, noting that forty-five states include Christian-centric religious references in their preambles.[162] Oaths of office and witness oath provisions in state constitutions contain similar references.[163] And, ironically, twenty-four states frame their free exercise of religion provisions with references to the right to worship God, while seven states' free exercise clauses make explicit references to the Christian faith.[164] Consider Alabama's provision, for example, which guarantees the "liberty to worship God according to the dictates of his or her own conscience."[165]

Some states' religious exercise provisions go even further than Vestal suggests. Multiple state constitutions contain provisions recognizing or setting forth a duty to engage in certain religious activity. Provisions referencing a duty to worship appear in the state constitutions of Delaware, Maryland, Massachusetts, Vermont, and Virginia.[166] Most of these provisions are abstract, although contradictory. Delaware, for example, recognizes a "duty of all persons frequently to assemble together for the public worship of

160. *See* Locke v. Davey, 540 U.S. 712, 721 (2004) (permitting an exclusion of scholarship funds for a student seeking to use them to train to be a minister at a religious school); *see also Carson ex rel. O.C.*, 596 U.S. at 788–89 (distinguishing *Locke* from the schools at issue by noting that *Locke* only addressed the pursuit of a religious degree).

161. Vestal, *supra* note 14, at 1170, 1176.

162. *Id.* at 1170–71.

163. *Id.* at 1172–73.

164. *Id.* at 1174–76.

165. ALA. CONST. art. I, § 3.02.

166. DEL. CONST. art. I, § 1; MD. CONST. art. XXXVI; MASS. CONST. pt. 1, art. II; VT. CONST. ch. I, art. III; VA. CONST. art. I, § 16.

Almighty God," and promotes "piety and morality, on which the prosperity of communities depends."[167] The language is, admittedly, qualified immediately thereafter—the provision states "no person shall or ought to be compelled to attend any religious worship"—but the official recognition of a duty to worship and be pious is still there.[168]

Maryland's constitution is structured similarly, asserting that "it is the duty of every man to worship God in such manner as he thinks most acceptable to Him," before stating that no one shall "be compelled to frequent, or maintain, or contribute" to a place of worship or ministry on account of religious belief.[169] But, bringing it back to the duty mentioned at the beginning of the provision, Maryland's constitution requires that one must believe in the existence of God to testify as a witness or serve as a juror; one needs to believe they will be "held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."[170]

Vermont's constitution provides that "all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God" and that people cannot be compelled to worship, compelled to contribute to places of worship, or deprived of rights on account of their religious sentiments.[171] And yet, the provision closes with an admonishment to those who happen to be Christians: "Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."[172]

To be sure, this last sentence is rather open ended, leaving the specifics of worship up to the worshippers and employing far less stringent sounding "ought" language. And yet, this provision is far

167. DEL. CONST. art. I, § 1.
168. *Id.*
169. MD. CONST. art. XXXVI.
170. *Id.*
171. VT. CONST. ch. I, art. III.
172. *Id.*

more exacting about the specifics of a duty to engage in religious practices than the other state constitutional provisions that acknowledge the duty without explaining what precisely it entails.

Are these provisions truly zombie provisions? Though Vestal does not use "zombie" terminology, he concludes that those provisions referring to God and otherwise reflecting a Christian-centric worldview cast non-Christians and nonreligious individuals in an inferior light and therefore ought to be removed from state constitutions.[173] And yet, the provisions themselves are largely abstract and tend to refer to broad notions of God and higher powers rather than a particular church or religious denomination. When considered alongside the Court's recent decisions elevating free exercise over religious establishment concerns and striking down refusals to fund religious organizations as unconstitutional burdens on free exercise, perhaps these religious references are not the zombies that critics may claim them to be.[174]

9. Time-Limited Provisions

The preceding discussions of zombie provisions and zombie laws tend to focus on those laws that are no longer enforceable because of contrary federal constitutional or statutory law. But a potential additional form of zombie law are provisions that remain on the books that are no longer active on their own terms. Provisions that contain expiration dates are examples. Recall the Migration or Importation Clause above. That provision bars Congress from prohibiting "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit . . . prior to the Year one thousand eight hundred and eight."[175] The provision sets forth a limitation on

173. Vestal, *supra* note 14, at 1176.

174. *See supra* Section II.B.7. To be clear, Vestal wrote his article in 2018 which, while recent, preceded the Court's rulings in *Espinoza* and *Carson*. Moreover, even if the provisions are not zombies, this does not undermine Vestal's argument that these provisions cast non-Christians and nonreligious individuals with a badge of inferiority—an argument that I do not dispute.

175. U.S. CONST. art. I, § 9, cl. 1.

Congress's power that is no longer effective—Reconstruction Amendments aside—because it expired on its own terms.

State constitutions contain provisions with expiration dates as well. Arizona's constitution prohibits the "introduction of intoxicating liquors for resale purposes into Indian country . . . until July 1, 1957."[176] Oregon's constitution provides for a sixteen-member Senate and a thirty-four-member House of Representatives that "shall not be increased until the year Eighteen Hundred and Sixty," after which the numbers may be increased up to designated maximums.[177] Minnesota's constitution requires that certain laws "relating to the taxation of taconite and semi-taconite" cannot be repealed "until November 4, 1989," and further provides that any conflicting laws will not be valid until that date.[178] These time-limited provisions are zombie provisions—not because of preemption by the U.S. Constitution or federal statutes, but because they are no longer operable by their own terms.

III. ZOMBIE PROVISIONS AND CONSTITUTIONAL INTERPRETATION

Critics of zombie provisions often discuss dangers of their revival or erroneous application.[179] But there has been no discussion, to date, of how these provisions might affect the broader process of constitutional interpretation. This section explains this danger, starting with a survey of state constitutional interpretation law on the issue of contextual interpretation.

A. Principles of Constitutional Interpretation: Text and Context

In the legal literature, theories of constitutional interpretation are a subject of unending debate.[180] Scholars fight over whether

176. ARIZ. CONST. art. XX, para. 3.
177. OR. CONST. art. IV, § 2.
178. MINN. CONST. art. X, § 6.
179. Brady, *supra* note 2, at 1081–84, 1085.
180. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 2–4 (2018).

constitutional provisions should be interpreted based on their original or present meaning, whether to look to the intention of the drafters or the public meaning of provisions, whether a theory of interpretation must account for how to implement that theory, and countless other issues.[181] Although this Article is informed by, and adds to, scholarly discussions of interpretive theory, my focus is not so much on how scholars say that constitutions should be interpreted, but the methods courts set forth and implement.

As it turns out, statements by courts that appear straightforward can end up being fairly complicated. Many courts, for instance, assert that their job is to determine the original intent of the constitution's drafters.[182] At first glance, this might seem to require resorting to a theory of original intent—necessitating the examination of convention reports, framer statements and correspondence, and ratification debate records. But references to original "intent" operate differently when used by the courts and typically indicate a focus on the plain meaning of the text.[183] After all, the text is supposed to communicate the intent of those who drafted and enacted the provision at issue.[184] Indeed,

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181. *Id.*

182. *See, e.g.*, Olive Lane Indus. Park, LLC v. County of San Diego, 174 Cal. Rptr. 3d 577, 585 (Cal. Ct. App. 2014) ("When interpreting constitutional and legislative enactments, we view the provisions as a whole and seek to determine and effectuate the intent of the enactors."); Ford v. Browning, 992 So. 2d 132, 136 (Fla. 2008) ("The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it." (quoting Crist v. Fla. Ass'n of Crim. Def. Laws., Inc., 978 So. 2d 134, 140 (Fla. 2008))).

183. Courts attempt to determine the meaning of specific provisions by understanding their context in the wider text:

> It is a cardinal rule of constitutional construction that the instrument must be construed in the light of what was intended by its framers. The intended meaning must be ascertained from the whole of the instrument and in construing a particular section the court may refer to any other section or provision to ascertain its purpose and intention.

State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193, 1195 (Utah 1973).

184. *See, e.g.*, People v. Taylor, 225 Cal. Rptr. 733, 737 (Cal. Ct. App. 1986) ("Constitutional provisions adopted by the People are to be interpreted so as to effectuate the voters' intent, and if the intent is clear from the language used, there is no room for further judicial interpretation."); *In re* Advisory Op. to Governor Request of June 29, 1979, 374 So. 2d 959, 964 (Fla. 1979) ("In construing provisions of the constitution, each provision must be given effect, according to its plain and ordinary meaning. The court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters.").

courts often use the notions of meaning of the text and the intention behind the provision in an interchangeable manner.[185] Even where courts recognize the need to resort to convention records or other circumstances surrounding a provision's drafting, the plain meaning of the text remains a key determinative component.[186] But sometimes, when the meaning of the text is clear, no additional evidence may be considered.[187]

When interpreting constitutions, the United States Supreme Court and the courts of all states emphasize the importance of constitutional text. Akhil Amar notes that "various words and phrases recur" in the Constitution and urges that interpreters draw on these instances when interpreting the constitution—referring to the process as

185. *See, e.g.*, Pierce v. Dennis, 138 S.E.2d 6, 9 (Va. 1964) ("In construing a constitutional provision it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intention and meaning of any particular provision . . . ." (quoting City of Portsmouth v. Weiss, 133 S.E. 781, 785 (Va. 1926))); Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 705 (N.C. 2021) ("The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." (quoting State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989))).

186. Courts apply "two rules of interpretation" when interpreting constitutional provisions:

> First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it. Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate. . . . Second, the interpretation should consider the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished.

League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1, 14 (Mich. Ct. App. 2020) (footnote omitted) (citations and internal quotations omitted) (first quoting Makowski v. Governor, 852 N.W.2d 61, 66 (Mich. 2014); then quoting *In re* Burnett Est., 834 N.W.2d 93, 98 (Mich. Ct. App. 2013)).

187. Courts will conclude their analysis if a provision conveys its meaning effectively:

> Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it. To this end, we first examine the plain language of the provision. If the language is clear and unambiguous, we generally must follow the text of the provision as written. No extrinsic matter may be shown to support a construction that would vary its apparent meaning.

Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994) (citations omitted) (first citing McElhaney Cattle Co. v. Smith, 645 P.2d 801, 804–05 (Ariz. 1982); and then citing Perini Land & Dev. Co. v. Pima County, 825 P.2d 1, 4 (Ariz. 1992)); Miles v. State, 80 A.3d 242, 251 (Md. App. Ct. 2013) ("In construing constitutional provisions, 'It is not until the means of solution afforded by the entire Constitution have been exhausted without success that the Court is justified in calling outside facts or considerations to its aid.'" (quoting Reed v. McKeldin, 115 A.2d 281, 285 (Md. 1955))).

"intratextualism."[188] Amar focuses on the United States Supreme Court and its interpretation of the U.S. Constitution—citing a variety of cases that he argues demonstrate the intratextualist method.[189] Amar's 1999 article gains support from recent cases in which the U.S. Supreme Court refers to other provisions of the Constitution to aid in interpreting provisions that are at issue.[190]

Although Amar's discussion is specific to the Supreme Court's interpretation of the Federal Constitution, state courts take a similar approach when interpreting state constitutions—and are often even more explicit about their interpretive methodology when doing so. In setting forth their law of constitutional interpretation, forty states emphasize the need to interpret state constitutional provisions in light of other provisions in the constitution or the state constitution as a whole. These states include Alabama,[191] Alaska,[192] Delaware,[193]

188. Amar, *supra* note 20, at 748.

189. *Id.* at 749–88.

190. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 536–37 (2014) (referring to art. I, § 5, cl. 4 of the Constitution and its bar against adjournments for more than three days to interpret the Recess Appointments Clause); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.").

191. State Docks Comm'n v. State *ex rel.* Cummings, 150 So. 345, 346 (Ala. 1933) ("A constitutional provision, as far as possible, should be construed as a whole and in the light of entire instrument and to harmonize with other provisions . . . .").

192. Forrer v. State, 471 P.3d 569, 585 (Alaska 2020) ("We do not interpret constitutional provisions in a vacuum—the document is meant to be read as a whole with each section in harmony with the others.").

193. State *ex rel.* Biggs v. Corley, 172 A. 415, 417 (Del. 1934) ("The principle of construction is that, to ascertain the true intent and meaning of any particular provision of a constitution, it is the duty of the court to consider the whole instrument.").

Florida,[194] Georgia,[195] Hawaii,[196] Idaho,[197] Illinois,[198] Indiana,[199] Iowa,[200] Kentucky,[201] Louisiana,[202] Maine,[203] Maryland,[204]

194. *In re* Advisory Op. to Governor Request of June 29, 1979, 374 So. 2d 959, 964 (Fla. 1979) ("Unless a different intent is clearly manifested, each section of the constitution should be read in conjunction, with all other provisions to determine its proper meaning, and the entire document should receive a consistent and uniform interpretation.").

195. Thompson v. Talmadge, 41 S.E.2d 883, 897 (Ga. 1947) (recognizing a "general rule that instruments must be considered as a whole" when interpreting the state constitution).

196. Haw. State AFL-CIO v. Yoshina, 935 P.2d 89, 91 (Haw. 1997) ("[A] constitutional provision must be construed in connection with other provisions of the instrument . . . ." (quoting Carter v. Gear, 16 Haw. 242, 244 (1904))).

197. Boise-Payette Lumber Co. v. Challis Indep. Sch. Dist., 268 P. 26, 27 (Idaho 1928), *superseded by constitutional amendment*, IDAHO CONST. art. VIII, § 3, *as recognized in* Village of Moyie Springs v. Aurora Mfg. Co., 353 P.2d 767, 771 (Idaho 1960).

198. Gregg v. Rauner, 124 N.E.3d 947, 953 (Ill. 2018) ("Effective constitutional interpretation requires that the court view the constitution as a whole, construing provisions in context with other relevant provisions.").

199. Horner v. Curry, 125 N.E.3d 584, 605 (Ind. 2019) ("We examine our Constitution's provisions 'within the structure and purpose of the Constitution as a whole.'" (quoting State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000))).

200. Gallarno v. Long, 243 N.W. 719, 725 (Iowa 1932) ("The aim and purpose of constitutional interpretation is to find the intention of the framers of, and the people who adopted, the instrument. In order to ascertain such intention, the Constitution should be construed as a whole . . . ." (citations omitted) (first citing N.W. Halsey & Co. v. City of Belle Plaine, 104 N.W. 494 (Iowa 1905); then citing Dist. Twp. of City of Dubuque v. City of Dubuque, 7 Iowa 262 (Iowa 1858); and then citing Town of McGregor v. Baylies, 19 Iowa 43 (Iowa 1865))).

201. Wood v. Bd. of Educ. of Danville, 412 S.W.2d 877, 879 (Ky. Ct. App. 1967) ("It is a cardinal rule of construction that the different sections of the Constitution shall be construed as a whole so as to harmonize the various provisions and not to produce a conflict between them." (first citing Matthews v. Allen, 360 S.W.2d 135 (Ky. Ct. App. 1962); then citing Grantz v. Grauman, 302 S.W.2d 364 (Ky. Ct. App. 1957); then citing Shamburger v. Duncan, 253 S.W.2d 388 (Ky. Ct. App. 1952); and then citing City of Somerset v. Caylor, 241 S.W.2d 990 (Ky. Ct. App. 1951))).

202. Succession of Lauga, 624 So. 2d 1156, 1166 (La. 1993) ("In ascertaining both the intent and general purpose, as well as the meaning, of a constitution, or a part thereof, it should be construed as a whole." (citing Antoine v. Consol.-Vultee Aircraft Corp., 46 So. 2d 260 (La. 1950))); *see also* Sciambra v. Edwards, 270 So. 2d 167, 169 (La. Ct. App. 1972) ("The rules of construction of constitutional law imposes upon the court the duty to consider the whole instrument, if necessary, to ascertain the true intent of any particular provision . . . .").

203. *In re* Op. of the Justs., 16 A.2d 585, 586 (Me. 1940) ("[T]he 'constitution is to be construed, when practicable, in all its parts, not so as to thwart, but so as to advance its main object, the continuance and orderly conduct of government by the people.'").

204. State Bd. of Elections v. Snyder *ex rel.* Snyder, 76 A.3d 1110, 1124 (Md. App. Ct. 2013) ("We . . . do not read the Constitution as a series of independent parts. Just as a statute is read in the context of a regulatory scheme, this Court construes constitutional provisions as part of the Constitution as a whole." (citations omitted) (citing Cnty. Comm'rs for Montgomery Cnty. v. Supervisors of Elections, 63 A.2d 735, 740 (Md. 1949))).

Massachusetts,[205] Michigan,[206] Minnesota,[207] Missouri,[208] Montana,[209] Nebraska,[210] Nevada,[211] New Hampshire,[212] New Jersey,[213] New

205. Lyons v. Sec'y of Commonwealth, 192 N.E.3d 1078, 1089 (Mass. 2022) ("In addressing any claim that the Legislature has exceeded its constitutional authority, we must view the Constitution as a whole, considering all relevant provisions, including those defining its plenary powers, the conduct of elections, and the right to vote.").

206. League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1, 9 (Mich. Ct. App. 2020) ("Every constitutional provision 'must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another.'" (quoting *In re* Lapeer Cnty. Clerk v. Lapeer Cir. Ct., 665 N.W.2d 452, 457 (Mich. 2003))).

207. Clark v. Ritchie, 787 N.W.2d 142, 147 n.4 (Minn. 2010) ("Constitutional provisions, like statutory provisions, are to be interpreted in light of each other to avoid conflicting interpretations." (citing Clark v. Pawlenty, 755 N.W.2d 293, 305 (Minn. 2008))).

208. Pestka v. State, 493 S.W.3d 405, 409 (Mo. 2016) (en banc) ("In construing individual sections, the constitution must be read as a whole, considering other sections that may shed light on the provision in question." (quoting State *ex rel.* Mathewson v. Bd. of Election Comm'rs of St. Louis Cnty., 841 S.W.2d 633, 635 (Mo. 1992) (en banc))).

209. State *ex rel.* Livingstone v. Murray, 354 P.2d 552, 555–56 (Mont. 1960) ("[T]he Constitution, like a statute, must be considered as a whole. The division of our Constitution into sections, articles and chapters is a mere matter of convenience for reference purposes and is of no significance in applying rules of construction and interpretation.").

210. Banks v. Heineman, 837 N.W.2d 70, 78 (Neb. 2013) ("The Nebraska Constitution, as amended, must be read as a whole.").

211. *In re* Contested Election of Mallory, 282 P.3d 739, 741 (Nev. 2012) ("When courts engage in constitutional interpretation, the document should be reviewed as a whole in order to ascertain the meaning of any particular provision." (citing Killgrove v. Morriss, 156 P. 686, 687 (Nev. 1916))).

212. Carrigan v. N.H. Dep't of Health & Hum. Servs., 262 A.3d 388, 394 (N.H. 2021) ("[T]he constitution as it now stands is to be considered as a whole, as if each provision were enacted at one time.").

213. Commc'ns Workers of Am., AFL-CIO v. N.J. Civ. Serv. Comm'n, 191 A.3d 643, 657 (N.J. 2018) ("We 'consider[] all the parts [of the Constitution] as a whole, and not one part as a separate and independent provision bearing no relation to the remainder.'" (alterations in original) (quoting Behnke v. N.J. Highway Auth., 97 A.2d 647, 652 (N.J. 1953))).

Mexico,[214] New York,[215] North Carolina,[216] North Dakota,[217] Oklahoma,[218] Oregon,[219] Pennsylvania,[220] Rhode Island,[221] South

214. Clark v. Mitchell, 363 P.3d 1213, 1218 (N.M. 2015) ("The provisions of the Constitution should not be considered in isolation, but rather should be construed as a whole." (quoting *In re* Generic Investigation into Cable Television Servs., 707 P.2d 1155, 1159 (N.M. 1985))).

215. New York courts explain:

> We, however, yield our fullest sanction to the doctrine that an amended constitution 'must be read as a whole, and as if every part had been adopted at the same time and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part.'

People *ex rel.* Killeen v. Angle, 17 N.E. 413, 418 (N.Y. 1888) (quoting Gilbert Elevated Ry. Co. v. Kobbe, 3 Abb. N. Cas. 434, 452 (N.Y. 1877)); *see also* Soc. Investigator Eligibles Ass'n v. Taylor, 197 N.E. 262, 264 (N.Y. 1935) ("The fundamental law is to be read as a whole and every relevant provision of statute is to be construed, if possible, so as to give effect to every other provision.").

216. Comm. to Elect Dan Forest v. Emp. Pol. Action Comm., 853 S.E.2d 698, 705 (N.C. 2021) ("The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and compare it with other words and sentences with which it stands connected." (quoting State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989))).

217. State *ex rel.* City of Minot v. Gronna, 59 N.W.2d 514, 540 (N.D. 1953) ("In ascertaining the intent 'and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole.'" (quoting 16 C.J.S. CONST. L. § 23(1956))).

218. Multiple Inj. Tr. Fund v. Coburn, 386 P.3d 628, 631–32 (Okla. 2016) ("We construe our statutes and constitution as a consistent whole in harmony with common sense and reason . . . .").

219. Oregon courts explain:

> [I]t must be remembered that the Constitution was adopted as a whole and a clause which, standing by itself, might seem of doubtful import may yet be made plain by comparison with other clauses of portions of the same instrument and, therefore, the whole instrument is to be examined with a view to arriving at the true intention of each part.

Jory v. Martin, 56 P.2d 1093, 1096 (Or. 1936).

220. *In re* Bruno, 101 A.3d 635, 660 (Pa. 2014) ("'[T]he Constitution is an integrated whole' and, as a result, the Court must strive in its interpretation to give concomitant effect to all constitutional provisions." (first citing Jubelirer v. Rendell, 953 A.2d 514, 528 (Pa. 2008); then citing Sprague v. Casey, 550 A.2d 184, 191 (Pa. 1988); and then citing Cavanaugh v. Davis, 440 A.2d 1380, 1381–82 (Pa. 1982))).

221. Rhode Island courts explain:

> When we are called upon to construe statutory or constitutional language, our role is to look at the legal scheme as a whole, and read the particular language at issue in that broader context. Whenever possible, constitutional provisions should be read to coexist, so that both may stand and be operative.

In re Request for Advisory Op. from the House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 936 n.8 (R.I. 2008) (citations omitted) (first citing Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989); and then citing Raila v. United States, 355 F.3d 118, 120 (2d Cir. 2004)).

Carolina,[222] South Dakota,[223] Tennessee,[224] Texas,[225] Utah,[226] Virginia,[227] West Virginia,[228] Wisconsin,[229] and Wyoming.[230]

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222. Johnson v. Piedmont Mun. Power Agency, 287 S.E.2d 476, 479 (S.C. 1982) ("The effect of a particular constitutional provision should be determined in light of its relationship to the entire Constitution and not as a single isolated provision." (citing Knight v. Salisbury, 206 S.E.2d 875 (S.C. 1974))).

223. *In re* Daugaard, 801 N.W.2d 438, 440 (S.D. 2011) ("The words used in a constitutional provision 'cannot be analyzed in isolation to the exclusion of the rest of the provision.'" (quoting Cummings v. Mickelson, 495 N.W.2d 493, 500 (S.D. 1993))).

224. Barrett v. Tenn. Occupational Safety & Health Rev. Comm'n, 284 S.W.3d 784, 787 (Tenn. 2009) ("[B]ecause constitutions are adopted as a whole 'it is a proper rule of construction that the whole [instrument] is to be examined with a view to arriving at the true intent of each part.'" (alteration in original) (quoting Prescott v. Duncan, 148 S.W. 229, 234 (Tenn. 1912))).

225. *In re* Nestle USA, Inc., 387 S.W.3d 610, 619 (Tex. 2012) ("The Constitution must be read as a whole, and all amendments thereto must be considered as if every part had been adopted at the same time and as one instrument, and effect must be given to each part of each clause." (quoting Collingsworth County v. Allred, 40 S.W.2d 13, 15 (Tex. 1931))).

226. State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193, 1195 (Utah 1973) ("The intended meaning must be ascertained from the whole of the instrument and in construing a particular section the court may refer to any other section or provision to ascertain its purpose and intention.").

227. Virginia courts explain:

> In construing a constitutional provision it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intention and meaning of any particular provision, and if there is an apparent repugnancy between different provisions the court should harmonize them if possible. Frequently the meaning of one provision of the Constitution, standing by itself, may be obscure or uncertain, but is readily apparent when resort is had to other portions of the same instrument.

City of Portsmouth v. Weiss, 133 S.E. 781, 785 (Va. 1926).

228. West Virginia courts explain:

> The polestar in the construction of constitutions is the ascertainment of and giving effect to the intent of the framers of a constitution and of the people who adopted it. In accomplishing this it is the court's duty to have recourse to the whole instrument. Only in this manner can the intent be ascertained and this is especially so when, as here, a latent ambiguity exists.

State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421, 428 (W. Va. 1973).

229. Coyne v. Walker, 879 N.W.2d 520, 536 (Wis. 2016) (citing Kayden Indus., Inc. v. Murphy, 150 N.W.2d 447 (Wis. 1967)) (noting that interpreting the constitution required considering the constitution as a whole rather than the words of a single part), *overruled on other grounds by* Koschkee v. Taylor, 929 N.W.2d 600 (Wis. 2019).

230. Wyoming courts explain:

> Our cases explain that every statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and that the constitution should not be interpreted to render any portion of it meaningless, with all portions of it read in pari materia and every word, clause and sentence considered so that no part will be inoperative or superfluous.

Geringer v. Bebout, 10 P.3d 514, 520 (Wyo. 2000).

Although the vast majority of states explicitly call for consideration of the constitution as a whole when interpreting constitutional provisions, there are a few outliers. Even so, many of these outliers also provide for consideration of provisions beyond what is at issue in a particular case. Six other states require that an interpreted provision at least be in harmony with other portions of the constitution; these states are Arizona,[231] Colorado,[232] Kansas,[233] Mississippi,[234] Ohio,[235] and Washington.[236] Arkansas's and Vermont's laws of constitutional interpretation require reference to other provisions of their state constitutions that relate to the same subject matter of the provision at issue.[237] California requires that constitutional provisions be read in the context of other sections in the same article that relate "to the

231. State *ex rel.* Montgomery v. Mathis, 290 P.3d 1226, 1233 (Ariz. Ct. App. 2012) ("We interpret a constitutional '[a]mendment as a whole and in harmony with other portions of the Arizona Constitution.'" (alterations in original) (quoting Ruiz v. Hull, 957 P.2d 984, 991 (Ariz. 1998) (en banc))).

232. Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996) (en banc) ("Courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions." (first citing Bolt v. Arapahoe Cnty. Sch. Dist. No. Six, 898 P.2d 525, 532 (Colo. 1995) (en banc); and then citing Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994) (en banc))).

233. State *ex rel.* Arn v. State Comm'n of Revenue & Tax'n, 181 P.2d 532, 540 (Kan. 1947) (noting that a constitutional provision at issue must be interpreted in harmony with other provisions of the constitution as well as with "the fundamental, inherent power of the state").

234. Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987) ("[C]onstitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other." (citing St. Louis & S.F. Ry. Co. v. Benton County, 96 So. 689, 690 (Miss. 1923))).

235. Froelich v. City of Cleveland, 124 N.E. 212, 215–16 (Ohio 1919) (arguing that a reading that results in a contradiction must be avoided and noting that the constitution must be interpreted in a manner that allows different parts to be read together without one defeating the other).

236. *In re* Sargent, 499 P.3d 241, 245 (Wash. Ct. App. 2021) ("We interpret both statutes and the constitution so that no portion is rendered superfluous." (citing Farris v. Munro, 662 P.2d 821, 826 (Wash. 1983))).

237. Cherokee Nation Bus., LLC v. Gulfside Casino P'ship, 632 S.W.3d 284, 289 (Ark. 2021) ("The Arkansas Constitution must be considered as whole, and every provision must be read in light of other provisions relating to the same subject matter." (quoting Gatzke v. Weiss, 289 S.W.3d 455, 458 (Ark. 2008))); State v. Lohr, 236 A.3d 1277, 1281 (Vt. 2020) ("[W]e do not read sentences or phrases in isolation; instead, we examine 'the whole and every part' of a provision, together with others governing the same subject matter, as parts of a system." (quoting State v. Berard, 220 A.3d 759, 762 (Vt. 2019))).

subject under review."[238] Connecticut is a bit of an outlier, noting a need to rely on the text of its constitution among five other factors: "persuasive and relevant federal precedent," "holdings and dicta of this court and the Appellate Court," the history of the provision at issue, decisions in other states, and "contemporary economic and sociological considerations, including relevant public policies."[239]

This survey of state and federal constitutional law demonstrates that in nearly all interpretive contexts, the text of other constitutional provisions is relevant to questions of constitutional interpretation.[240] Courts frequently urge reference to other provisions of the constitution when interpreting constitutional language and emphasize that interpretation is a contextual task and that the constitution must be interpreted as a single, whole document.[241] This reflects an "intratextualist" approach in which interpreters focus on multiple clauses to inform the interpretation of words or phrases that appear in both provisions, both through identical wording and through close synonyms.[242]

B. Dangers of Zombie Provisions

Maureen Brady identifies three risks of zombie constitutional provisions: revival, signaling, and error.[243] Revival is the risk that a

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238. Wallace v. Payne, 241 P. 879, 881 (Cal. 1925). In California:

> It is a cardinal rule, to be applied to the interpretation of particular words, phrases, or clauses in a statute or a Constitution, that the entire substance of the instrument or of that portion thereof which has relation *to the subject under review* should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part, and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear.

Id. (emphasis added); *see also* Mendoza v. State, 57 Cal. Rptr. 3d 505, 518 (Cal. App. 2d. 2007) ("[W]e are to read sections of the same article of the Constitution 'not in isolation,' but 'together as a whole.'" (quoting County of Riverside v. Superior Ct., 66 P.3d 718, 723 (Cal. 2003))).

239. Bysiewicz v. Dinardo, 6 A.3d 726, 752 (Conn. 2010) (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 421 (Conn. 2008)).

240. *See supra* Part III.

241. *See supra* Part III.

242. *See* Amar, *supra* note 20, at 788.

243. Brady, *supra* note 2, at 1081.

zombie provision may come back to life should the federal statute or precedent deeming it invalid change in the future.[244] With the right change to a federal statute or precedent, there would be no need to take any legislative action at the state level—those laws would simply come back into effect.[245] A recent example of zombie law revival occurred in the wake of the Court's decision in *Dobbs v. Jackson Women's Health Organization*, where it ruled that there was no constitutional right to abortion.[246] In doing so, *Dobbs* overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, precedents guaranteeing the right to abortion that had, until *Dobbs*, limited the scope of state restrictions on abortion.[247] As a result, a host of "trigger laws" imposing harsh restrictions on abortion went into effect in numerous states.[248] These were purposefully created zombie laws, designed to go into effect upon the overruling of *Roe* and *Casey*.[249]

One aspect of revival that Brady overlooks is that zombie laws themselves make revival more likely because they may generate the cases that change federal law. In the wake of *Dobbs*, for example, states may end up deciding that the Court's logic applies to contraception and, therefore, decide to begin enforcing zombie laws restricting contraception that remain on the books.[250] With numerous zombie laws, there is no need to pass new legislation in order to change

244. *Id.*

245. *Id.* at 1081–82.

246. 597 U.S. 215, 302 (2022).

247. *Id.* at 292 (overruling *Roe* and *Casey*).

248. Sarah McCammon, *Two Months After the* Dobbs *Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022, 2:42 PM), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/ZT9C-PK4Q]; Jesus Jiménez & Nicholas Bogel-Burroughs, *What Are Abortion Trigger Laws and Which States Have Them?*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/25/us/trigger-laws-abortion-states-roe.html [https://perma.cc/K22X-PQUQ].

249. Jiménez & Bogel-Burroughs, *supra* note 248.

250. *See* Aria Bendix, *Birth Control Restrictions Could Follow Abortion Bans, Experts Say*, NBC NEWS (June 24, 2022, 9:33 PM), https://www.nbcnews.com/health/health-news/birth-control-restrictions-may-follow-abortion-bans-roe-rcna35289 [https://perma.cc/K28G-MDX6] (discussing the possibility of contraception restrictions in the wake of *Dobbs*). For an example of a currently unenforceable contraception restriction that remains on the books, see IDAHO CODE § 18-603 (current through ch. 39 of 2d Reg. Sess. 67th Idaho Leg.).

enforcement patterns—one need simply dust off the zombie statute, begin enforcing it again, and hope that it becomes the vehicle that changes federal constitutional law.

How does this relate to zombie constitutional provisions? Recall that numerous state constitutions contain provisions limiting marriage to relationships between one man and one woman.[251] In the wake of *Dobbs*, which took aim at the Court's prior substantive due process jurisprudence that gave rise to opinions like *Obergefell*, finding a constitutional right to same-sex marriage, states may begin enforcing these constitutional provisions once again in hopes that the Court will extend its reasoning in *Dobbs* to overturn the right to same-sex marriage.

Brady identifies the risk of error as a further danger of zombie provisions—briefly raising the possibility that judges may mistakenly rely on these provisions.[252] Brady expresses hope that "the magic of Westlaw and LexisNexis annotations ordinarily prevents most zombie statutes and zombie provisions from wreaking . . . havoc."[253] Unfortunately, this formulation of error as limited to honest mistakes minimizes the risk of deliberate error by interpreters—one which has already occurred in the context of zombie provisions. The Alabama Supreme Court's decision in *Moore v. Alabama Judicial Inquiry Commission* details former Alabama Supreme Court Chief Justice Roy Moore's efforts to continue enforcing Alabama's zombie marriage provision in the wake of contrary federal authority.[254] Even though a federal court had declared Alabama's constitutional definition of marriage unconstitutional, Moore rejected the federal court's authority over Alabama and issued an order demanding the continued enforcement of the provision.[255] Zombie provisions may pose a risk of

251. *See supra* Section II.B.2.
252. Brady, *supra* note 2, at 1085.
253. *Id.*
254. 234 So. 3d 458, 464–67 (Ala. 2017).
255. *Id.* at 464–65.

erroneous reliance, but they also give ammunition to those who would willfully act contrarily to federal statutes or constitutional law.

The final danger of zombie laws that Brady discusses is the expressive impact of zombie provisions.[256] Brady's discussion focuses on the expressive harm of zombie provisions and whether they send a message of disrespect to groups they disadvantage.[257] Although this more abstract message of disrespect is a concern worth noting, the content zombie provisions communicate may have a more immediate technical impact at the interpretive level. This danger has gone unnoticed in the limited literature on zombie provisions thus far, and I turn to it in detail now.

C. The Interpretive Significance of Zombie Provisions

While zombie laws and even zombie state constitutional provisions have received recent attention, their implications on constitutional interpretation have been largely overlooked. Brady briefly addresses the implications that zombie provisions may have on the overall task of constitutional interpretation and notably argues that this perspective may cast zombie provisions in a positive light: "First, and rather basically, as a matter of interpretation, some zombie provisions may shed light on the meaning of other provisions or parts of the constitutional text, giving them interpretive value that would be lost with their eradication."[258]

I agree with this statement but not with the implication that the zombie provisions can shed a beneficial light. As discussed above, the vast majority of states require courts to refer to other provisions and the constitution as a whole when interpreting the constitution.[259] This pervasive requirement means that, in nearly all states, when courts work to determine the meaning of constitutional provisions, the rest of the constitution's text is part of the consideration—including zombie

256. Brady, *supra* note 2, at 1084.
257. *Id.* at 1084–85.
258. *Id.* at 1084.
259. *See supra* Section III.A.

provisions. Unlike Brady, I conclude that this is a harm, rather than a benefit, of zombie provisions. Constitutional provisions that purport to defend inalienable rights, equal protection, and religious freedom are all undermined by the existence of zombie provisions elsewhere in the constitution.

Many state constitutions contain abstract rights provisions. Some of these provisions mirror similar protections in the United States Constitution, such as the Fourteenth Amendment's Equal Protection Clause and Due Process Clause.[260] Many states also include broad declarations of individual rights that do not have an analogue in the United States Constitution.[261] A common thread of these provisions is their abstract nature—they identify concepts like "due process of law," "equal protection of the laws," "inalienable rights," "enjoying and defending life and liberty," among others.[262] State constitutional individual rights provisions tend to be open ended as well, with

260. *Compare* U.S. CONST. amend. XIV, § 1, *with* FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law . . . ."), ARIZ. CONST. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."), WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."), ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."), ME. CONST. art. I, § 6-A ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."), *and* CAL. CONST. art. I, § 7 ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . .").

261. *See, e.g.*, CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); COLO. CONST. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."); IDAHO CONST. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."); IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights - among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); ME. CONST. art. I, § 1 ("All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.").

262. *See supra* notes 260–61.

qualifiers like "among these" and "among which"—which signal that the examples of rights listed in the clauses are not exhaustive.[263]

Some constitutional provisions do not require very much interpretive effort. For example, there is little dispute over the age one must be in order to be President or how many years there are in a president's term.[264] But the abstract, open-ended nature of state constitutional rights provisions makes them prime candidates for construction by courts.[265] When confronted with concrete disputes that potentially implicate broad constitutional provisions, courts must interpret these provisions to determine whether they apply to particular claims and the extent of the constitutional protections these provisions guarantee.[266]

It is here where courts may resort to textualist methods—including the widely accepted technique of interpreting undefined, open-ended, abstract provisions by referring to language elsewhere in the constitution.[267] And it is here where zombie provisions may have a detrimental impact on rights protections elsewhere in state

263. *See, e.g.*, Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1168 (Idaho 2023) (reasoning that because Idaho's Inalienable Rights Clause contained "the connective term 'among which,'" it was intended to be "non-exhaustive" when listing the rights of life, liberty, property, happiness, and safety (quoting IDAHO CONST. art. I, § 1)).

264. *See* U.S. CONST. art. II, § 1, cl. 1, 5 (providing for a four-year term and a minimum age of thirty-five to be president). Some advocates of originalist interpretation purport that alternate interpretive methods may require departures from the text in light of changed life expectancies since the founding, but such an atextual method bears little resemblance to most nonoriginalist theories of interpretation. *See* Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 219–20 (1996) (making the case for an alternate reading of the thirty-five year provision as a satirical critique of nonoriginalism). *But see* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1397 (2018) ("That's silly.").

265. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 8 (1999) (noting that constitutional construction may be necessary when constitutional text is objectively unclear or insufficiently clear to guide official action).

266. There are debates over whether the application of provisions to particular circumstances is part of the interpretive process or whether it is a separate phase of construction. *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 41–43 (2010) (describing Lawrence Solum's approach of distinguishing interpretation from construction and noting actual and potential objections to that distinction). Here, I remain agnostic on this debate—as application must occur whether it's at the interpretive phase or at a later "construction" phase. *Id.*

267. *See infra* Part IV (describing this method and surveying opinions endorsing it).

constitutions. Should interpreters draw on zombie provisions to inform the meaning of abstract provisions elsewhere in a constitution, those abstract provisions may end up reflecting the restricted and outdated sentiments embodied by the zombie provisions.

Consider, for example, North Carolina's constitution. It begins with a broad statement of individual rights: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[268]

In interpreting this broad language—including questions of the scope of the liberty and pursuit of happiness rights protected as well as what other rights the non-exhaustive language of this provision protects—North Carolina law urges the interpreter to read the provision in the context of the rest of the constitution.[269] Some qualifications emerge when read in this way. All persons may have rights to life, liberty, and the pursuit of happiness, but not the right to marry someone of the same sex.[270] Reading this provision to guarantee a broad right to vote is also complicated by North Carolina's constitutional provision requiring literacy tests for voters.[271] A similar problem arises for attempts to read this provision as protecting the right to hold political office because a contextual reading of the provision runs up against North Carolina's requirement that officeholders cannot "deny the being of Almighty God."[272] The claim that all persons are equal is also undermined by gendered language in other constitutional

268. N.C. CONST. art. I, § 1.

269. *See* Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 705 (N.C. 2021) ("The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and compare it with other words and sentences with which it stands connected." (quoting State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989))).

270. *See* N.C. CONST. art. XIV, § 6 ("Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.").

271. *See id.* art. VI, § 4 ("Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language.").

272. *See id.* § 8.

provisions, implying that due process rights and the right to hold the Governor's office are limited to men.[273]

South Carolina's constitution gives another example of zombie provisions' influence on interpretation. It includes guarantees of due process, equal protection, and privileges and immunities that reflect similar guarantees in the Fourteenth Amendment.[274] Article I, section 3 of South Carolina's constitution provides that "[t]he privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."[275] Yet, when read as a whole, the protections this section guarantees may be even more limited than those provided at the federal level. South Carolina's guarantee of equal protection is included in the same document that permits the legislature to impose voter literacy tests.[276] That guarantee of equal protection is accompanied by repeated instances of gendered language and, if taken literally, implies that certain rights are guaranteed to men alone and that only a man may serve as the state's governor.[277] South Carolina guarantees religious freedom in seemingly absolute terms, providing that "[t]he General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[278] But it also requires religious tests for would-be officeholders, stating in similarly absolute terms that "[n]o person who denies the existence of the Supreme Being shall hold any office under this Constitution."[279] Following South Carolina law and considering each provision "in light of its relationship to the entire Constitution

273. *See id.* art. I, § 19; *id.* art. III, §§ 2, 5.
274. S.C. CONST. art. I, § 3; U.S. CONST. amend. XIV, § 1.
275. S.C. CONST. art. I, § 3.
276. *See id.* art. II, § 6.
277. *See id.* art. I, §§ 12, 14; *id.* art. IV, §§ 4, 21.
278. *Id.* art. I, § 2.
279. *Id.* art. VI, § 2.

and not as a single isolated provision," strains broad interpretations of South Carolina's equal protection and religious freedom guarantees.[280]

Wyoming's constitution includes broad, aspirational language regarding political rights, providing that:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.[281]

And yet, if one follows Wyoming's law of constitutional interpretation, which requires "that every statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and . . . every word, clause and sentence considered so that no part will be inoperative or superfluous," some doubts arise over how broad this provision truly is.[282] To start, Wyoming's constitution requires electors to be twenty-one years of age, a provision that is now a zombie in the wake of the 26th Amendment to the U.S. Constitution.[283] Wyoming's constitution also includes a literacy test, stating "[n]o person shall have the right to vote who shall not be able to read the constitution of this state."[284] Read in the context of these zombie provisions, Wyoming's broad guarantee of equal political rights and privileges seems to be quite a bit less protective than it appears when read in isolation.

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280. Johnson v. Piedmont Mun. Power Agency, 287 S.E.2d 476, 479 (S.C. 1982).

281. WYO. CONST. art. I, § 3.

282. Geringer v. Bebout, 10 P.3d 514, 520 (Wyo. 2000).

283. WYO. CONST. art. VI, § 2 (requiring that voters be at least twenty-one years old); U.S. CONST. amend. XXVI, § 1 (guaranteeing the right to vote to all who are eighteen years of age or older); *see also* Delgiorno v. Huisman, 498 P.2d 1246, 1247 (Wyo. 1972) (recognizing the disparity between Wyoming's constitution and the 26th Amendment).

284. WYO. CONST. art. VI, § 9.

There are similar doubts over the scope of Colorado's inalienable rights provision, which states "[a]ll persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."[285] Colorado's zombie provisions overshadow this aspirational language. Colorado's constitution continues to restrict marriage to "a union of one man and one woman."[286] The zombie provision prohibiting homosexuality from being the basis for protected or minority status is still there as well.[287] If we read all of these provisions in harmony, questions arise over whether LGBTQ individuals can truly rely on the inalienable rights provision as a source of protection against adverse government action.[288]

Reference to zombie provisions happens in the academic context as well. Arguing for a "textualist semi-originalist" approach to constitutional interpretation, Christopher Green focuses on textual hints in the Constitution that he argues mandate a particular approach to constitutional interpretation.[289] One example Green addresses is the Migration or Importation Clause, which begins by stating that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."[290] Green argues that this provision "historically confine[s]" the Constitution to the time of the Founding and requires it to be read from that temporal perspective; he argues it's incoherent to read this

285. COLO. CONST. art. II, § 3.

286. *Id.* § 31.

287. *Id.* § 30b.

288. *See* Zaner v. City of Brighton, 917 P.2d 280, 283 (en banc) (Colo. 1996) ("Courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions." (first citing Bolt v. Arapahoe Cnty. Sch. Dist. No. Six, 898 P.2d 525, 532 (Colo. 1995) (en banc); and then citing Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994) (en banc))).

289. *See generally* Christopher R. Green, *"This Constitution": Constitutional Indexicals As a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009).

290. *Id.* at 1662 (quoting U.S. CONST. art. I, § 9, cl. 1).

provision from a modern perspective because it refers to the year 1808 as a year in the future.[291]

Green does not, however, wrestle with the fact that he is relying on a zombie provision to make his point. The "Migration or *Importation*" the clause refers to is of "Persons"—the importation of people into the states is a way of referring to the slave trade without saying "slavery."[292] Not only is this provision repugnant, it has also been undone by the Thirteenth Amendment.[293] And yet, Green uses this zombie provision to support a theory of interpretation for the entire Constitution and all of its amendments.[294] Although the Migration or Importation Clause is a zombie both because of the Fifteenth Amendment and its own time limitation, it may continue to have an influence on interpretation overall—at least if one follows Green's logic.[295]

These are only a few examples. As discussed above, zombie provisions appear in nearly every state constitution to some extent.[296] The problem these provisions pose for state constitutional interpretation may have yet to truly arrive because many of these constitutional provisions are zombies due to relatively recent United States Supreme Court decisions. Provisions limiting marriage to one man and one woman, for example, did not become zombies until the *Obergefell* decision in 2015.[297] Additionally, state constitutions may gain newfound attention and importance in the years to come as the United States Supreme Court restricts the scope of substantive due

291. *Id.* at 1663–64.

292. U.S. CONST. art. I, § 9, cl. 1 (emphasis added); *see also* Neuman, *supra* note 65, at 1878 (describing the Migration or Importation clause as "[o]ne of the United States Constitution's infamous compromises with slavery"); David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 954 (2019) (noting that the Migration or Importation Clause was inserted as a moratorium on "congressional prohibition of" slavery because there already existed "[a] broad consensus to ban the importation of slaves from abroad").

293. *See* U.S. CONST. amend. XIII.

294. *See* Green, *supra* note 289, at 1663–64.

295. *See id.* To be clear, this is only a small part of the interpretation debate because this is only one of Green's arguments, and the issue I discuss is only one problem with the argument.

296. *See supra* Part III.

297. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

process protections.[298] All of this increases the odds that zombie provisions may continue to have influence from beyond the grave by impacting the interpretation of separate constitutional provisions.

IV. DEALING WITH ZOMBIE PROVISIONS

Howard Wasserman argues that "[c]ourts can do nothing about zombie laws," noting that people "cannot obtain judicial relief against 'the mere enactment of the statute' absent some effort to enforce it against that rights-holder."[299] Although courts may not be able to eliminate zombie constitutional provisions from constitutions' text, there may be methods available to mitigate the potential impact of such provisions on constitutional interpretation.

Recall that most courts follow their own rules of interpretation regarding what context is relevant when interpreting constitutional provisions.[300] Courts could create exceptions to this rule for zombie provisions—requiring recourse to the entire document, except for those provisions that are no longer good law. These zombie laws would be effectively nonexistent for purposes of constitutional interpretation. This "zombie provision avoidance" method of interpretation ensures these dead provisions do not influence the scope of existing rights protections and helps modernize constitutions to function in a world that has moved past their zombie provisions. Actively avoiding zombie provisions and applying zombie provision avoidance promotes active recognition of dead provisions, signals

298. *See* Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES, https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html [https://perma.cc/Q3F4-6BLW] (Jan. 31, 2023) (discussing the significance of state constitutional law disputes in the wake of *Dobbs*); Becky Sullivan, *With* Roe *Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022, 5:00 AM), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions [https://perma.cc/2DQS-9K9K]; *see also* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 10 (2023) (discussing the role of state constitutional provisions in disputes over abortion rights).

299. Wasserman, *supra* note 1, at 1051.

300. *See supra* Section III.A.

their zombie status, and makes it less likely that these provisions will have a covert impact on interpretation.[301]

Zombie provision avoidance requires less drastic measures than doing away with zombie laws altogether.[302] Focusing on interpretation sidesteps much of the debate and controversy over the proper extent of desuetude in the constitutional context.[303] In cases that involve zombie provisions, judges need not wrestle with implications of overreach or democratic legitimacy, nor should they be troubled by tradition or precedent that bars resorting to desuetude.[304] After all, the work to invalidate the law has already occurred—it is why the law at issue is a zombie in the first place. All that is needed is the additional step of affirmatively excluding such zombie laws from consideration when relying on constitutional context to interpret those provisions that remain alive.

Avoiding zombie provisions at the interpretive level also avoids some potential drawbacks to outright removal of the provisions. Maureen Brady notes potential concerns that removing zombie provisions could whitewash history or take up political resources that would be better spent elsewhere.[305] A rule of avoiding zombie provisions when engaging in contextual interpretive analysis avoids both of these issues: those provisions remain to educate and illuminate the states' legal histories, and no efforts need be made to pass legislation or generate public support because this reform takes place on the judicial level alone.

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301. Daniel Rice makes a similar point in urging that courts acknowledge when they depart from "repugnant decisions," arguing that implicit departure from precedent increases the probability of future reliance on such decisions. Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 626–27 (2023).

302. *See* Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 390 (1964) (noting reasons for why laws tend not to be repealed, including the options of nonenforcement or administrative action, as well as the point that once a statute "'is on the books, an active minority can easily prevent its repeal' despite the fact that most people have long opposed it and flagrantly disregard its mandate").

303. *See* Albert, *supra* note 56, at 680–84.

304. *Id.*; *see also* Johnson, *supra* note 55, at 104–08 (describing the development of American hostility toward the doctrine of desuetude).

305. Brady, *supra* note 2, at 1087–88.

Taking steps to avoid zombie provisions in the interpretive process holds promise. But repealing zombie provisions is the only way to guarantee that they will cease to have an impact on constitutional interpretation. Accordingly, while I urge a rule of avoidance for zombie provisions in constitutional interpretation—perhaps as a good first step—I ultimately side with Allan Vestal, who urges the elimination of zombie (and other) constitutional provisions that send a message of inferiority about various groups.[306]

What about the concern that eliminating zombie provisions will whitewash history and eliminate reminders of states' less-than-ideal histories? Brady cites concerns over "erasing history," and notes that keeping zombie provisions may aid in historic study (although she does not appear to suggest that these benefits make zombie provisions worth keeping).[307] Are zombie provisions worth keeping to the extent that they remind us of governments' checkered pasts and warn against repeating these prior errors?

In the face of this concern, the answer is yes. Removing a provision from the text of a constitution may make an outdated provision harder to track down, but legislative history records and historical versions of the constitution can still be tracked down by attorneys and judges.[308] Beyond this specialized audience, it is a stretch to claim that much of the general public will be deprived of information upon which they relied before the provisions' removal, given that much of the general public is unaware of the substance of state constitutions.[309] Additionally, extensive changes to state constitutions are not new

306. Vestal, *supra* note 14, at 1164–65, 1168.

307. Brady, *supra* note 2, at 1087, 1091.

308. That, of course, assumes that judges and attorneys are aware of the contents of state constitutions in the first place—which may not always be the case. Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Litigation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 78–79 (2013). While this is not an ideal state of affairs, it does undermine arguments for leaving zombie provisions in state constitutions, which rely on the assumption that those provisions are seen and recognized for symbolizing mistakes of the past.

309. *See* G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 9 n.23 (2001); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 194 (2018) (describing attorneys' lack of education regarding state constitutions).

because states undergo relatively frequent revision and wholesale updates.[310]

Arguments against removing zombie provisions that draw on the scarce attention and allocation of resources for political reform pose more of a problem for potential reforms. Even if state constitutions include zombie provisions that convey disrespect to certain groups like LGBTQ individuals or people of color, states are actively passing and considering laws that target these same groups directly and imminently.[311] Whether to devote time and resources to undo zombie provisions must be a case-by-case determination that accounts for legislative and other political efforts in a state that target groups affected by the zombie provisions. Still, repealing zombie provisions may not be off the table. As noted above, with the Supreme Court signaling its moves against substantive due process and with state legislative efforts targeting LGBTQ people on multiple fronts, eliminating state constitutional provisions that prohibit same-sex marriage may strengthen future state constitutional challenges to these and other restrictions.[312]

Though removing zombie provisions may require political efforts and resources, there may be benefits to taking a political approach rather than a judicial approach. There's no guarantee of success in removing zombie provisions—Alabama's history of attempts to remove blatantly unconstitutional, racist language from its constitution

310. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 851 (1991) (describing extensive, recent changes to state constitutions).

311. *See, e.g.*, Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some with the Possibility of a Felony Charge*, CNN, https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html [https://perma.cc/396J-L4BD] (June 6, 2023, 3:10 PM); TAIFHA ALEXANDER, LATOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, UCLA SCH. OF L., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY 16 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [https://perma.cc/63HW-JPX3] (counting 563 state and local measures seeking to restrict concepts purportedly related to critical race theory); Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES, https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html [https://perma.cc/2VM7-SETM] (June 22, 2023) (noting an uptick in book bans and describing how these bans frequently target "books about race, gender, and sexuality").

312. *See supra* Section III.B.

demonstrates this.[313] But even an unsuccessful attempt at removing zombie language may reveal where people stand on issues and shed light on those who continue to adhere to antiquated, unconstitutional notions. A legislative vote on amendment, for instance, could force lawmakers to go on record opposing gay marriage, religious tests for officeholders and witnesses, and revision of gendered language—moves that would often signify departures from the will of the electorate.[314] Efforts to reform state constitutions may not succeed, but at the very least, they may cause a fair number of otherwise well-disguised homophobes and misogynists to reveal themselves.

CONCLUSION

Zombie laws and constitutional provisions are pervasive. At the state constitutional level, in particular, constitutions continue to restrict the right to marry, demand literacy tests of voters, and require religious tests for officeholders and witnesses. Despite the relative frequency of amendment at the state constitutional level, many of these provisions remain.

Zombie constitutional provisions pose unique dangers to constitutional interpretation. Widespread reliance on context, coupled with the abstract nature of many provisions, create fertile ground for zombie provisions to exert indirect influence on how other constitutional provisions are interpreted. Recognition of this danger, and explicit avoidance, can prevent zombie provisions from living on.

313. *See* Valerie Strauss, *FYI, Alabama's Constitution Still Calls for 'Separate Schools for White and Colored Children,'* WASH. POST (Mar. 10, 2017, 7:10 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/03/10/fyi-alabamas-constitution-still-calls-for-separate-schools-for-white-and-colored-children/ [https://perma.cc/ET7S-EYYM] (noting Alabama's failed attempts to remove unconstitutional, racially discriminatory language from its constitution in 2004 and 2012).

314. *See, e.g.*, Vestal, *supra* note 14, at 1190–92 (describing opposition to removing marriage provisions from constitutions and noting the rise in public support for marriage equality).