NO STATE ACTOR, NO PROBLEM: STATE CONSTITUTIONAL RIGHTS AND PRIVATE ACTORS

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ABSTRACT

Why is it crucial to study State Constitutional Law? 1) It provides a comprehensive understanding of the underlying principles and structures of state governance; 2) It enriches legal practice by offering insights into the intricacies of state law; 3) It fosters active participation in civic affairs by promoting an in-depth knowledge of the legal framework; 4) It stimulates legal innovation by encouraging the examination and development of state constitutional jurisprudence; 5) It serves to preserve the historical evolution of state law and constitutional principles; and 6) It bolsters the mechanism of state judicial review by providing a solid foundation for legal analysis and decision-making.

The doctrine of state action, a cornerstone of American constitutional law, dictates that constitutional protections, particularly those enshrined in the Bill of Rights and the Fourteenth Amendment, apply exclusively to government actions and not to the conduct of private individuals or entities. This distinction has long shielded private actors from constitutional scrutiny. This article explores the contours of state constitutional rights without a state action requirement, focusing on cases where state courts have held private entities accountable under constitutional provisions traditionally reserved for government actors. The article highlights the judicial recognition that certain constitutional guarantees should extend beyond the public sector. These cases demonstrate how state courts are willing to interpret state constitutions as documents imposing constitutional obligations on private entities, reflecting a deep commitment to protecting individual rights.

Ultimately, this article argues for a more inclusive understanding of constitutional rights that does not hinge on the actor's identity but rather on the nature of the rights at stake. By advocating for the extension of constitutional protections to the private sector, it aims to contribute to the ongoing dialogue on the role of state constitutions in safeguarding fundamental liberties, ensuring that these protections remain robust in the face of evolving societal and economic realities.

> "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."
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> Justice Louis Brandeis[1]

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

INTRODUCTION

The State Action Doctrine asserts that constitutional protections, especially those enshrined in the Bill of Rights and the Fourteenth Amendment, apply solely to actions executed by government entities, whether federal, state, or local, but not to private conduct.[2] Consequently, an individual claiming a violation of their constitutional rights must establish that the government or a state actor was culpable for the infringement.[3]

Many state constitutions declare that persons possess certain rights or liberties without specifying who is bound to them. These characteristics differ from most of the first ten federal amendments and the Fourteenth Amendment, which are worded as limitations on the powers of government. The text of the Fourteenth Amendment makes it clear that the rights are enforceable only if "state action" is found to be responsible for the constitutional violation.[4]

Claims based on state constitutions against private entities generally take two forms. The first is a direct action seeking equitable relief or damages. The second is a traditional tort action in which a state guarantee plays a role, often related to public policy.[5] Many cases have involved privately owned shopping malls where individuals have tried to use them for expressive purposes against the owners' wishes.[6] State

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2. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–08 (1985).

3. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

4. U.S. CONST. amend. XIV, § 1 provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Public policy has been defined to include rights stated in state constitution. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 394–95 (Cal. 1988) (holding that a private employer may be sued in tort when dismissal breaches a public policy derived from a statute or a constitutional provision).

6. There has been a lot of published commentary on the shopping mall access cases. *See e.g.*, Wayne Batchis, *Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism, and the First Amendment*, 21 S. CAL. INTERDISC. L.J. 301 (2012); Josh Mulligan, *Finding a Forum in a Simulated City: Mega Malls, Gated Towns and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533 (2004); Ian J. McPheron, *From the Ground to the Sky: The Continuing Conflict Private Property Rights and Free Speech Rights on the Shopping Center Front*, 16 N. ILL. U. L. REV. 717 (1996); John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique, and Proposal*, 21 RUTGERS L.J. 819 (1990); James M. Dolliver, *The Washington Constitution and "State Action": the View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986); Justice Robert F. Utter, *The Right to Speak, Write, and Publish*

justices have allowed direct lawsuits for violations of state constitutional rights against private actors in environmental claims,[7] university officials who disclosed sensitive information,[8] a private hospital that allegedly retaliated against a nurse for writing a controversial article,[9] doctors and others who interfered with the operation of a clinic because it performed elective abortions,[10] doctors who retaliated against patients who complained to a watchdog agency about the quality of care at a hospital,[11] a company that rejected a woman for a job because it wanted "a male employee,"[12] and an investor-owned utility that denied equal job opportunities to homosexuals.[13]

The article is structured to thoroughly examine how state constitutional rights can be applied in contexts where the traditional state action requirement is absent. The analysis is divided into three essential parts, each focusing on a different aspect. Part I lays the foundation by discussing the importance of studying state constitutional law, emphasizing the unique role that state constitutions play in expanding individual rights beyond the limitations of federal law. This section highlights how state constitutions often provide broader protections

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Freely: State Constitutional Protection Against Private Abridgment, 8 UNIV. PUGET SOUND L. REV. 157 (1985).

7. *See* Cape-France Enters. v. Est. of Peed, 29 P.3d 1011, 1017 (Mont. 2001) ("Moreover, interrelated with and interdependent upon Montanans' fundamental Article II, Section 3 right to a clean and healthful environment is the mandate provided in Article IX, Section 1, of our Constitution. This provision provides, in pertinent part, that 'the State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. . . .' While MEIC involved state action, we, nonetheless, recognized that the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well.")

8. *See* Porten v. Univ. of S.F., 134 Cal. Rptr. 839, 843–44 (Cal. Dist. Ct. App. 1976) (applying privacy protection in CAL. CONST. art. I, § 1).

9. *See* Jones v. Mem'l Hosp. Sys., 746 S.W.2d 891, 892, 896 (Tex. Ct. App. 1988).

10. *See* Chico Feminist Women's Health Ctr. v. Blutte Glenn Med. Soc'y, 557 F. Supp. 1190, 1198–1200 (E.D. Cal. 1983) (applying California privacy clause).

11. *See* Leach v. Dummond Med. Grp., 192 Cal. Rptr. 650, 658–89 (1983) (applying the California petition clause, CAL. CONST. art. I, § 3, in dispute against private medical group).

12. Walinski v. Morrison & Morrison, 377 N.E. 2d 242, 243, 245 (Ill. Ct. App. 1978) (allowing plaintiff to seek both compensatory and punitive damages for violations of ILL. CONST. art. I, § 17).

13. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 601–02 (Cal. 1979) (applying California equal protection clause, CAL. CONST. art. I, § 7(a)); *see also* Rojo v. Kliger, 801 P.2d 373, 388–89 (Cal. 1990) (noting in a wrongful discharge action that CAL. CONST. art. I, § 8 had banned sex discrimination by private employers since 1876).

and critical instruments for legal innovation and civic engagement instruments.

In Part II, the article delves into cases where state courts have recognized constitutional rights in lawsuits against private parties without state action. This part will be subdivided into specific topics, including protecting free expression on private property and protecting privacy against intrusions by private actors. The discussion in this section is critical as it illustrates how state courts have increasingly interpreted their constitutions to impose obligations on private entities, thus extending constitutional protections traditionally reserved for state actors to the private sector. The article sheds light on the evolving judicial landscape and the implications for individual rights through a detailed analysis of landmark cases from various states.

In Part III, the article presents arguments for extending constitutional rights to the private sector. It challenges the conventional boundaries that limit the application of constitutional protections. This section argues that the nature of the rights at stake, rather than the actor's identity, should determine the scope of constitutional protections. By advocating for this broader interpretation, the article seeks to promote a more inclusive legal framework that better reflects the realities of modern society. The conclusion reinforces the article's call for reexamining the state action doctrine in light of the demonstrated need for enhanced constitutional safeguards against private infringements.

I. THE IMPORTANCE OF THE STUDY OF STATE CONSTITUTIONAL LAW

In the intricate tapestry of American legal education, state constitutional law occupies a central yet frequently marginalized position.[14] Despite the prevailing prominence of federal law in scholarly discussions, state constitutions embody fundamental legal principles and governance frameworks that directly influence individuals' everyday lives.[15]

State constitutions transcend their role as mere complements to the U.S. Constitution; they often serve as sources of broader rights and

14. *See* John Kincaid, *Early State History and Constitutions*, *in* THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT 239, 240 (Donald P. Haider ed., 2014) (referring to state constitutions as "dark side of the moon").

15. *See* Steven G. Calabresi et al., *Individual Rights in States Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 114 (2018) (providing a detailed analysis of the individual rights protected by state constitutions in the United States as of 2018).

freedoms.[16] Unlike the federal constitution, which establishes a minimum standard for rights, state constitutions frequently offer enhanced protections and reflect diverse regional values and priorities.[17] For instance, various state constitutions explicitly provide more comprehensive safeguards in criminal procedures than the rights enshrined in the Federal Bill of Rights.[18] This disparity underscores the importance for law students to comprehend the distinctions and intricacies of their respective jurisdictions.

State constitutional law plays a crucial role in the practical application of legal principles. Most legal matters—from criminal proceedings and property disputes to family law and probate—are primarily governed by state statutes.[19] Grasping the constitutional underpinnings of these laws enhances a lawyer's capacity to advocate persuasively and interpret statutory provisions and judicial rulings within the appropriate constitutional context. Additionally, state supreme courts often issue decisions based on their constitutions, which can significantly diverge from federal interpretations, underscoring the necessity

16. *See* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 130 *(*2022*)* (providing a robust framework for understanding the dynamics between state and federal constitutional law and the essential role of state courts in maintaining the balance of federalism and protecting individual liberties); *see, e.g.*, Stanley Mosk, *The Power of State Constitutions in Protecting Individual Rights*, 8 N. ILL. U. L. REV. 651, 662 (1988).

17. *See e.g.,* Justice Debra Stephens, *The Once and Future Promise of Access to Justice in Washington's Article I, Section 10,* 91 WASH. L. REV. ONLINE 41 (2016); Honorable Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children:" Interpreting State Constitutions in the Era of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1633 (2004).

18. Textual differences in about twenty state constitutions expand the scope of the federal Fifth Amendment right against self-incrimination. *See e.g.*, CONN. CONST. art. I, § 8; PA. CONST. art. I, § 9; Commonwealth v. Molina, 104 A.3d 430, 452 (Pa. 2013) (holding that the prosecutor's use of properly admitted evidence of the defendant's pre-arrest silence to infer substantive evidence of guilt violated the defendant's privilege against self-incrimination under PA. CONST. art. I, § 9); *see* Connor D. McDonald, *It Just Means More: Why Tennessee Should Maintain the Tennessee Open Fields Doctrine and Reject the Less Protective Federal Standard*, 10 BELMONT L. REV. 106 (2022) (arguing that Tennessee should maintain its heightened protections under the open fields due to its historical, cultural, and legal foundations and because the position is rooted in the state's historical and cultural context that emphasizes individual property.).

19. In civil law systems like Louisiana and Puerto Rico, private law is codified in a Civil Code, divided into Books, each covering a particular area of private law. *See, e.g*., LA. CIV. CODE (1870)*;* P.R. CIV. CODE (2020).

for a comprehensive understanding of state-specific legal landscapes.[20]

The United States operates under a federal system of government, which distributes power between the national and state levels as defined by the United States Constitution.[21] It is important to note that unlike state governments, which inherently possess powers, the federal government operates under delegated powers, holding only those explicitly outlined in the Constitution and additional powers inferred from those expressly granted.[22] As a result, except for matters of foreign affairs, the federal government only exercises the powers assigned to it by the Constitution and those necessary and proper to carry out its delegated responsibilities.[23]

American democracy thrives at the state level. Over the years, states have served as arenas for both advancement and opposition, as well as for discussions and widespread movements. They embody both agreement and disagreement within their governance. These democratic laboratories operate under various constitutions, each of the fifty states having a unique document. These state constitutions, created and ratified by citizens over the past two centuries, address shared historical and contemporary concerns. State constitutions cover many issues that the federal constitution doesn't cover, or expand rights of the federal constitution, including voting rights,[24] victims'

20. *See, e.g.*, Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 132 HARV. L. REV. 811, 812 (2018)

21. *See* MICHAEL S. ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 77 (Carlina Academic Press 2d ed. 2016) ("The Constitution creates a system of shared power, both horizontally (among the legislative, executive and judicial branches) and vertically (between the federal and state governments). The horizontal division of powers is referred to as separation of powers. The vertical division of power is called federalism.").

22. *See* Kansas v. Colorado, 206 U.S. 46, 46 (1907).

23. *See* McCulloch v. Maryland, 17 U.S. 316, 316 (1819).

24. *See e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 89 (2014); Michael T. Morley, *Rethinking the Right to Vote under State Constitutions*, 67 VAND. L. REV. 189, 190 (2014).

rights,[25] the right to bear arms,[26] the right to education,[27] equal rights amendments,[28] and maintaining healthy environments.[29]

State constitutions are historical artifacts and active legal frameworks shaping governance. They have evolved alongside the nation, serving as historical documents that vividly reflect the democratic practices of their time. These localized expressions of popular sovereignty connect us to the historical context and capture the essence of American democracy. For instance, principles of justice trace back to the Magna Carta, as seen in provisions for "open courts" and guarantees of timely remedies.[30] Many state constitutions also enumerate inalienable rights, including "life, liberty, and the pursuit of happiness,"

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25. *See* ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. 1, § 28; COL. CONST. art. II, § 16a; CONN. CONST. art. I, § 8b; FLA. CONST. art. I, § 16(b); GA. CONST. art. I, § 1, para. XXX; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. art. XLVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28.

26. *See* Quinn Yeargain, *The State Constitutional Right to Bear Arms After Rahimi*, STATE COURT REPORT (Aug. 5, 2024), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-rights-bear-arms-after-rahimi. ("Virtually every state in the country has an explicit protection of the right to keep and bear arms in its constitution. Only California, Maryland, Minnesota, New Jersey, and New York lack such a provision. Yet the scope of these rights, as well as the contexts in which they were adopted, vary significantly. The number of state constitutions *without* rights to bear arms has not changed significantly over the course of American history; instead, as new states were admitted to the Union and convened constitutional conventions, these rights were often included in the new constitutions.").

27. *See* FLA. CONST. art. IX, § 1(a) ("The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.").

28. *See* Alicia Bannon & Amanda Powers, *Want Gender Equality? Don't Overlook State Constitutions*, BRENNAN CTR. FOR JUST. (Aug. 30, 2022), https://www.brennancenter.org/our-work/analysis-opinion/want-gender-equality-dont-overlook-state-constitutions ("We found that 21 states have comprehensive Equal Rights Amendments in their constitutions, explicitly barring the denial of equal rights under the law on the basis of sex. Six additional states have constitutional provisions that prohibit gender discrimination in certain circumstances.")

29. *See* HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. art. XLIX; MONT. CONST. art. IX, § 1; N.Y. CONST. art. 1, § 19; PA. CONST. art. 1, § 27.

30. *See* OKLA. CONST. art. II, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, **denial, delay, or prejudice**.") (emphasis added).

echoing the natural rights espoused in the Declaration of Independence.[31] Constitutions, like the ones in Montana and Puerto Rico, have an inviolable human dignity clause in their Bill of Rights, echoing international rights influence in their charters.[32] The earliest state constitutions from the Founding Era, such as those of Massachusetts, New Hampshire, and Vermont, have endured and continue to influence governance.[33]

States play a crucial role as laboratories of democracy across various policy areas, contributing to the evolution of American governance.[34] This is particularly evident in the functioning democracy itself. During the Jacksonian and Antebellum eras, states introduced measures to safeguard legislative processes as voting rights expanded. These included the single-subject rule,[35] public purpose requirements,[36] and bans on special legislation.[37] Surviving elements from this period were further developed in Reconstruction Era constitutions, which enhanced executive power at the expense of legislative bodies.[38] The Progressive Era introduced additional reforms, such as

31. *See* Anthony B. Sanders, *Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees*, SSRN (Aug. 2, 2024), https://ssrn.com/abstract=4913917 (noting that 2/3 of constitutions have an enumerate inalienable rights provision in their state constitution); *see also* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1 (1997); Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. REV. 375 (2009).

32. *See* P.R. CONST. art. II, § 1.; MONT. CONST. art. II, § 4; *see also* Mathew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana's Constitution's "Dignity Clause" with Possible Applications*, 61 MONT. L. REV. 301 (2000); José David Rodríguez González, *Human Dignity and Proportionate Punishment: The Jurisprudence of Germany and South Africa and its Implications for Puerto Rico*, 87 REV. JUR. U. P.R. 1179 (2018*)*; Carlos E. Ramos González, *La Inviolabilidad de la Dignidad Humana: Lo Indigno de la Búsqueda de Expectativas Razonablesde Intimidad en el Derecho Constitucional Puertorriqueño*, 45 REV. JURIDICA U. INTER. P.R. 185 (2011); José Julián Álvarez González, *La Dignidad como Derecho Independiente*, 45 REV. JURIDICA U. INTER. P.R. 205 (2011).

33. *See generally* MASS. CONST. (ratified in 1780); N.H. CONST. (ratified in 1788); VT. CONST. (ratified in 1793).

34. *See generally, e.g.*, JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (Oxford Univ. Press 2022).

35. *See, e.g.*, OR. CONST. art. IV, § 20.

36. *See, e.g.*, WIS. CONST. art. VIII, § 7.

37. *See, e.g.*, NEV. CONST. art. IV, § 20.

38. Reconstruction-era constitutional changes were influenced by the need for strong governance to enforce new civil rights protections, which often enhanced executive authority. *See, e.g.*, ROBERT SPITZER, PRESIDENT AND CONGRESS: EXECUTIVE HEGEMONY AT THE CROSSROADS OF AMERICAN GOVERNMENT (Temple Univ. Press 1992); PAMELA BRANDWEIN, RETHINKING JUDICIAL SETTLEMENT OF RECONSTRUCTION (Cambridge Univ. Press 2014).

creating special regulatory agencies to oversee industries and the establishment of positive rights to education and welfare.[39] By the early twentieth century, state constitutions had also begun to glorify the practice of direct democracy, including mechanisms for amending the Constitution itself.[40]

The challenge lies in rediscovering a shared civic vocabulary rooted in American principles and a common forum for democratic practices. State constitutions articulate this vocabulary and structure these forums. Each state is an essential element of our federal political system, offering a platform for political mobilization that can either propel or restrain national progress. While it is easy to view states as lagging on critical issues like separation of church and state and LGBTQ rights, many states have also pushed back against the federal government on these matters. For instance, Pennsylvania resisted the Fugitive Slave Act,[41] Hawaii was an early pioneer in exploring marriage equality,[42] and the states are currently fighting abortion restrictions after the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*.[43] National progress often stems from deliberation and action at the state level.

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39. *See, e.g.*, Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057 (1993); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998); Justin R. Long, Comment*, Enforcing Affirmative State Constitutional Obligations and* Sheff v. O'Neill, 151 U. PA. L. REV. 277 (2002).

40. *See* Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1 (Bowler et al. eds., Ohio State Univ. Press 1998) ("Direct democracy devices such as the initiative, referendum, and recall were adopted by many states during the Progressive Era, a period of radical redesign and reform for many American political institutions. The unique institutions emerging from this era were expected to give citizens a greater voice in state-level policy making and weaken the hold of wealthy interests over state legislatures.").

41. *See* Prigg v. Pennsylvania, 41 U.S. 539, 625–26 (1842) (holding that the Fugitive Slave Act of 1793 precluded a Pennsylvania state law that prohibited Blacks from being taken out of the free state of Pennsylvania into slavery); *see also* Jeffery M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of* Prigg v. Pennsylvania, 123 PENN STATE L. REV. 103 (2018).

42. *See* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (denying marriage licenses to same-sex couples constituted discrimination based on sex and was therefore subject to strict scrutiny under the Hawai'i State Constitution). This ruling did not immediately legalize same-sex marriage, but it did set the stage for a significant legal and political battle over the issue in Hawaii and across the United States. The case was pivotal in advancing the discussion and legal considerations regarding same-sex marriage rights in America.

43. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). Abortion rights are being saved at the state level after the Supreme Court's decision in *Dobbs.*

Studying State Constitutional Law is crucial because:

1. It helps to understand the foundations of State Government.[44]
2. Enhances the legal practice.[45]
3. Encourages civic engagement.[46]
4. Promotes legal innovation.[47]
5. Preserves legal history.[48]
6. Supports state judicial review.[49]

See Hannah Ledford, *Direct Democracy is Saving Abortion Rights. Conservatives Want it Gone*, THE HILL (Aug. 31, 2023, 9:30 AM), https://thehill.com/opinion/civil-rights/4178935-direct-democracy-is-saving-abortion-rights-conservatives-want-it-gone/; Erin Geiger Smith & Betsy Zalinski, *Where Abortion Rights Will be on the Ballot in 2024*, STATE CT. REPORT (Sept. 13, 2024), https://statecourtreport.org/our-work/analysis-opinion/where-abortion-rights-could-be-ballot-2024.

44. By studying state constitutional law, scholars and legal professionals can understand how state governments function independently from the federal system and what design and functions their representatives have in their state. *See* T. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 RUTGERS UNIV. L. REV. 1145 (2021) (arguing that the creation of lieutenant governorships and the shift away from legislative leaders as gubernatorial successors represent significant steps towards making the process more democratic and also highlighting that this democratization is incomplete.); T. Quinn Yeargain, *Democratizing Gubernatorial Selection*, 14 NE. UNIV. L. REV. 1 (2022) (exploring modern reforms like top-two primaries and ranked-choice voting as potential avenues to democratize the selection of governors further, advocating for continuous efforts to enhance democratic legitimacy in gubernatorial elections across the country).

45. Lawyers specializing in state constitutional law can provide more informed counsel and representation, particularly in cases involving constitutional challenges, governmental powers, and civil liberties. *See, e.g.*, Jeffrey S. Sutton, *Why Teach—and Why Study—Constitutional Law*, 34 OKLA. CITY UNIV. L. REV. 165 (2009) (noting the significant lack of focus on state constitutional law in law school curricula and how this neglect leads to a lack of awareness and expertise among new lawyers, undermining their ability to fully leverage state constitutions in legal practice).

46. A knowledgeable citizenry is fundamental to the vitality of a democracy. Individuals can enhance their understanding of government and rights by delving into state constitutional law. This knowledge enables citizens to participate more effectively in the political process, advocate for constitutional reforms, and demand accountability from their state officials. Civic engagement informed by a grasp of state constitutional law can foster more responsive and accountable governance.

47. State constitutional law is constantly evolving to address contemporary legal issues. From debates over abortion and cannabis legalization to digital privacy and environmental protection challenges, state constitutions often serve as the battleground for critical legal and societal issues. Studying state constitutional law enables legal professionals and scholars to stay abreast of these developments and contribute to ongoing legal discourse and reform.

48. State constitutions are historical documents that reflect each state's unique legal and cultural heritage. Studying these documents provides insights into state governance's historical context and evolution. This historical perspective is invaluable for understanding current legal frameworks and preserving the legal traditions that shape state identities. *See, e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1193–96 (2022).

49. *See* J.R. Saylor, Note, *Judicial Review Prior to* Marbury v. Madison, 7 SW. L.J. 88, 89 (1953) ("Another precedent for judicial review was that the state courts

II. CONSTITUTIONAL RIGHTS WITHOUT STATE ACTION REQUIREMENT IN SUITS AGAINST PRIVATE PARTIES

A. Direct Action

1. Free Expression on Private Property

The Federal Constitution does not bar private property owners from restricting free speech activities, such as leafletting, at their shopping centers, as such actions are not considered state action.[50] Similarly, most state courts that have examined this issue have determined that state constitutional free speech provisions do not prevent private property owners from prohibiting leafletting at their shopping centers since the owners' actions are not deemed to involve state action.[51] In contrast, in the absence of federal law, some states have extended their speech protection to apply to private property.

The most notable instances concern privately owned properties accessible to the public, such as shopping malls and private college campuses. State supreme court rulings have affirmed that individuals possess valid constitutional rights to communicate and express themselves freely within shopping malls. State courts in Colorado, Puerto Rico, California, Massachusetts, New Jersey, and Washington have

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had been exercising this power prior to the Federal Convention. Some of the outstanding cases in which legislative acts were declared null and void by state courts are: *Holmes v. Walton* (1780), a New Jersey case; *Commonwealth v. Caton* (1782), a Virginia case; *Trevitt v. Weeden* (1786), a Rhode Island case; and *Bayard v. Singleton* (1787), a North Carolina case.").

50. *See e.g.*, Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 17–18 (1999).

51. *See* Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 720–21, 724 (Ariz. Ct. App. 1988) (noting that neither the free speech clause nor the right to assemble and petition were meant to restraint private practice); Cologne v. Westfarms Assoc., 469 A.2d 1201, 1202 (Conn. 1984) (holding that Connecticut's free speech and petition clauses were not directed at other than government interference); Citizens for Ethical Gov't v. Gwinnett Place Assoc., 392 S.E.2d 8, 9 (Ga. 1990); Cahill v. Cobb Place Assoc., 519 S.E.2d 449, 450 (Ga. 1999); State v. Viglielmo, 95 P.3d 952, 955–56 (Haw. 2004) (noting that there is nothing in the text or history of HAW. CONST. art. I, § 4 to suggest that it afforded more free speech protection to a trespassing picketer than the textually identical First Amendment); City of West Des Moines v. Engler, 641 N.W.2d 803, 804 (Iowa 2002) (holding that the distribution of leaflets in a privately owned shopping mall is not an activity protected as a right of free speech by IOWA CONST. art. I, § 7); Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337, 338–39 (Mich. 1985); Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 548 (S.C. 1991) (upholding injunction against the distribution of leaflets in common areas of the shopping mall, contrary to the mall owners' policy, and rejecting defendant's contention that the mall had become a public forum when the owners permitted it to be used for civic and charitable activities).

held that states may require shopping malls to permit some form of non-disruptive political speech in common areas of the malls.

In *Bock v. Westminster Mall Co.*, the Supreme Court of Colorado relied on its state constitution's free speech provision to hold that political activists had a constitutional right to distribute literature in a privately owned mall.[52] The court determined that the petitioners' rights to distribute political pamphlets and gather signatures in the shopping mall were protected under Article II, Section 10 of the Colorado Constitution.[53] This protection applied explicitly to the mall's public spaces. However, the court's decision was contingent on classifying the mall as a state actor.[54] The court based this classification on three key factors. First, improvements to the surrounding streets and drainage systems were funded through municipal bonds.[55] Second, the mall hosted a police substation that provided city-wide services, with the space offered rent-free by the mall, effectively contributing to municipal functions.[56] Third, the mall featured a prominent government presence, including military recruiting offices and voter registration drives conducted by the county clerk.[57] The court concluded that these elements—financial contributions from the city, the police substation arrangement, and government activities in the mall—demonstrated significant governmental involvement in the mall's operations.

In the case of *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp*., the Supreme Court of New Jersey ruled that regional shopping centers must allow leafleting on social issues.[58] The court held that suburban shopping centers, which compete with downtown business districts, must permit non-disruptive leafleting by the affirmative right of free speech outlined in the New Jersey state

52. *See* Bock v. Westminster Mall Co., 819 P.2d 55, 56 (Colo. 1991).

53. *See id.* ("Within the public spaces of the Mall, Article II, Section 10 protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging non-violent dissent from the federal government's foreign policy toward Central America.").

54. *See id.* at 61 ("Considering all the facts and circumstances underlying the Mall's operation with the preferred liberty of speech in mind, we conclude that there was governmental involvement in this case, most assuredly triggering the protections of Article II, Section 10.").

55. *See id.*

56. *See id.*

57. *See Bock*, 819 P.2d at 62.

58. *See* N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994).

constitution.[59] Either government or private entities cannot unreasonably restrict this right.[60] However, the court noted that its ruling applied explicitly to regional shopping centers and did not decide regarding community shopping centers.[61] It emphasized that the right to leaflet applies exclusively to shopping centers and not elsewhere.

In *Alderwood Associates v. Washington Environmental Council*, the majority of the Washington Supreme Court lifted an injunction prohibiting a group from collecting signatures at a mall.[62] However, only a four-justice plurality agreed that the state's constitution's free speech clause did not require state action.[63] In *Southcenter Joint Venture v. National Democratic Policy Committee*, the court, in a divided decision, rejected the plurality opinion from the *Alderwood* case, ruling that the state's free speech clause does not extend to speech on private property.[64] Nevertheless, the portion of the *Alderwood* decision affirming the right to gather signatures on private property under the state's constitution initiative provision remains unchanged.[65]

In the case of *Batchelder v. Allied Stores Corp.*, the Massachusetts Supreme Court invoked the "free and equal election" provision in the State Constitution to affirm that individuals collecting signatures for ballot access in a public election have the right, as outlined in Article 9 of the Massachusetts Declaration of Rights, to do so reasonably and unobtrusively within the common areas of a shopping mall, as long as the mall owner has established reasonable

59. *See id.* at 779 (" In New Jersey, we have an affirmative right of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech. Were the government ever to attempt to prohibit free speech in the downtown business district, without doubt our Constitution would prohibit it, and in New Jersey when private entities do the same thing at these centers, our Constitution prohibits that too.").

60. *See id.* at 771 ("[T]he State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities.") (citing State v. Schmid, 423 A.2d 615, 628 (1980)).

61. *See id.* at 760 n.1.

62. *See* Alderwood Assoc. v. Wash. Env't Council, 635 P.2d 108, 110 (Wash. 1981).

63. *See id.* at 117.

64. Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm., 780 P.2d 1282, 1285 (Wash. 1989).

65. *See id*. at 1290 ("[T]he holding in *Alderwood* was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners. We expressly do not here disturb that holding.").

regulations.[66] In *Commonwealth v. Hood*, Massachusetts's highest court made clear that its shopping mall case could not be extended to protect the distribution of anti-war leaflets at a private business.[67]

The pivotal case in California is *Robins v. Pruneyard Shopping Center*.[68] In this case, several high school students sued to prevent Pruneyard Shopping Center from obstructing their efforts to gather signatures for a government petition. Pruneyard argued that allowing petitioning on its property was not protected under the California Constitution and should be subject to Pruneyard's regulations as the shopping mall owner, arguing that a different ruling would diminish Pruneyard's property rights.[69] The court held that the California Constitution protects free speech and petitioning within privately owned shopping centers.[70] The court emphasized that Pruneyard's property rights are subservient to society when addressing general welfare issues, such as health, safety, the environment, and aesthetics.[71]

The California Supreme Court, in *Fashion Valley Mall, LLC v. National Labor Relations Board*, ruled in favor of protecting union leafleting at private shopping centers under the state's constitution.[72]

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66. Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1129 (Mass. 1983) (citing MASS. CONST. DECLARATION OF RTS. art. 9).

67. *See* Commonwealth v. Hood, 452 N.E.2d 188, 192 (Mass. 1983).

68. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979); *see also* N. Cal. Newspaper Org. Comm. v. Solano Assocs., 239 Cal. Rptr. 227, 228–29 (Cal. Ct. App. 1994) (affirming labor organizing reasonably conducted in shopping mall centers); Savage v. Trammel Crow. Co., Inc., 273 Cal. Rptr. 302, (Cal. Ct. App. 1990) (extended the principle established in *Robins* to religious expression but allowed the owner to ban all parking loft leaflets) (citing *Robins*, 592 P.2d at 346).

69. *See Robins*, 952 P.2d at 343.

70. *See id.* at 347 ("We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.").

71. *See id.* at 906 ("We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already 'thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society.'") (quoting Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 694 (Cal. 1976)).

72. Fashion Valley Mall, LLC v. Nat'l Lab. Rels. Bd., 172 P.3d 742, 743 (Cal. 2007). Unionized employees of a newspaper publishing company distributed leaflets outside a department store within a mall. *See id.* The mall intervened, citing a policy prohibiting activities encouraging customers to boycott any of its stores. *See id.* In response, the National Labor Relations Board (NLRB) filed a complaint, and an administrative law judge concluded that the mall's actions violated the National Labor Relations Act. *See id.* at 743–44 (citing 29 U.S.C. § 158(a)(1)). The judge observed that the union employees conducted their leafleting courteously and peacefully without causing disruptions or obstructing customers from entering or exiting the store. *Id.* at 744. The NLRB upheld this finding, leading the mall to seek a review of the

In this case, the United States Court of Appeals for the District of Columbia had requested the California Supreme Court's opinion on whether California law allowed a mall to prohibit individuals from encouraging shoppers to boycott a business within the mall. The California Supreme Court concluded that the state's constitution, specifically California Constitution Article 1, Section 2, supports the right to advocate for a boycott within a shopping mall.

The court's decision built upon nearly thirty years of case law, beginning with the landmark *Pruneyard Shopping Center* decision,[73] where the court first established that California's free speech protections are more expansive than those provided by the First Amendment, treating shopping malls as public forums. Despite this precedent, the mall contended that its ban on boycott advocacy was a "reasonable regulation" to ensure that free speech activities would not disrupt standard business operations, as permitted under *Pruneyard*. The mall argued that such speech hindered its primary purpose: facilitating the sale of goods and services.[74]

The Court, however, rejected this reasoning. It determined that the rule banning boycott advocacy was not a neutral regulation of time, place, or manner; instead, it directly targeted speech based on its content and was thus subject to "strict scrutiny."[75] The final decision held that the California Constitution's free speech protections could not protect such a rule.

> Shopping malls may enact and enforce reasonable regulations of the time, place and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall, but they may not prohibit certain types of speech based

NLRB's cease-and-desist order in the D.C. Circuit. *See id.* at 744–45. The United States Court of Appeals subsequently referred the question regarding California constitutional law to the California Supreme Court for clarification. *See id.* at 745.

73. *See Robins*, 952 P.2d at 347.

74. *See Fashion Valley Mall, LLC*, 172 P.3d at 750 ("According to the Mall, it 'has the right to prohibit speech that interferes with the intended purpose of the Mall,' which is to promote 'the sale of merchandise and services to the shopping public.' We disagree.").

75. *See id.* at 751 ("Prohibiting speech that advocates a boycott is not a time, place, or manner restriction because it is not content neutral. The Malls rule prohibiting persons from urging a boycott is improper because it does not regulate the time, place, or manner of speech, but rather bans speech urging a boycott because of its content.").

> upon its content, such as prohibiting speech that urges a boycott of one or more of the stores in the mall.[76]

The California Supreme Court, in *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, recently ruled that free speech rights on private property are restricted to areas where such activities do not disrupt the usual business operations.[77] In this case, a union conducted picketing at a grocery store, chosen because the store employed nonunion workers without a collective bargaining agreement. The picketing took place near the only entrance to the store, with union members distributing flyers within five feet of this entryway.[78] Thus, they effectively used the walkway right in front of the store for their demonstrations. The grocery store sought a court order to stop the picketing, arguing that the union's actions did not qualify as free speech within a public forum as interpreted in the *Pruneyard* case. The California Supreme Court sided with the store, determining that the reasoning from *Pruneyard* did not apply in this instance.

> [The reasoning in *Pruneyard* i]s most apt in regard to shopping centers' common areas, which generally have seating and other amenities producing a congenial environment that encourages passing shoppers to stop and linger and to leisurely congregate for purposes of relaxation and conversation. By contrast, areas immediately adjacent to the entrances of individual stores typically lack seating and are not designed to promote relaxation and socializing. Instead, those areas serve utilitarian purposes of facilitating customers entrance to and exit from the stores and also, from the stores' perspective, advertising the goods and services available within. Soliciting signatures on initiative petitions, distributing handbills, and similar expressive activities pose a significantly greater risk of interfering with normal business operations when those activities are conducted in close proximity to the entrances and exits of individual stores rather than in the less heavily trafficked and more congenial common areas. Therefore, within a shopping center or mall, the areas outside individual stores' customer entrances and exits, at least

76. *Id.* at 870.

77. Ralphs Grocery Co. v. United Food & Com. Workers Union Loc. 8, 290 P.3d 1116, 1118 (Cal. 2012).

78. *See id.* at 1119.

> as typically configured and furnished, are not public forums under this Court's decision in *Pruneyard*.[79]

In *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, a resident of a cooperative apartment complex sought permission to distribute campaign materials within the building as part of his run for a seat on the Board.[80] The Board denied this request, referencing a "House Rule" prohibiting solicitation and distributing written materials. The resident then filed a lawsuit, arguing that his free speech rights were being infringed. The New Jersey Supreme Court ruled in his favor, noting that New Jersey's Constitution provides broader protections, unlike the First Amendment—which applies only to government actions. It prohibits government restrictions on free speech and guards against excessively restrictive or oppressive conduct by private entities in specific situations.[81]

In *Empresas Puertorriqueñas de Desarrollo, Inc. v. Hermandad Independientes de Empleados*, the Supreme Court of Puerto Rico held that free speech right to protest in a private shopping mall was available regardless of the owner's wishes.[82] The case concerned whether a protest demonstration could be held in a privately owned shopping center.[83] The court determined that the Puerto Rico Constitution offers more extensive protection for freedom of speech than the First Amendment.[84] Furthermore, the court concluded that large privately owned shopping centers inviting the public, offering government

79. *Id.* at 1120–21.

80. *See* Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 251 (N.J. 2014).

81. *See id.* at 254 ("As this Court explained in Schmid, the New Jersey Constitution bars the government from abridging free speech and also protects "against unreasonably restrictive or oppressive conduct on the part of private entities" in certain circumstances."); *Id* at. 260 ("On balance, we find that the restriction on Dublirer's right to disseminate his written materials to neighbors is unreasonable. Dublirer's right to promote his candidacy, and to communicate his views about the governance of the community in which he lives, outweigh the minor interference that neighbors will face from a leaflet under their door. In short, Dublirer's right to free speech outweighs the Board's concerns about the use of the apartment building. We therefore find that the Board's House Rule violates the free speech guarantee in New Jersey's Constitution.").

82. *See* Empresas Puertorriqueñas de Desarrollo, Inc. v. Hermandad Independiente de Empleados Telefónicos*,* 150 D.P.R. 924, ¶ 3 (P. R. 2000).

83. *See id.* at ¶ 1("We must determine the tenability of a preliminary injunction to prohibit some protest demonstrations staged on the premises of a privately held shopping center without the owner's authorization.").

84. *See id.* at ¶ 15–16 ("Thus, on previous occasions we have stated that our Constitution is of broader make than the United States Constitution with respect to rights such as . . . [the] freedom of expression.").

services, and hosting community events are equivalent to traditional public forums. Consequently, the owners of shopping centers cannot wholly prohibit free speech but can impose reasonable restrictions on the time, location, and manner of expression.[85] The court relied on two legal sources to support its decision. First, it considered the international and worldwide nature of our constitution. Second, it looked at state constitutional trends where free speech was permitted in private shopping malls.[86]

The other notable instance concerning private property accessible to the public is private college campuses. In *Commonwealth v. Tate*, the Supreme Court of Pennsylvania held that the free speech clause of the state constitution was broader than its federal counterpart.[87] Thus, the free speech clause afforded a defense from a prosecution based on a non-disruptive use of a private campus for a political or speech activity.[88] In *State v. Schmid*, the Supreme Court of New Jersey also held that the free speech clause of its constitution afforded a defense for a prosecution of trespassing.[89] Both opinions treated college campuses as quasi-public entities for the purposes of expression.[90]

2. Right to Privacy Invasion by Private Actors

The right to privacy under state constitutions embraces at least three distinct types of interests: 1) the right to be free of unreasonable government (or, sometimes, private) surveillance; 2) the right to prevent accumulation or dissemination of certain kinds of information;

85. *See id.* at ¶ 24.

86. *See id.* at ¶ 11–15.

87. *See* Commonwealth v. Tate, 432 A.2d 1382, 1387 (Pa. 1981).

88. *See id.* ("It is well settled that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution and that the rights so guaranteed may be more expansive than their federal counterparts.") (citing Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 80–82 (1980)).

89. *See* State v. Schmid, 423 A.2d 615, 633 (N.J. 1980).

90. *See id.* at 630 ("Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.").

and 3) the right to make choices about intimate personal or family issues free of state coercion.

In the constitutions of one group of five states and a territory comprising Alaska, California, Florida, Hawaii, Montana, and Puerto Rico, privacy is both expressly enumerated as an individual right and as a matter of structure, separated from related protections such as the prohibition of unreasonable search and seizures. Puerto Rico's approach is unique within this group as it characterizes privacy by stating, "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."[91] California's approach is also unique in characterizing privacy as an "inalienable right," having been added to an old clause identifying other inalienable rights.[92] Alaska,[93] Florida, Hawaii,[94] and Montana[95] place the right to privacy in an independent, free-standing clause. Florida's, the most recent and the most detailed, provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be constructed to limit the public's right of access to public records and meetings as provided by law.[96]

Some state constitutions have provisions similar to the Fourth Amendment of the U.S. Constitution, which protects against unreasonable searches and seizures.[97]

Courts have recognized a constitutional right to privacy in states without explicit provisions. For example, in *Jegley v. Picado*, the Supreme Court of Arkansas held that Arkansas has a strong tradition of

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91. P.R. CONST. art. II, § 8.

92. *See* CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among those rights are enjoying and defending life and liberty, acquiring, possessing, protecting property, and pursuing and obtaining safety, happiness, and privacy.") The voter initiative in 1972 added the word "privacy," which also replaced "people" with the original "men," the language of §1 that dates from the earliest constitutions in 1849.

93. *See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed. The legislature should implement this section.").

94. *See* HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without showing a compelling state interest. The legislature should take affirmative steps to implement this right.").

95. *See* MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a society and shall not be infringed without the showing of a compelling state interest.").

96. FLA. CONST. art. I.

97. *See* FLA. CONST. art. 1, § 12; HAW. CONST. art. 1, § 7; ILL. CONST. art. 1, § 6; LA. CONST. art. 1, § 5; S.C. CONST. art. 1, § 10.

protecting individual privacy, and the fundamental right to privacy is guaranteed to the citizens of Arkansas.[98] Similarly, in *Powell v. State*, the Georgia Supreme Court held that there is an implicit right to privacy, stating that "Georgia citizens have a 'liberty of privacy' guaranteed by the Georgia constitutional provision, which declares that no person shall be deprived of liberty except by due process of law."[99] In *Commonwealth v. Wasson*, the Supreme Court of Kentucky stated that "[t]he right to privacy has been recognized as an integral part of the guaranteed liberty in our 1891 Kentucky Constitution since its inception."[100] In the case of *Jarvis v. Levine*, the Minnesota Supreme Court ruled that the right to privacy arises from a social compact clause.[101] In *Right to Choose v. Byrne*, the New Jersey Supreme Court ruled that the constitutional right to privacy is one of the inalienable and natural rights of the state constitution.[102] In *Doe v. Maher*, the Connecticut Supreme Court ruled that the right to privacy is part of the state constitution's preamble.[103]

Mississippi acknowledges a right to privacy, or "autonomous bodily integrity," in common law. This right is additionally constitutionally recognized by Mississippi Constitution Article III, Section 32, which asserts: "The listing of rights in the constitution shall not be interpreted to deny or disparage others retained by and inherent in the people."[104]

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98. *See* Jegley v. Picado, 80 S.W.3d 332, 349–50 (Ark. 2002).

99. Powell v. State, 510 S.E.2d 18, 21 (Ga. 1998) (quoting Pavesich v. New England Life Ins Co., 50 S.E. 68, 71 (Ga. 1905)).

100. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 495 (Ky. 1993).

101. Jarvis v. Levine, 418 N.W.2d 139, 144–48, 150 (Minn. 1988) (holding forcible administration of neuroleptic drugs to non-consenting patients in confinement violates the right to privacy under the state constitution. The right to privacy emanates in part from the Bill of Rights § 1, which provides the government is instituted for the security, benefit, and protection of the people, and in part from § 8, which guarantees remedies in the law for injuries and wrongs.).

102. Right to Choose v. Byrne, 450 A.2d 925, 933 (N.J. 1982) ("By declaring the right to life, liberty and the pursuit of safety and happiness, *Art.* I, *par.* 1 protects the right of privacy, a right that was implicit in the 1844 Constitution."); *see* Greenberg v. Kimmelman, 393 A.2d 294, 304 (N.J. 1985) ("Like its federal counterpart, the New Jersey Constitution does not expressly recognize a right to marry, a right of familial association, or a right to privacy. Previously, however, we have found a right to privacy implicit in article 1, paragraph 1 of the state constitution. That right embraces the right to make procreative decisions, the right of consenting adults to engage in sexual conduct, the right to sterilization, and even the right to terminate life itself.").

103. Doe v. Maher, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

104. *See* In re Brown, 478 So. 2d 1033, 1039–40 (Miss. 1985) (right to refuse medical treatment); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 666 (Miss. 1998) (right to choose abortion).

In some states, courts have extended the right to privacy to protect against intrusion by private parties. In Puerto Rico, the right to privacy, with the right to human dignity[105] and the right to worker protection[106] apply *ex propio vigore*[107] and can be invoked against private parties.[108] Concerning Section 8 of the Bill of Rights, the Report of Article II Bill of Rights Committee to the Constitutional Convention pointed out that

> "[w]e are dealing here with the inviolability of the person in the fullest and most embracing manner [and that] honor and privacy are values of the individual which deserve full protection not only against threats by other individuals but also against encroachment by the authorities. The formula proposed in Sec. 8 covers both aspects . . . The inviolability of the person extends to everything necessary for the development and expression of the same."[109]

In *Succecion Victoria v. Iglesia Pentecostal*, the court weighed a church's fundamental right to freely exercise its religious practices against the right to privacy and peaceful enjoyment of a family's home.[110] The court found that the church's activities inhibited the family's ability to enjoy their property adequately.[111] The court held, favoring the right of privacy:

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105. *See* P. R. CONST. art. II, § 1 ("The dignity of the human being is inviolable . . . .").

106. *See* P. R. CONST. art. II, § 16.

107. *See "Ex propio vigore" Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ex%20propio%20vigore (last visited May 5, 2025) (Ex propio vigore means "of its own force").

108. Lopez Tristani v. Maldonado, 168 D.P.R. 838, 850 (P.R. 2006)

109. 4 *DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE* 2566–67 (1951).

110. La De Vict. v. De Dios Pentecostal, 102 D.P.R. 20, 35 (P.R. 1974) ("This case presents a controversy between two fundamental rights, which already prior to their inclusion in the context of the constitutions of free nations, were considered natural rights: religious freedom Art. II, Sec. 3 of the Constitution of the Commonwealth of Puerto Rico); and the right to life, liberty, and the enjoyment of property Art. II, sec. 7 of the same Constitution").

111. *Id.* at 31 ("[T]he freedom of worship written in the Constitution is patrimony of the human being and an inalienable right of man to comply with what he believes to be his obligation of conscience before the mysteries of life, but it is not a license to create a separate, untouchable, and autocratic world capable of impunitively offsetting the sensitive equilibrium of the harmonious entity which is the political society.").

> The vertigo of modern life leaves very few moments free for reflection without which there will not be thorough understanding of the freedoms. The home only, offers those moments of serenity in which, besides dividing his bread with his family, man May lead his existence and that of his family between what is known and the secret which life offers to us. Without those opportunities for serenity and reflection, which gradually have been reduced, Judge Frankfurter has said, the freedom of thought becomes a mockery and without freedom of thought a free society cannot exist. We cannot think of any right of position preferable to the freedom of being and feeling calm at home.[112]

One of the Supreme Court of Puerto Rico's most emblematic decisions is *Arroyo v. Rattan Specialties, Inc.*[113] In the case of *Arroyo*, the plaintiff was a worker employed by Rattan Industries. The company's regulations required polygraph tests with increasing levels of discipline for refusal. The plaintiff was suspended multiple times for refusing to take the polygraph test. The plaintiff filed a lawsuit seeking an injunction and damages. The trial court dismissed his complaint, but Puerto Rico's highest court reversed the dismissal and remanded the case back to the trial court. The Supreme Court of Puerto Rico ruled that the right to dignity and personal integrity are fundamental constitutional rights that can be enforced between private parties. They held that forcing employees to take polygraph tests violates these fundamental constitutional rights in the absence of a compelling interest.[114]

The employer's property rights did not justify this intrusion. The court also held that

> [w]hen a person looking for a job agrees to submit to the polygraph test required by the employer, it may not be inferred that the job applicant voluntarily waived his right of privacy, particularly if such waiver becomes a

112. *Id.* at 31–32.

113. Arroyo v. Rattan Specialists, Inc, 117 D.P.R. 35, 43 (P.R. 1986).

114. *Id.* at 72–73 ("Regardless of the degree of reliability that the polygraph test could reach, its intrusion upon the mind of the human being, with his thoughts, is such that he loses the freedom to control the disclosure of his own thoughts. This encroachment upon man's privacy can only be tolerated in the absence of less drastic means for protecting compelling State interests, and, even in that case, only in the presence of adequate guarantees that assure that such invasion is limited to what is strictly necessary. Our Constitution guarantees that a part of ourselves may be free from the intrusion of the State and of private citizens.").

> requirement for obtaining a job or for staying in it. The risk of losing a job or not getting one, and the worker's position of disadvantage vis-a-vis his employer's, impair the possibility of a really free and voluntary waiver.[115]

Another essential labor law decision is *Siaca v. Bahia Beach Resort and Golf Club*,[116] in which the Supreme Court held that it violates the right to privacy for an employer to hinder a woman's latency option in the working environment. The plaintiff argued that she had tried multiple times to request a suitable place to extract milk.[117] Each time, the location for extraction changed, and sometimes the sanitation provided was inadequate.[118] The Court ruled that by taking actions that made breastfeeding more difficult and by essentially hindering a working mother who voluntarily breastfeeds from exercising her rights, an employer infringes upon her right to make crucial decisions regarding the upbringing of her newborn.[119] Consequently, the right to privacy, protected by the Puerto Rico Constitution, was violated.[120]

In a case concerning employment and drug testing, the Alaska Supreme Court ruled that the state's 1972 privacy clause does not apply to private actions, as there is no language in the amendment nor any demonstrated intent indicating that it was meant to address actions of private entities.[121] In contrast, California courts, backed by a broader interpretation of the privacy amendment's legislative history,[122] have taken a different stance in some cases, addressing various forms of mandatory drug tests used by employees or job applicants. In two cases, appellate courts concluded that employers' insistence on

115. *Id.* at 72.

116. *See* Siaca v. Bahia Beach Resort and Golf Club, 194 D.P.R. 559 (2016).

117. *See id.* at 585.

118. *See id.*

119. *See id.* at 585–86.

120. *See id.*

121. *See* Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123 (Alaska 1989); Miller v. Safeway, Inc., 102 P.3d 282 (Alaska 2004) (holding that state action was required to pursue cause of action under privacy amendment to the Constitution); Folmsbee v. Tech Tool Grinding & Supply, Inc., 630 N.E.2d 586 (Mass. 1994) (holding that constitutional prohibitions against searches and seizures did not apply to private employer which sought to impose drug testing requirement to employees); Belloumini v. Fred Meyer of Alaska, Inc., 993 P.2d 1009 (Alaska 1999) (holding that absent state action, a private employer is not liable for interference with the constitutional rights of its former employee).

122. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 644 (Cal. 1984) ("In summary, the Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities.").

compulsory random drug testing of current, non-safety employees violated their constitutional right to privacy.[123] In a separate case, the court upheld the employer's practice of requiring a medical exam that screened for the presence of illegal drugs, regardless of whether the job position directly affected safety concerns.[124] Notably, an employee's private dating relationships may also be protected by privacy rights against adverse employer action.[125] California courts have also upheld constitutionally based privacy rights against private schools[126] and other defendants.[127]

B. Tort Action Related to Public Policy

In contrast to direct claims, constitutional interests are sometimes protected against private infringement without the need to discuss the state action doctrine. For example, in a state that recognizes the tort of wrongful discharge as a violation of public policy, the state equal rights amendment prohibiting sex discrimination may be a source of state public policy. This sub-constitutional practice appears more likely to develop in the future.

In *Foley v. Interactive Data Corp.*,[128] the California Supreme Court stated that a private employer might be sued in tort when an employee dismissal breaches a public policy "derived from a statute or a constitutional prohibition."[129] This established principle has been applied in two appellate court cases where it was found that private employers infringed on constitutional privacy rights by mandating

123. *See* Semore v. Pool, 266 Cal. Rptr. 280, 288 (Cal. Ct. App. 1990) (holding that when a private employee is terminated for refusing to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right of privacy); Luck v. S. Pacific Transp. Co., 267 Cal. Rptr. 618, 624 (Cal. Ct. App. 1990) (holding that a computer programmer terminated for refusing a random urine test may recover contract damages for breach of the implied covenant of good faith and fair dealing).

124. *See* Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194, 207 (Cal. Ct. App. 1989) (holding that there was no violation of prospective employee's privacy rights in the company's policy of conditioning job offer on applicant willingness to submit a drug test).

125. *See* Rulon-Miller v. International Business Machines Corp., 208 Cal. Rptr. 524, 526 (Cal. Ct. App. 1984) (employee was terminated for having a romantic relationship with the manager of a rival firm).

126. *See* Porten v. Univ. of S.F., 134 Cal. Rptr. 839, 843 (Ct. App. 1976) (privacy right violated by public school's disclosure of academic records).

127. *See* Chico Feminist Women's Health Ctr. v. Butte Glenn Med. Soc'y, 557 F. Supp. 1190, 1204 (E.D. Cal. 1983).

128. *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

129. *Id.* at 379.

random drug testing for employees whose roles did not involve safety responsibilities. The two cases diverged, however, on whether employees could pursue legal action on grounds of tort law or were limited to contract-based claims.[130] In a separate case, the court addressed job applicants specifically. It upheld an employer's policy of requiring medical examinations, including drug screening, irrespective of whether the position involved safety-related duties.[131]

California's distinct constitutional protection against job discrimination based on sex bolstered a lawsuit brought by female employees against a private employer for discriminatory practices.[132] Additionally, drawing on the constitutional right to petition the government, earlier California cases indicated that private employees might be protected from termination or disciplinary actions due to work-related protests, reflecting a common law adaptation of constitutional principles.[133] Privacy rights in California and Puerto Rico may also shield employees' personal dating relationships from negative employment actions taken by their employers.[134]

Several states support using the state constitution to establish public policy. Oregon was among the first to rule that employees could not face penalties for fulfilling jury duty, as this would violate the constitutional right to a jury trial.[135] In most states where courts

130. *See* Semore v. Pool, 266 Cal. Rptr. 280, 280 (Cal. Ct. App. 1990) (private employee terminated for refusing random drug test can invoke public policy exception to at-will employment doctrine to assert a violation of state constitutional right to privacy); Luck v. S. Pacific Transp. Co., 267 Cal. Rptr. 618, 618 (Cal. Ct. App. 1990) (computer programmer terminated for refusing random urine test may recover contract damages for breach of the implied covenant of good faith and fair dealing).

131. *See* Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Ct. App. 1989) (holding no violation of prospective employee's privacy rights in company of policy or condition job offer on applicant's willingness to submit to a drug test).

132. *See* Rojo v. Kliger, 801 P.2d 373 (Cal. 1990) (documenting history of constitutional bans on gender discrimination as proof that California's public policy is violated by private employer disparagement of equal opportunity).

133. *See* Greene v. Hawaiian Dredging Co., 157 P.2d 367 (Cal. 1945) (holding that an employee's protest of working conditions was not "cause" for termination of his employment contract).

134. *See* Rulon-Miller v. IBM Corp., 208 Cal. Rptr. 524 (Cal. Ct. App. 1984) (employee terminated for having a romantic relationship with the manager of a rival firm); *see also* Belk Arce v. Martínez, 146 D.P.R. 215 (P.R. 1998) (lawyer employee terminated for not informing his law firm that he married another lawyer in the firm).

135. *See* Nees v. Hocks, 536 P.2d 512 (Or. 1975) (awarding compensatory but not punitive damages). Significantly, in *Nees*, the employee's suit was allowed to vindicate a public interest in constitutional jury trials, not only a right personal to the employee. Access to court to file civil suits is also a public interest guarded by the Constitution. *See* Groce v. Foster, 880 P.2d 902 (Okla. 1994) (under the limited public-policy exception to the termination at will doctrine, a wrongful discharge action

acknowledge a public policy exception to at-will employment, the state constitution is a foundation for such policy.[136] Tying the public element of the tort to a written constitution satisfies the courts' needs for clarity and guidance from a democratically created source of such values or policies.

The Ohio Supreme Court established four elements of a tort of wrongful discharge in violation of public policy: 1) the clarity element, that is, that a clear policy existed and was manifested in state or federal constitution, statute or administrative regulation, or common law; (2) the jeopardy element, that is, that dismissing employees under these circumstances would jeopardize the public policy; (3) the causation element, that is, that the plaintiff was dismissed because of conduct related to the public policy; and (4) the overriding justification element, that is, that the employer lacked overriding legitimate business justification for dismissal.[137]

The Idaho Supreme Court has taken a different approach than recognizing a public policy exception to at-will employment. In *Edmondson v. Shearer Lumber Products*, the Court rejected a free speech right as the basis for the public policy element in wrongful discharge claims without state action.[138] The plaintiff was a twenty-two-year employee at Shearer Lumber Products. He was fired because of his continuous "involvement in activities [that] are harmful to the long-term interests of Shearer [Lumber Products]." Justice Kidwell dissented, pointing to the power of employers to coerce agreement with their political aims and thereby undermining a healthy practice of democracy:

> "Allowing employers to terminate employment based on an individual's association and speech regarding public issues that may have little or nothing in connection with the employer's business invites employers to squelch the association, speech, and debate so necessary to our system of government. This is particularly true in the context of the myriad of small Idaho

will lie against an employer who fires an employee for refusing to dismiss a lawsuit against a third party—a customer of the employer-for redress of on-the-job injuries).

136. *See* Palmateer v. Int'l Harvester, 421 N.E.2d 876, 878 (Ill. 1981) ("[P]ublic policy concerns what is right and just what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."); *see also* Brockmeyer v. Dun & Bradstreet, 355 N.W.2d 834, 840 (Wis. 1983) ("The provisions of the Wisconsin constitution initially declared the public policies of this state . . . An employer may not require an employee to violate a constitutional or statutory provision with impunity.")

137. *See* Collins v. Rizkana, 652 N.E. 2d 653, 657–58 (Ohio 1995).

138. *See* Edmondson v. Shearer Lumber Prods., 75 P.3d. 733, 739 (Idaho 2003).

> communities with only one or two prominent employers. Thus, I would hold it against public policy to discharge an employee for constitutionally protected political speech or activities regarding a matter of public concern, provided that such speech or activity does not interfere with the employee's job performance or the business of the employer."[139]

Using state constitutional principles to limit private defendants has roots in common law decisions that predate modern debates on "state action." Some earlier cases addressed the wrongful expulsion of individuals from private organizations for exercising their speech rights.[140]

1. Free Speech and Employment

In *Jones v. Memorial Hospital System*, a Texas Court of Appeals held that an intensive care nurse who was dismissed after publishing an article on the "right to die" could bring a wrongful discharge claim directly under the state constitution.[141] The court introduced a Texas-specific interpretation of state action, concluding that the privately operated hospital acted as a public entity due to its substantial connections to the state, including regulations, receipt of state grants, partnerships with public universities, licensing, and tax-exempt status.[142]

In Massachusetts, a statute allows individuals to bring claims against private entities that interfere with rights protected under the state constitution. In *Redgrave v. Boston Symphony Orchestra, Inc.,* this statute was applied in a complex situation involving the free

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139. *Id.* at 741 (Kidwell, dissenting).

140. *See, e.g.*, Cooper v. Nutley Sun Printing Co., 175 A.2d 639 (N.J. 1961) (constitutional right to bargain collectively enforced); *see also* Zelenka v. Benevolent & Protective Order of Elks, 324 A.2d 35 (N.J. Super. Ct. App. Div. 1974) (member expelled for publishing appeal to integrate fraternal organization stated cause of action; public policy expressed in state's guarantee of free speech outweighed the private interest of the club in restricting public discussion of its policies); *see also* Spayd v. Ringing Rock Lodge, 113 A. 70 (Pa. 1921) (Pennsylvania guarantees of freedom of speech and right to petition required reinstatement of union member expelled for petitioning legislature; these fundamental rights cannot lawfully be infringed by corporations or unincorporated associations, "which function solely by grace of the state.").

141. Jones v. Mem'l Hosp. Sys., 746 S.W.2d 891 (Tex. App. 1998); *see id* at. 893–94 ("We accordingly hold that article I, section 8 of the Texas Constitution constitutes an independent legal basis for a cause of action claiming an infringement of the right of free speech guaranteed by that section of the state constitution.").

142. *Id.* at 895 ("Because we are concerned with the affirmative provisions of the Texas Constitution, rather than first amendment freedoms of the federal constitution, we are not restricted by the same tests used by the federal courts.").

speech rights of both parties in an employment contract.[143] The Boston Symphony Orchestra canceled a performance contract with Vanessa Redgrave after receiving threats of "severe adverse consequences" from individuals opposing her political views.[144] Ms. Redgrave filed a claim under the Massachusetts Civil Rights Act, alleging interference with her rights under both the federal Constitution and several articles of the Massachusetts Constitution. Ultimately, the First Circuit had to resolve this "conflict of rights," concluding that the orchestra held its free speech rights to decide not to perform with Ms. Redgrave.[145] The court accepted the orchestra's argument that proceeding with the performance amidst controversy could compromise the production's artistic integrity.

In California, the Court of Appeals upheld a whistleblower lawsuit against a private medical group. The plaintiffs claimed that the defendant doctors had denied them medical care as retaliation for filing complaints with a state investigative agency regarding healthcare quality at a local hospital. This alleged retaliation violated the plaintiff's constitutional right to petition the government for a redress of grievances.[146]

The Texas Supreme Court dismissed a state constitutional claim filed by the Log Cabin Republicans, a group supporting equal rights for LGBTQ+ individuals, against the Republican Party of Texas.[147] The group had been denied a booth and advertising space at the party's political convention. It sought an injunction, citing state constitutional protections for freedom of speech, equal rights, and "due course of law." The court first examined whether "state action" is required to invoke claims under the Texas Bill of Rights. It concluded that the Texas Constitution primarily aims to restrict government actions rather than private conduct, reasoning that private infringements are generally not within constitutional scope. Since no "state action" was present in this case, the Texas Constitution was found not to govern the internal decisions of a political party. However, it could apply if the party were conducting official elections.

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143. Redgrave v. Bos. Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985), *aff d in part, vacated and remanded in part*, 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989).

144. *Id.* at 906.

145. *See id.* at 904–11.

146. *See* Leach v. Drummond Med. Grp., 192 Cal. Rptr. 650, 659 (Cal. Ct. App. 1983); CAL. CONST. art. I, § 3.

147. *See* Republican Party v. Dietz, 940 S.W.2d 86, 94 (Tex. 1997).

The Nebraska Supreme Court dismissed a wrongful discharge claim against a bank, ruling that the plaintiff needed to demonstrate state action to invoke Nebraska's freedom of speech protections.[148] The plaintiff, a bank teller, was terminated after publicly criticizing a proposed school district merger as a private citizen at a school board meeting. In the termination letter, the bank president noted her remarks had been "negative" about the community and risked the bank's relationships with key clients. The president later testified that Loomis Public Schools, the bank's largest depositor, had expressed discomfort about continuing business with the bank if the plaintiff remained employed following her comments on the merger.

Determining incompatibility in cases involving speech rights can be challenging. In contrast, situations involving demands for equal treatment, such as discrimination claims, may be more straightforward. Generally, an employer has no legitimate property interest in hiring or firing decisions based solely on an employee's gender or race.

2. Sex Discrimination

State constitutions significantly vary in their approaches to equality protections. These include guarantees of equal protection, prohibitions against discrimination based on sex and race, declarations of natural rights, restrictions on unequal privileges and immunities, and combinations of these elements in various forms.

Louisiana, California, Montana, and Puerto Rico's constitutions also include provisions prohibiting certain forms of private discrimination. Louisiana Constitution provides: "In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition."[149] Puerto Rico's Constitution establishes:

> The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be

148. *See* Dossett v. First State Bank, 627 N.W.2d 131, 138 (Neb. 2001); *see also* Miller v. Safeway, Inc., 102 P.3d 282, 284–85 (Alaska 2004) (Alaska Native employee disputed hair length rule of the private employer; state action was required to pursue cause of action under the privacy amendment to Constitution); Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 738–39 (Idaho 2003) (free speech rights accorded by the Idaho Constitution do not apply to the actions of private parties; plaintiff had no cause of action against the private sector employer who terminated him because of the exercise of the employee's constitutional right of free speech).

149. LA. CONST. art. I, § 12.

> made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.[150]

California's Constitution provides, "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."[151] Montana's Constitution establishes that the

> dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[152]

Claims of sex discrimination related to hiring, termination, and promotion are commonly pursued under various civil rights laws. However, claims grounded in the state constitution may offer advantages when applicable. Constitutional claims may provide additional remedies or procedural benefits, such as access to compensatory damages or the right to a jury trial, which may not be available under statutory or common law claims. On the other hand, in states with established statutory or administrative remedies for sex discrimination, constitutional claims on similar grounds might face preemption defenses.[153]

Several case decisions highlight the application of constitutionally based claims of sex discrimination in employment. For instance, in *Peper v. Princeton University Board of Trustees*, the court allowed a female employee to bring a claim under the state constitution against her private university employer, alleging that her promotion had been denied due to her gender.[154] While the New Jersey constitution does not explicitly mention protection against sex discrimination, the court noted that if the plaintiff's allegations were true, she was denied equal

150. P.R. CONST. art. II, § 1.

151. CAL. CONST. art. I, § 8.

152. MONT. CONST. art. II, § 4.

153. *See, e.g.*, Badih v. Myers, 43 Cal. Rptr. 2d 229, 232–33 (Cal. Ct. App. 1995).

154. *See* Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465, 468 (N.J. 1978).

rights to acquire property—rights that Article I, section 1 guarantees to "all persons."[155]

A landmark ruling by the California Supreme Court confirmed that female employees could pursue a common law claim against a private employer for sexual harassment and wrongful termination based on the California constitution.[156] This decision overcame defenses of statutory preemption and arguments regarding the need to exhaust administrative remedies. The court concluded that (1) the state Civil Rights Act did not replace common law claims related to employment discrimination; (2) employees were not required to exhaust administrative remedies under this statute before seeking judicial relief for nonstatutory claims; and (3) employment-related sex discrimination could support a claim for wrongful discharge in violation of public policy.

The private employer contended that the California constitution's equal opportunity protections did not apply to it. However, the court dismissed this defense, clarifying that even if Article I, section 8, were limited to state action, it nonetheless embodies a fundamental public policy against employment discrimination—whether public or private—based on sex, including sexual harassment.[157] A federal court in California later applied this rationale to a claim of pregnancy discrimination under the state constitution.[158]

The California constitutional provision applied in these cases also prohibits racial discrimination in employment. In one case, a white male employee was allowed to assert a claim based on public policy against discrimination after he alleged he was terminated for protesting the underrepresentation of women and ethnic minorities in his workplace.

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155. *See* N.J. CONST. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").

156. Rojo v. Kliger, 801 P.2d 373, 375 (Cal. 1990).

157. *See id.* at 389 ("For our purposes here, however, whether article I, section 8 applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental public policy against discrimination in employment—public or private—on account of sex.").

158. *See* Merrell v. All Seasons Resort, Inc., 720 F. Supp. 815, 819 (C.D. Cal. 1989).

C. State Action and Search by Private Actors

The Fourth Amendment serves as the principal legal limitation on police authority. Applied to the states through the Fourteenth Amendment's Due Process Clause, it safeguards against misuse of state police power. The Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[159]

According to the state action doctrine, the U.S. Constitution governs only actions by government officials or those functioning under the "color of law."[160] In *Lugar v. Edmondson Oil Co.*, the U.S. Supreme Court established a two-part test to determine state action.[161] (1) The constitutional violation must result from "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[162] When the actor is a government official or employee, identifying them as a state actor is usually straightforward; however, it can be more complex for private individuals. Courts have determined that private actions can meet the threshold of state action in certain situations.

Determining when private actions must adhere to constitutional standards has been described as a "conceptual disaster area,"[163] with even U.S. Supreme Court Justices acknowledging that their decisions on this issue lack consistency.[164] However, the Court has offered some guidance by identifying seven approaches to evaluate whether private conduct can be attributed to the state.[165] Among these, four primary

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159. U.S. CONST. amend. IV.

160. *See* Civil Rights Cases, 109 U.S. 3, 11–13 (1883); *see also* Richard H.W. Maloy, *"Under Color of"- What Does It Mean?*, 56 MERCER L. REV. 565, 565–66 n.2 (2005).

161. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

162. *Id.* at 937.

163. *See* Charles L. Black, Jr., *Foreword* to *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

164. *See Edmondson*, 500 U.S. at 632 (O'Connor, J., dissenting).

165. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001).

tests are commonly applied in lower courts: (1) the public function test, (2) the joint action test, (3) the state compulsion test, and (4) the nexus test.[166]

The public function test identifies state action when a private entity performs duties traditionally and exclusively reserved for the government, such as conducting elections or exercising eminent domain.[167] The joint action test applies when private parties collaborate or cooperate with public officials.[168] The state compulsion test assesses whether the government exerted coercive power or significantly encouraged the private entity's actions.[169] Lastly, the nexus test examines whether there is a sufficiently close connection between the state and the private party's conduct to treat the latter's actions as those of the state itself.[170]

Under the state action doctrine, the U.S. Constitution's primary regulatory provisions, including those governing police conduct, generally do not extend to private actors such as private security personnel. In *Burdeau v. McDowell*, the U.S. Supreme Court ruled that the Fourth Amendment does not apply to searches or seizures conducted by private individuals.[171] However, this ruling does not grant blanket immunity to private searches from constitutional scrutiny; if the government is involved in or initiates a private search, the state action requirement is satisfied, and the Fourth Amendment applies.[172]

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166. *See* David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in Courts*, 16 CONN. PUB. INT. L.J. 221, 227 (2017).

167. *See* Jackson v. Metro. Co., 419 U.S. 345, 352 (1979) ("We have, of course, found state action present in the exercise by private entities of powers traditionally exclusive to the State."); *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157–58 (1978) (holding that state action arises when a private actor engages in an "exclusively public function").

168. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."); *see also* Dennis v. Sparks, 449 U.S. 24, 27–28 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting see [sic] 'under color' of law for purposes of § 1983 actions.").

169. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

170. *See Jackson*, 419 U.S. at 351; *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.").

171. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

172. *See* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (holding that the Fourth Amendment did not apply to a search or seizure by a private party who

The Supreme Court has yet to definitively address when, for example, private police can be classified as state actors, leaving federal appellate courts to navigate this issue using established legal tests.[173] Federal courts have sometimes deemed private police state actors when granted full police powers under the state compulsion or nexus theories.[174] However, these courts more frequently decline to classify private police as government agents when their functions are limited to police-like activities, avoiding an automatic extension of Fourth Amendment protections.[175]

The private search doctrine, established in *United States v. Jacobsen*, operates similarly to the state action doctrine.[176] According to this principle, once a private individual conducts an initial search independently of the government, authorities may repeat that search without violating the Fourth Amendment, even if such a search typically requires compliance with constitutional protections.[177] In *Jacobsen*, the U.S. Supreme Court determined that there is no meaningful difference between the government using information obtained from

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was not acting as an "'instrument' or agent" of the government); *see also* Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities.").

173. *See Flagg Bros.*, 436 U.S. at 163–64 (1978) ("We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [including police protection] and thereby avoid the strictures of the Fourteenth Amendment."); *see also id.* at 163 n.14 (expressing no opinion on the "constitutional status of private police forces.").

174. *See, e.g.*, Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 630 (7th Cir. 1999) ("[N]o legal difference exists between a privately employed special officer with full police powers and a regular Chicago police officer."); *see also* Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980) ("[T]he delegation of police powers, a government function, to the campus police buttresses the conclusion that the campus police act under color of state authority."); Romanski v. Detroit Ent., L.L.C., 428 F.3d 629, 640 (6th Cir. 2005) (holding that a licensed private security police officer was a state actor because the officer had plenary arrest powers).

175. *See* United States v. Garlock, 19 F.3d 441, 443 (8th Cir. 1994); *see, e.g.*, *id.* at 443–44 ("[T]he mere fact that an individual's job involves the investigation of crime does not transform him into a government actor."); *see also* Johnson v. LaRabida Childs. Hosp., 372 F.3d 894, 897 (7th Cir. 2004) (holding that a hospital security guard was not a state actor because he "was not expected or authorized to carry out the functions of a police officer."); *see also* Boykin v. Van Buren Twp., 479 F.3d 444, 452 (6th Cir. 2007) ("[A] private security guard, who merely places a call to police that a suspected shoplifting has occurred, but in no way directly confronts the suspect, can be deemed a state actor.").

176. *See* United States v. Jacobsen, 466 U.S. 109 (1984).

177. *See e.g.*, Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J.F. 326 (2017).

a private party and physically searching a container that that party had already searched.[178]

The Court reasoned that the federal agents' subsequent search did not violate any privacy interest that the private search had not already compromised.[179] By eliminating an individual's reasonable expectation of privacy,[180] a private search allows a subsequent government search to proceed without needing a warrant or other Fourth Amendment safeguards.[181] However, this doctrine includes limitations: the government cannot initiate or be involved in the original private search,[182] and its subsequent search cannot exceed the scope of the private search.[183] The state action and private search doctrines outline the constitutional boundaries of permissible searches.

State courts have generally aligned with the U.S. Supreme Court in recognizing that searches conducted independently by private individuals are not subject to state constitutional provisions. Consequently, evidence acquired by these individuals and provided to law enforcement is typically admissible in criminal prosecutions. For instance, the Montana Supreme Court initially enforced an exclusionary rule regarding evidence obtained from private searches, citing the state's explicit constitutional protection of "privacy" and its prohibition of unreasonable searches.[184] However, the Court later overruled the decision.[185] Similarly, in Arkansas, searches conducted by private parties without direction from law enforcement are deemed outside the

178. *See id.* at 329.

179. *See Jacobsen*, 466 U.S. at 126.

180. *See* Expectation of Privacy, BLACK'S LAW DICTIONARY (11th ed. 2019). Expectation of privacy refers to "a belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing. To suppress a search on privacy grounds, a defendant must show the existence of the expectation and that the expectation was reasonable." *Id.* (Requisitos para que una persona se encuentre con uan expectativa razonable de intimdiad bajo la jurisprudencia de Puerto Rico.)

181. *See* MacKie-Mason, *supra* note 177, at 326.

182. *See Jacobsen*, 466 U.S. at 113.

183. *See id.* at 115–16.

184. *See* State v. Hyem, 630 P.2d 202 (Mont. 1981) (evidence obtained by the manager of a storage facility by breaking into the defendant's storage unit violated constitutional rights and may not be admitted in evidence in a criminal trial).

185. *See* State v. Long, 700 P.2d 153 (Mont. 1995) (cannabis plants discovered by the landlord in the rented home; privacy section of the state constitution, Art. II § 10 contemplated privacy invasion only by state action); *see also* State v. Christensen, 797 P.2d 893 (Mont. 1990) (extending *Long* even when a private person's felonious conduct leads to information that is shared with the police and forms a basis for issuance of a search warrant, the state constitution is not violated and evidence seized under the warrant need not to be excluded).

purview of the state constitution.[186] However, some states may treat private security personnel differently.[187]

The fundamental principle is that constitutional rights are activated only when a private individual acts in conjunction with or under the direction of government authorities.[188] For example, a murder defendant in Pennsylvania argued that a warrant was needed before his doctor could provide the police with a bullet that had been extracted from him.[189] The Court rejected this argument, highlighting that the doctor made an independent decision to remove the bullet for the

186. *See* Parette v. State, 786 S.W.2d 817 (Ark. 1990).

187. *See* State v. Muegge, 360 S.E.2d 216 (W. Va. 1987) (statements obtained by a privately employed security guard after the defendant had refused to waive his constitutional rights and clearly stated his desire for legal counsel should not have been admitted into evidence; search by guards acting according to statutory authority must fall within an authorized exception to the rule prohibiting warrantless searches under West Virginia Constitution). Muegge was partially overruled, the court later holding that police, not just private, involvement with & suspect must be evident before her statements are considered involuntary and inadmissible under the West Virginia due process clause; *see also* State v. Honaker, 454 S.E.2d 96 (W. Va. 1994); Pueblo v. Benjamín Rosario Igartúa, 129 D.P. R. 1055 (P.R. 1992) (ruling that a search and seizure by a security guard of the Puerto Rico Land Authority was unconstitutional because the official acted outside his legal authority by detaining Rosario without probable cause under Puerto Rico's criminal procedure rules).

188. *See* Puerto Rico v. Ramírez Lebrón, 123 D.P.R. 391 (P.R. 1989) (holding that private university officials are not bound by the same constitutional constraints as public law enforcement, particularly regarding evidence abandoned in private grounds); Toll v. Adorno, 130 D.P.R. 352 (P.R. 1992) (ruling that in private civil cases, where the government is not a party, evidence obtained illegally by police may be admissible if it does not directly implicate governmental interests, creating an exception to the exclusionary rule in private disputes); State v. Abdouch, 434 N.W.2d 317 (Neb. 1989) (private searches are governed by search and seizure provisions where undertaken jointly with government official); State v. Tucker, 997 P.2d 182 (Or. 2000) (as matter of first impression, provision of Oregon Constitution prohibiting unreasonable searches and seizures will apply it a state officer requests a private person to search a particular place or thing, and the private person acts because of and within scope of the officer's request); State v. Okoke, 745 P.2d 418 (Or. 1987) (where private detoxification center had contracted with county, and was bound by state rules and regulations, a pistol found by employee on a person taken to center involuntarily by police had to be excluded from weapons prosecution); State v. Nemse, 807 A.2d 1289 (N.H. 2002) (refusing to suppress marijuana seized from defendant by college safety and security officers; the state constitution can be triggered either by state action or by agency relationship, but the facts did not support the existence of an agency relationship between the college and police. The college policy concerning confiscating illegal substances did not reveal an understanding that the college would act on the government's behalf or for its benefit when it did so.).

189. *See* Commonwealth v. Johnson, 727 A.2d 1089 (Pa. 1999).

patient's benefit without any prior direction from the government.[190] In another case, a tow truck driver, acting at the request of a state trooper, searched a suspect's vehicle for identification papers and subsequently discovered a gun in a camera case.[191] Because the trooper had not obtained a warrant and the search was conducted at his official request, the weapon was excluded from evidence in the suspect's firearm possession trial.[192]

The legality of evidence obtained by private citizens through unlawful means remains a contentious issue. Numerous state privacy laws restrict individuals from intercepting others' communications without consent.[193] In a notable case, the Washington Supreme Court ruled that evidence obtained by a private citizen who illegally eavesdropped on defendants' telephone conversations was inadmissible for any purpose, including impeachment.[194] Furthermore, any subsequent evidence from a police search of the defendant's residence was also suppressed, as consent for the search had been acquired by exploiting the illegal interception.

Similarly, Texas and Rhode Island laws prohibit using evidence acquired unlawfully by private individuals.[195] However, this prohibition did not extend to a situation where an informant trespassed—disregarding "no trespass" signs—to observe marijuana cultivation on a defendant's property, information that the police subsequently used to

190. *See id.* at 1907–08 ("Sgt. Johnson of the Reading Police requested that if the bullet were removed, he would like to have it. Under these circumstances, where a medical professional has made an independent decision that removal of the bullet was in the best interests of the patient, and where there was no antecedent direction from the authorities to do so, we cannot find the requisite governmental action to support Appellant's claims of violation of his constitutionally-protected interests").

191. *See* State v. Tucker, 997 P.2d 182 (Or. 2000).

192. *See id*. at 185 ("[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request, then Article I, section 9, will govern the search.").

193. *See e.g.*, 2017 Cal. Legis. Serv. § 632 (West); N.Y. PENAL LAW § 250.00 (McKinney 2025)

194. *See* State v. Faford, 910 P.2d 447 (Wash. 1996).

195. *See* TEX. CODE OF CRIM. PROC. ANN. art. 38.23(a) (West 1987) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."); 9 R.I. GEN. LAWS ANN. § 9-19-25 (West 1956) ("In the trial of any action in any court of this state, no evidence shall be admissible where the evidence shall have been procured by, through, or in consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the constitution of the state of Rhode Island.").

obtain a search warrant.[196] The state appeals Court clarified that while the law addresses specific illegal actions by private citizens that infringe upon constitutional or other legal protections, a mere act of trespass does not trigger the statutory exclusionary rule.[197]

In *State v. Von Bulow*, the Rhode Island Supreme Court established stricter protections against searches and seizures involving private actors, ruling that evidence obtained by a private investigator should have been excluded.[198] Claus von Bulow faced prosecution in Rhode Island for allegedly attempting to murder his wife by injecting her with insulin.[199] During the investigation, members of Mrs. von Bulow's family hired a private investigator who searched von Bülow's belongings and discovered a black bag containing prescription drugs, syringes, and vials.[200] The investigator had the items tested by private physicians, and Mrs. von Bulow's son later handed the bag's contents to the Rhode Island State Police, who conducted their analysis.[201] At trial, von Bulow moved to suppress the state's test results, arguing that they were obtained without a warrant.[202]

The Rhode Island Supreme Court overturned the conviction on two key grounds. First, it found that the state's chemical testing of the bag's contents went beyond the scope of the initial private search, violating the Fourth Amendment's warrant requirements.[203] The Court determined that this expansion of the private search doctrine was impermissible without a warrant. Second, the Court relied on state constitutional grounds as an independent basis for its decision.[204] Under Article I, Section 6 of the Rhode Island Constitution, which provides robust privacy protections, the Court concluded that the evidence obtained by the private investigator should not have been admitted.[205] Although subsequent decisions have invoked Article I, Section 6 to suppress evidence beyond what the Fourth Amendment would

196. *See* Carroll v. State, 911 S.W.2d 210, 215 (Tex. App. 1995).
197. *See id.* at 221.
198. *See* State v. Von Bulow, 475 A.2d 995, 1020 (R.I. 1984).
199. *See id.* at 999.
200. *See id.* at 1001–02.
201. *See id.* at 1002–03.
202. *See id.* at 1003.
203. *See Von Bulow*, 475 A.2d at 1017.
204. *See id.* at 1019.
205. *See id.* at 1020.

exclude, the Rhode Island Supreme Court has not since ruled to exclude evidence gathered by private actors.[206]

The ratio decidendi in *Shelley v. Kraemer*—that state enforcement of private discriminatory agreements constitutes state action and hence is subject to constitutional scrutiny—provides a useful grounding for extending protections against private searches and seizures in certain contexts.[207] In *Shelley*, the Court made the point that private parties may be free to engage in conduct which, if committed by a state or one of its subdivisions, would violate constitutional prohibitions. Still, the Constitution becomes applicable when a court or other state actor enforces such private conduct. Similarly, the courts could find, in cases regarding private searches and seizures, that when state mechanisms are utilized either to maintain or reap advantage from such actions—e.g., admitting evidence obtained from a private search in criminal proceedings—those actions should fall within the realm of state action for all intents and purposes of the Fourth Amendment constitutional considerations.

In *Shelley*, a Black family acquired a home in St. Louis that was bound by a racially restrictive covenant.[208] Nearby residents contested the purchase and requested enforcement of the covenant.[209] The U.S. Supreme Court held that the restrictive covenant itself did not violate the Shelley family's rights under the Equal Protection Clause of the Fourteenth Amendment.[210] However, the Court determined that judicial enforcement of such covenants would qualify as state action and would, therefore, violate the family's constitutional rights.[211]

Edmonson v. Leesville Concrete Co., Inc.,[212] like *Shelley*, stands for the proposition that private action can rise to the level of state action when private parties make use of judicial procedures with the "overt, significant assistance of state officials."[213] In *Edmonson*, a Black plaintiff contested the defendant's use of racially discriminatory

206. *See, e.g.*, Pimental v. Dep't of Transp., 561 A.2d 1348, 1353 (R.I. 1989) (holding police roadblocks for drunk driving unconstitutional and requiring the exclusion of evidence obtained); *see also* State v. Barkmeyer, 949 A.2d 984, 996 (R.I. 2008) (refusing to exclude a privately obtained rope because public authorities seized it with consent).

207. *See* Shelley v. Kraemer, 334 U.S. 1, 13–14 (1948).

208. *See id.* at 4–5.

209. *See id.* at 6.

210. *See id.* at 13.

211. *See id.* at 20.

212. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

213. *See id.* at 622 (quoting Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988)).

peremptory challenges during voir dire, asserting that these actions violated the equal protection rights of the excluded jurors.[214] The U.S. Supreme Court determined that a private party's use of peremptory challenges could be attributed to state action based on three key considerations.[215]

First, the Court emphasized that peremptory challenges rely heavily on government involvement and would serve no purpose outside the jury system, which the government solely administers.[216] Second, the Court recognized that jury selection constitutes a traditional government function, as it determines membership in a governmental body.[217] Third, the harm caused by discriminatory peremptory challenges is exacerbated by the fact that they occur within the courthouse, a venue symbolizing the administration of law.[218] The Court further noted that discrimination in jury selection undermines the integrity of the judicial system and obstructs the realization of democratic governance.[219]

In *Shelley*, the U.S. Supreme Court held that judicial enforcement of a private contract could constitute state action.[220] Similarly, State Supreme Courts could interpret the judicial admission of evidence obtained by private actors as state action. The *Shelley* Court acknowledged that the state was not simply refraining from action and allowing private discrimination but was actively providing "the full coercive power of government" to enforce racial discrimination and deny property rights based on race or color.[221] In an analogous manner, when a state court admits unlawfully obtained evidence from a private party, it employs the judiciary's procedural authority to infringe on a defendant's constitutional right to privacy.

Applying the reasoning from *Edmonson*, the admission or exclusion of evidence by private actors is inherently a judicial process that depends on significant and overt government involvement. Without the government's administration of a trial, there would be no procedural framework for admitting or excluding evidence. The second *Edmonson* factor—that the challenged action involves the performance of a traditional government function—also supports this conclusion.

214. *See id.* at 616–17.
215. *See id.* at 621–22.
216. *See id.* at 622.
217. *See Edmonson*, 500 U.S. at 627.
218. *Id.* at 628.
219. *Id.*
220. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).
221. *Id.*

While investigatory actions may involve private and public actors, the adjudication of criminal cases, including decisions about the admissibility of evidence, has traditionally been the exclusive domain of the government. Furthermore, as with peremptory challenges in *Edmonson*, the admission or exclusion of evidence occurs within a courthouse—a setting that embodies the rule of law. The introduction of illegally obtained evidence in such a context undermines the judicial system's integrity. These factors suggest that judicial admission of evidence acquired unlawfully by private actors constitutes state action.

States can also enhance individual privacy protections by adopting exclusionary rule statutes that exclude evidence illegally obtained by private parties, as Rhode Island and Texas have done. These types of laws broaden privacy rights because evidence acquired through private illegal activity-such as illegal surveillance or unauthorized searches-cannot be admitted into court. The purpose of such laws is to create a deterrent against private entities from committing violations of constitutional principles or statutory rights without direct involvement by the government.

III. ARGUMENTS IN FAVOR OF EXTENDING CONSTITUTIONAL RIGHTS TO THE PRIVATE SECTOR

Determining the specific intent of those who drafted state constitutions on the issue of private versus public rights can be challenging, especially when dealing with older provisions where direct evidence is limited. However, if a constitutional right is a recent addition and there is accessible drafting or election history, it becomes easier to discern the drafters' intentions. For older constitutional provisions, it is reasonable to assume that the drafters reflected the prevailing expectations of their time regarding the scope of constitutional rights. In contrast to these historical expectations, an advocate may present textual or policy-based arguments to support a broader interpretation.

A. Expansive Text and Policy Goals

Expansive constitutional texts often serve as a strong foundation for extending the application of constitutional rights to private actions. When constitutional provisions are articulated in broad, inclusive terms, they lend themselves to interpretations that transcend the traditional public-private divide. For example, the human dignity clause in the Puerto Rico Constitution affirms that "the dignity of the human

being is inviolable."[222] The human dignity clause in the Montana Constitution, adapted from the Puerto Rico Constitution, further states that "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person . . . ."[223] The language safeguarding individuals in Montana from discrimination by private actors was modeled after the equal protection clause found in the New York State Constitution.[224]

This sweeping language suggests that the state and private entities should respect human dignity. Thus, the clause can be interpreted to impose a duty on private actors to uphold and respect the dignity of others, creating a legal basis for addressing violations of dignity in private interactions, such as employment, housing, environmental rights, and service provision.

Similarly, California's Inalienable Rights provision underscores fundamental rights such as the right to enjoy life and liberty, to acquire and protect property, and to pursue and obtain happiness and privacy.[225] The expansive nature of this provision, particularly its explicit reference to privacy, provides a robust argument for applying these rights in private contexts. For example, the right to privacy has been invoked to protect individuals against invasive actions by private employers or corporations. Montana's Inalienable Rights provision states that "all persons recognize their corresponding duties."[226] This illustrates how constitutional rights can be extended beyond government actions, including private conduct.[227] The broad language of the provision supports the idea that these rights are not confined to the public sphere but are inalienable, thus applicable in all aspects of life, including private relationships.

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222. P.R. CONST. art. II, § 1.

223. MONT. CONST. art. II, § 4

224. *See* Tia Rikel Robbin, *Untouched Protection from Discrimination: Private Action in Untouched Montana's Individual Dignity Clause*, 51 MONT. L. REV. 553, 556 (1990).

225. *See* CAL. CONST. art. I, § 1.

226. *See* MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a **clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, **health and happiness** in all lawful ways. In enjoying these rights, **all persons recognize corresponding responsibilities**.") (emphasis added).

227. Some sections of the California Declaration of Rights can be argued to apply to private parties. *See e.g.*, CAL. CONST. art. I, § 6 (slavery); § 20 (property rights of non-citizens); § 25 (right to fish).

The use of expansive constitutional texts to apply rights to private actions is rooted in recognizing that fundamental rights should be protected universally, regardless of the actor involved. In Puerto Rican, Montanan, and Californian contexts, the broad language used to describe these rights reflects a commitment to safeguarding essential human values in every sphere of life.[228] This approach ensures that constitutional protections are not diminished or rendered ineffective. Instead, expansive interpretations of these texts help reinforce the universality of constitutional rights, ensuring that they apply consistently and comprehensively across all public or private interactions.[229]

B. Constitutional Provision > Statutory Provision

Constitutional provisions provide a more urgent and authoritative means for addressing rights violations in ways that statutory protections often cannot achieve. Unlike statutes, which are always susceptible to repeal or modification, constitutional provisions carry an inherent sense of permanence and foundational authority. When these provisions employ expansive language to define fundamental rights—such as privacy, equal protection, or free speech—they create a robust framework for redress, particularly for violations occurring in private contexts.

When statutory protections are limited or absent, constitutional provisions establish a benchmark that judicial interpretation can use to provide remedies aligned with broad principles of justice and equity. This trend is particularly evident in labor disputes, privacy invasions, and discrimination cases, where courts frequently draw upon state constitutional mandates to delineate rights and responsibilities for private individuals. Moreover, these provisions act as reactive and proactive tools that courts can utilize to adapt the legal framework to contemporary challenges, preserving the inviolability of human rights even as the socio-technological landscape evolves. Crucially, by recognizing state constitutions as primary sources of law rather than mere supplementary frameworks, courts can enhance their role in

228. Montana's Constitution is the most universal. It contains an inviolable rights clause, a human dignity clause, a privacy clause, and a duty clause regarding the right to a healthy environment. *See* MONT. CONT. art. IX, § 9(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations . . . .").

229. In some states, the Equal Protection Clause of the Constitution has been interpreted to apply to private action. *See* Peper v. Princeton University Bd. of Trustees, 389 A.2.d 465, 473–74 (N.J. 1978) (holding that the equality provision of the New Jersey Constitution applied to a private university).

safeguarding individual liberties against infringements by both governmental and private actors.

CONCLUSION

State supreme courts should interpret that all political, non-violent speech can be permitted in private shopping malls. States that have expanded free speech protections to include private spaces like shopping malls and universities should consider extending these decisions to address constitutional rights in private universities and the digital realm. In cases like *Robins v. Pruneyard Shopping Center*, courts have recognized that privately owned spaces serving as public forums must accommodate free speech, reflecting the growing importance of non-governmental spaces in public discourse.[230] Similarly, with private universities playing a pivotal role in shaping academic and societal conversations, there is a strong argument for applying constitutional free speech protections to these institutions.[231] In the digital realm, where platforms like social media dominate public communication, courts could reconsider the state action doctrine to ensure private tech companies protect fundamental rights such as free speech against censorship or restriction. Expanding these protections would align with the evolving nature of public forums and the increasing privatization of spaces where critical discussions occur.[232]

Extending constitutional rights to the private sector signifies a crucial advancement in protecting individual freedoms. As private entities increasingly perform functions that affect public life, state courts have rightly acknowledged the necessity of imposing constitutional obligations on these entities. This ensures the protection of fundamental rights such as free speech, privacy, and human dignity, irrespective of whether the infringement stems from a government or private

230. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979).

231. *See* John Hasnas, *Free Speech on Campus: Countering the Climate of Fear*, 20 GEO. J.L. & PUB. POL'Y 975, 979 (2020) ("Private colleges and universities may impose as many or as few restrictions on the speech of their students and faculty as they see fit. As private organizations, they are free to determine both their schools' mission and the means they will use to fulfill it. . . . Public universities do not have the same degree of freedom. Under contemporary Constitutional interpretation, the government's provision of higher education constitutes state action, which is subject to the restrictions in the Bill of Rights. Thus, public universities are required to act in accordance with the First Amendment.").

232. *See* Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the Era of New Media*, 53 TEX. TECH L. REV. 273 (2020) (stating that the rise of the internet, mainly social media platforms, as primary mediums for public discussion necessitates a reevaluation of the public forum doctrine).

entity. Legal cases involving shopping malls, private universities, and private employers exemplify the need for constitutional protections to encompass entities beyond the state, reflecting the shifting landscape of power and influence in modern society.

This approach to state constitutional law recognizes that the distinction between public and private action often becomes blurred, particularly in spaces where private entities wield substantial control over crucial aspects of public discourse and individual autonomy. By interpreting state constitutions as dynamic documents that respond to these realities, courts can guarantee the robust enforcement of rights in both public and private spheres. Instances from Puerto Rico, Montana, and California, where expansive constitutional texts emphasize human dignity and inalienable rights, demonstrate a growing judicial readiness to safeguard constitutional rights against encroachments by private entities, setting a precedent for a more comprehensive and inclusive application of constitutional protections.