LABORATORIES OF REPRODUCTIVE JUSTICE: STATE AMENDMENTS AND THE RIGHT TO PAID FAMILY LEAVE

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Abstract

This Note proposes legal strategies for recognizing paid family leave as a constitutional entitlement under state law. Long viewed as laboratories for democratic experimentation, states can play a central role in areas where federal protections remain limited. In the aftermath of *Dobbs v. Jackson Women's Health Organization*, several states—including Maryland, Michigan, Missouri, Montana, Ohio, and Vermont—amended their constitutions to guarantee a right to "reproductive freedom." This Note argues that these amendments create fertile ground for rights development and should be read to include an affirmative right to paid family leave. Drawing on a reproductive justice framework, which defines reproductive autonomy as the ability to have children, not have children, and parent children in safe and sustainable conditions, this Note analyzes the text of these amendments and the historical landscape of state positive-rights jurisprudence.

INTRODUCTION

In 2022, several Michigan advocacy groups¹ formed a coalition called the Reproductive Justice Work Group to place Proposal 3—otherwise known as the Reproductive Freedom

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¹ These groups included the ACLU of Michigan, Planned Parenthood of Michigan, Planned Parenthood Advocates of Michigan, and Michigan Voices. See Allison R. Donahue, Abortion Rights Coalition Files Record-Breaking Number of Signatures to Get on Nov. Ballot, MICH. ADVANCE (July 11, 2022), https://michiganadvance.com/2022/07/11/coalition-to-protect-abortion-rights-files-record-breaking-number-of-signatures [https://perma.cc/M47L-HHY5].

for All Amendment—on Michigan's midterm election ballot.² This campaign secured 753,759 petition signatures, marking the most signatures ever collected for a Michigan public ballot referendum.³ That November, voters approved Proposal 3 as the Michigan Constitution's 28th Amendment, formally enshrining a right to "reproductive freedom."⁴

That same year, Vermont voters similarly passed the Right to Personal Reproductive Autonomy Amendment.⁵ In 2023, Ohio voters ratified the Right to Reproductive Freedom with Protections for Health and Safety Amendment.⁶ Most recently, in 2024, Missouri, Maryland, and Montana voters followed suit, adopting their own constitutional amendments to protect reproductive rights.

These amendments arose in the wake of *Dobbs v. Jackson Women's Health Organization*, in which the U.S. Supreme Court declared that the 14th Amendment to the U.S. Constitution did not affirmatively protect the right to abortion.¹⁰ As a result, "the

² See Eva Lopez, How Michiganders Showed Up for Reproductive Freedom and Won, ACLU (July 14, 2023), https://www.aclu.org/news/reproductive-freedom/how-michiganders-showed-up-for-reproductive-freedom-and-won [https://perma.cc/CZ7M-BSU9].

³ Donahue, *supra* note 1.

⁴ MICH. CONST. art. I, § 28; see also Yue Stella Yu & Robin Erb, Michigan Proposal 3 Supporting Abortion Rights Wins Big, Bridge Mich. (Nov. 9, 2022), https://www.bridgemi.com/michigan-government/michigan-proposal-3-supporting-abortion-rights-wins-big [https://perma.cc/P2CK-54MX].

⁵ VT. CONST. art. 22; see also Mikaela Lefrak, Vermont Votes to Protect Abortion Rights in State Constitution, NPR (Nov. 9, 2022), https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results [https://perma.cc/U2AT-8SNL].

⁶ OHIO CONST. art. I, § 22; see also Jo Ingles, Ohio Votes in Favor of Amending the State Constitution to Enshrine Abortion Rights, NPR (Nov. 7, 2023), https://www.npr.org/2023/11/07/1209092670/2023-results-key-ohio-elections [https://perma.cc/TZ6H-RPL3].

Mo. Const. art. I, § 36; see also Summer Ballentine, Missouri Voters Enshrine Abortion Rights in a State That Has a Near-Total Abortion Ban, Assoc. Press (Nov. 6, 2024), https://apnews.com/article/abortion-missouri-amendment-ballot-election-f114445b087e77d0cc786d3eeb2eb615 [https://perma.cc/U9GQ-VBKC].

⁸ MD. CONST. art. 48; see also Scott Maucione, Abortion Will Be Protected in the Maryland State Constitution, NPR (Nov. 5, 2024), https://www.npr.org/2024/11/05/g-s1-32723/abortion-will-be-protected-in-the-maryland-state-constitution [https://perma.cc/R67E-N2R3].

⁹ Mont. Const. art. II, § 36; see also Shaylee Ragar, Montanans Vote to Codify Abortion Access in the State Constitution, NPR (Nov. 6, 2024), https://www.npr.org/2024/11/06/g-s1-32997/montana-abortion-results [https://perma.cc/Q3LU-5PWH].

¹⁰ Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 (2022).

people and their elected representatives" were free to regulate it as they saw fit. ¹¹ Some states quickly enacted sweeping restrictions on abortion and other reproductive rights, with several even invoking pre-existing state constitutional amendments or trigger laws to immediately ban abortion altogether. ¹² Meanwhile, other states seized the opportunity to safeguard, establish, or even strengthen reproductive rights. ¹³ Michigan, Ohio, Vermont, Missouri, Maryland, and Montana chose to enshrine reproductive rights protections through state constitutional amendments.

These states' amendments are especially significant because voters ratified them directly through ballot initiatives, empowering the amendments with a stronger democratic mandate than ordinary legislative or executive actions. ¹⁴ Generally, constitutional amendments also afford these rights greater resistance against temporary political realignments. Perhaps most importantly, these amendments do not merely protect *abortion* rights; rather, they broadly affirm fundamental rights to "reproductive freedom" or "reproductive liberty."

These terms are imbued with untapped legal potential: what exactly does "reproductive freedom" mean? At a minimum, it likely includes the right to an abortion, given these amendments' origins in the aftermath of *Dobbs*. However, the definition of reproductive freedom could extend much further to cover prenatal healthcare, access to contraception, or postpartum care. The theoretical framework of reproductive justice argues that it must.

Reproductive justice asserts that true reproductive freedom requires the ability to freely make decisions about having children, not having children, and raising children in safe environments. A reproductive justice approach seeks to address the needs of vulnerable populations—particularly women of color and low-income individuals—who disproportionately bear the economic and social burdens of inadequate reproductive

¹¹ *Id*.

¹² See Allison McCann & Amy Schoenfeld Walker, Tracking Abortion Bans Across the Country, N.Y. TIMES (Sep. 8, 2025), https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html [https://perma.cc/G9F5-9TXM].

¹³ See id.

¹⁴ See Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 884–85 (2021).

¹⁵ See Reproductive Justice, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUST. AGENDA (2025), https://blackrj.org/our-causes/reproductive-justice/ [https://perma.cc/43T3-ACRY]. See also *infra* Part II.A for a further discussion of the history and core tenets of reproductive justice.

policies.¹⁶ And for many of these amendments, drafters intentionally crafted the constitutional language with theories of reproductive justice in mind.¹⁷

This Note focuses on one critical—yet often overlooked—component of reproductive freedom: paid family leave. 18 While the wider discourse surrounding reproductive rights frequently centers on abortion access, true reproductive freedom must protect individuals' rights to parent with dignity and economic security. 19 Post-birth welfare policies like paid family leave are essential to achieving these amendments' mandates of reproductive freedom. Without policies that guarantee parents leave to recover from pregnancy or care for newborns (or newly adopted children) without risking their livelihoods, the promise of reproductive freedom remains incomplete. This precarious moment in reproductive rights should inspire advocates to drive meaningful, radical progress at the state level by leveraging the unique legal potential of these amendments. This Note proposes that courts interpret "reproductive freedom" protections in state constitutions expansively to include paid family leave as a fundamental right.

Part I of this Note provides background on state-driven, positive constitutional rights, highlighting how states have historically played a key role in the expansion of constitutional rights. Part II.A provides a primer on reproductive justice, explaining its origins and goals. Part II.B explains how paid family leave fits into the reproductive justice movement, and Part II.C analyzes the current landscape of paid family leave in the United States. Part III.A explores how other countries have expanded their own legal understandings of reproductive justice. Part III.B analyzes the language of Michigan, Ohio, Vermont, Missouri, Maryland, and Montana's reproductive freedom amendments and considers various legal strategies that could expand their reach to include paid family leave. Part III.C contemplates what these paid family leave policies might look like in practice. Finally, Part III.D addresses potential counterarguments.

¹⁶ See generally Reproductive Justice, supra note 15; infra Part II.A.

¹⁷ See Lopez, supra note 2 ("The language in Proposal 3 was developed by our partners who made it really clear they didn't want something that just talked about abortion because that wasn't enough for them and for their communities. We wanted to center our work around reproductive justice.").

¹⁸ Generally, "paid family leave" policies can include leave for caring for sick family members or the employee's own illness in addition to maternity/paternity benefits. *See* discussion *infra* Part II.C.1. However, for the purposes of this Note, the term "paid family leave" will exclusively refer to parental leave related to the birth or adoption of a child.

¹⁹ See, e.g., Kimala Price, What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm, 10 Meridians: Feminism, Race, Transnationalism 42, 43 (2010).

I. Background on State-Driven Rights

The majority opinion in Dobbs²⁰ reaffirmed core principles of federalism: that some powers must be reserved for the states.²¹ Accordingly, in the wake of *Dobbs*, the state-by-state abortion landscape varied wildly; some states made bold moves to erect near-total abortion bans²² just as other states hurried to pass abortion protections.²³ This colorful variation among states is emblematic of the long-standing belief that states have the prerogative to experiment with policies within their own constitutions and bodies of law—i.e., states are our laboratories of democracy.²⁴ Such prerogatives may, and should, inspire adoption of successful or popular policies at the national level.

Indeed, there is extensive legal scholarship analyzing the ways in which states have filled in gaps where the federal government has been silent, particularly when it comes to positive rights.²⁵ Generally, positive rights are affirmative in nature, in that they obligate the state to provide rights-holders with entitlements.²⁶ States' duties to provide their citizens

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256, 221 (2022) ("But the people of the various States may evaluate those interests differently. The Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.") ("Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons").

²¹ See The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people").

²² See McCann & Schoenfeld Walker, supra note 12.

²³ See id.

²⁴ See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("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.").

²⁵ See generally Jessica Bulman-Pozen & Miriam Seifter, State Constitutional Rights and Democratic Proportionality, 123 Colum. L. Rev. 1855 (2023); William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Dustin Coffman, Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential, 24 Marq. Benefits & Soc. Welfare L. Rev. 181 (2023); Jeffrey Omar Usman, Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions, 73 Ala. L. Rev. 1459 (2010).

See generally Jorge M. Farinacci-Fernos, Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach, 41 HASTINGS INT'L & COMP. L. REV. 31 (2018.). But see id. at 45–46 (discussing how the distinction between positive and negative rights can be blurry or oversimplistic).

with clean water or public schooling are examples of positive rights. They stand in contrast to negative rights, which exist as liberties from government interference.²⁷ Common examples include the right to speech (freedom from censorship) or the right to privacy (freedom from surveillance). Negative rights do not impose any burden upon the state to provide or act; rather, they restrain intervention.

The U.S. Constitution is often referred to as a "charter of negative liberties." Yet, it would be inaccurate to say that the Constitution features no positive rights, though they are few; see, for example, Congress's obligation to conduct a census, the Sixth Amendment right to counsel, or the executive branch's responsibility to protect citizens from invasion. It would also be inaccurate to say that the federal government has completely absolved itself from serving its citizens in a positive fashion; Congress has passed landmark welfare schemes like Social Security and Temporary Assistance for Needy Families (TANF), created public services like the U.S. Postal Service, and established departments ensuring citizens access to clean water and higher education loans. Still, the key distinction is that, while Congress has the power to provide for its citizens, it is usually not constitutionally obligated to do so. Just as Congress has the power to grant access to programs like Medicare, so too does it reserve the power to take such programs away.

²⁷ See id. at 42.

²⁸ Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties."). See generally, e.g., David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).

²⁹ U.S. Const. art. I, § 2 ("Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years").

³⁰ U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

³¹ U.S. CONST. art. IV, § 4. ("The United States . . . shall protect each of [the States in this Union] against Invasion . . . ").

³² Social Security Act, 42 U.S.C. §§ 301–1397mm.

³³ Block Grants to States for Temporary Assistance for Needy Families, 42 U.S.C. §§ 601–619.

³⁴ Postal Service Act, 39 U.S.C. § 101.

³⁵ National Environmental Policy Act, 42 U.S.C. § 4331.

³⁶ Department of Education Organization Act, 20 U.S.C. § 3411.

The Supreme Court has repeatedly rejected interpretations of the 14th Amendment that attempt to confer positive rights, especially where the constitutional protections in question are not explicit or obvious.³⁷ The United States is an outlier in this regard, as many foreign constitutions contain robust positive rights provisions.³⁸ However, the Founding Fathers were primarily concerned with protecting citizens from unchecked federal tyranny—not with permanently inscribing affirmative welfare benefits.³⁹

State constitutions, on the other hand, are more likely to feature positive rights or, at a minimum, have been interpreted by state courts to afford greater protections than identical provisions in the federal constitution.⁴⁰ The Nevada Constitution explicitly guarantees all workers a minimum wage.⁴¹ New York courts read into its constitution's "care and

³⁷ See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (affirming that the 14th Amendment's Due Process Clause was "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973) (finding no constitutional right to education). But see Currie, supra note 28, at 886–87 ("From the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can be in some sense be described as positive . . . [I]t would be dangerous to read too much, even at the theoretical level, into the generally valid principle that our [Constitution] . . . is a Constitution of negative rather than positive liberties.").

³⁸ See generally Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees, 56 Syracuse L. Rev. 1 (2005); Herman Schwartz, Do Economic and Social Rights Belong in a Constitution?, 10 Am. U. J. Int'l L. & Pol'y 1233 (1995); Ellen Wiles, Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law, 22 Am. U. Int'l L. Rev. 35 (2006); Currie, supra note 28 (examining how German courts have interpreted their constitution to confer positive rights in a manner unlike U.S. courts).

³⁹ See, e.g., Jackson, 715 F.2d at 1203 ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."); Currie, supra note 28, at 864–65 nn.8–10 and accompanying text.

⁴⁰ See, e.g., Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (recognizing that states have a "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution"). See generally, e.g., EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Brennan, supra note 25 (examining how state constitutions can confer greater rights than the federal constitution); Robert K. Fitzpatrick, Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights, 79 N.Y.U. L. Rev. 1833 (2004) (discussing judicial federalism); Jonathan L. Marshfield, America's Misunderstood Constitutional Rights, 170 U. Penn. L. Rev. 853 (2022) (exploring how state constitutional amendments fundamentally differ from federal constitutional amendments).

⁴¹ See Nev. Const. art. 15, § 16.

support of the needy" language an obligation to provide housing for the homeless. ⁴² Public education is perhaps the most successfully litigated positive rights claim amongst all the states. ⁴³ In fact, all fifty states ⁴⁴ include public education language in their constitutions, and most state courts have interpreted such language as establishing a fundamental right to education. ⁴⁵

However, many obstacles stand in the way of positive rights expansion through litigation. Legal scholarship has documented state courts' reluctance to involve the judiciary in positive rights development, instead preferring to leave wide policy discretion to the legislature. ⁴⁶ Michigan courts, for example, have declined to read the state's constitutional

- 42 N.Y. Const. art. XVII, § 1; Tucker v. Toia, 371 N.E.2d 449, 451–52 (N.Y. 1977). *But see* Bernstein v. Toia, 43 N.Y.2d 437, 448 (1977) ("We do not read this declaration and precept as a mandate that public assistance must be granted on an individual basis in every instance, . . . or indeed as commanding that, in carrying out the constitutional duty to provide aid, care and support of the needy, the State must always meet in full measure all the legitimate needs of each recipient.").
- 43 See, e.g., Seattle Sch. Dist. v. Washington, 585 P.2d 71, 99 (Wash. 1978) (requiring the state to increase school funding as education was "the paramount duty of the state," per the state constitution); McDuffy v. Sec'y of the Exec. Off. of Education, 615 N.E.2d 516 (Mass. 1993) (holding that the state's unequal school-financing system violated a state constitutional right to education). See generally Robert M. Jensen, Advancing Education Through Education Clauses of State Constitutions, 1997 BYU EDUC. & L.J. 1 (1997).
- 44 See Educ. Comm'n of the States, 50-State Review: Constitutional Obligations for Public Education (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1-1.pdf [https://perma.cc/5LX9-3P4K].
- 45 See Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 108 (2008) ("[A right to public education] may be at least one very fundamental positive-law entitlement that all Americans have long possessed."). However, not all state courts have held that these education clauses actually confer enforceable education rights. See SchoolFunding.Info, School-Funding Court Decisions by State, https://cee.tc.columbia.edu/schoolfundinginfo/ [https://perma.cc/R3PS-DQ9G] (documenting fifteen states that have denied a legally enforceable right to education despite constitutional language ostensibly conferring one).
- 46 See, e.g., Usman, supra note 25, at 1497–1500, 1502–05 (discussing how some state courts have either refused to hear state constitutional rights arguments because of the political question doctrine, or have recognized a state constitutional right but leave extraordinary deference to the legislature); Schwartz, supra note 38, at 1237–38 ("By what authority does a court tell a legislature that it must create a health care or education system, a welfare program, or some other kind of benefit system? This certainly raises issues relating to budgetary priorities, separation of powers, judicial authority, and competence."); Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 HARV. L. REV. 1131, 1136–37 (1999) [hereinafter Positive Rights] (discussing how most state courts adopt the "trend of post-Lochner federal constitutional law and accord great deference to legislative decisions" when interpreting the scope of state constitutional rights). See generally Helen Hershkoff & Stephen Loffredo, State Courts and

guarantee of a "free public education" to also require equal funding among different school districts. ⁴⁷ Kansas courts have held that the state's constitutional provisions to provide for the "needy" did not obligate the state to do so on an individual basis. ⁴⁸ Even where courts may recognize a citizen's fundamental constitutional right, it is often difficult to figure out an appropriate judicial remedy that does not breach basic principles of separation of powers. In the case of state education litigation, courts have struggled to identify when existing legislation is "adequate" to meet constitutional standards. ⁴⁹ However, education litigation remains a promising model for bringing positive reproductive freedom arguments, as several state courts have recognized the judicial power to "command [positive] legal compliance" from the legislature with constitutional education rights. ⁵⁰

Another major obstacle is whether a state's constitutional provision is self-executory.⁵¹ When a section is self-executory, no further legislative action is needed to make the law

Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis, 115 Penn St. L. Rev. 923 (2011) [hereinafter Underutilization Thesis]; Jensen, supra note 43; Matthias Klatt, Positive Rights: Who Decides? Judicial Review in Balance, 13 Int'l J. Const. L. 354 (2015).

⁴⁷ See E. Jackson Pub. Schs. v. State, 348 N.W.2d 303, 305–06 (Mich. Ct. App. 1984); see also SchoolFunding.Info, supra note 45.

⁴⁸ See Bullock v. Whiteman, 865 P.2d 197, 205–06 (Kan. 1993).

⁴⁹ See, e.g., Josh Kagan, A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses, 78 N.Y.U. L. Rev. 2241, 2243 (2003) ("Asked to define the reach of state constitutions' education clauses, state supreme courts have reacted differently. Some pull definitions out of the air, and some ask other branches of government to define adequacy." (citations omitted)); see also Jensen, supra note 43, at 4–5, 40–42 (discussing how many state education litigation claims depend on "quality" clauses in the amendments, e.g., the right to an "efficient" school system, but many courts have still ordered educational reforms under amendments with no quality language).

⁵⁰ 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, 1058–59 (1993) (discussing Englewood Ind. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989), where the Texas Supreme Court ordered the legislature to create new funding laws for Texas schools, or else all state education spending would be enjoined).

See generally W. L. O., Constitutional Amendments, Self-Executing and Otherwise, Providing for the Initiative and Referendum, 15 MICH. L. REV. 334, 335 (1917) ("A terse way of summing up the distinction between self-executing provisions and those which are not, is to say that self-executing provisions are addressed to the courts while those that are not are addressed to the legislatures.... Constitutional provisions are 'self-executing where it is the manifest intention that they should go into effect and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty or liability imposed.'... However, if merely general principles are laid down, and the legislature must supplement the constitutional provision by

enforceable.⁵² When a section is non-self-executory, implementing legislation is required to make the law effective.⁵³ Non-self-executory provisions are akin to mission statements, general principles, or broad mandates for the legislature to take into consideration, and they do not create any self-enforcing rights.⁵⁴ Prior literature has studied how the self-execution test has been a major roadblock for environmental rights advocacy in particular.⁵⁵ A state constitution may proclaim a right to a clean and healthy environment, but if a state court deems the clause merely declaratory, those provisions amount to nothing more than a proclamation. They would neither mandate further legislative action nor provide citizens with grounds to bring further enforcement actions.

Uniquely, Montana state courts have recognized a self-executing and enforceable right to a clean environment.⁵⁶ Article IX, § 1 of Montana's state constitution obligates the state to "maintain and improve a clean and healthful environment" for future generations.⁵⁷ Most recently, in *Held v. State*, the Montana Supreme Court acknowledged that the right to a clean and healthful environment is "forward-looking and preventative" and emphasized that there is no requirement for "the Framers to have specifically envisioned an issue [such as restrictions on pollutants that had not existed at the time of the amendment's enactment] for it to be included in the rights enshrined in the Montana Constitution" or for citizens to bring a direct enforceable action.⁵⁸ The case is seminal, as it marks the "first time in which

passing laws to effectuate its purpose, then it is not self-executing." (citations omitted)); Hershkoff & Loffredo, *Underutilization Thesis*, *supra* note 46.

⁵² See W. L. O., supra note 51.

⁵³ See id.

⁵⁴ See id.

⁵⁵ See, e.g., Tammy Wyatt-Shaw, The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: 'They Mean Something', 15 Pub. Land L. Rev. 219, 221–27 (1994). See generally Oliver A. Pollard, A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question, 5 Va. J. Nat. Res. L. 351 (1986).

⁵⁶ See Cape-France Enters. v. Est. of Peed, 29 P.3d 1011, 1016–17 (Mont. 2001) (rescinding a private contract whose performance required substantial environmental degradation "not in accord with the guarantees and mandates of Montana's Constitution").

⁵⁷ Mont. Const. art. IX, § 1. Article II, Section 3 of the Montana Constitution also establishes Montanan citizens' "right to a clean and healthful environment." Mont. Const. art. II, § 3.

⁵⁸ Held v. State, 560 P.3d 1235, 1248 (Mont. 2024) (quoting Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 477 P.3d 288, 304 (Mont. 2020)); *id.* at 1248; *id.* at 1249 (citing Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1241 (Mont. 1999)).

an American court decided on the merits that a law promoting the use and consumption of fossil fuels infringed upon constitutional rights."59

While this type of constitutional jurisprudence is uncommon, it nevertheless reaffirms the critical role of state constitutions in progressive rights expansion. The laboratories of democracy concept traditionally applies to state legislatures' ability to pass novel policy through legislation or state constitutional amendments, but it can just as readily apply to state courts. ⁶⁰ Justice Brennan's dissent in *Michigan v. Mosley* urged state courts to fully appreciate judicial federalism:

Each state has power to impose higher standards . . . under state law than is required by the Federal Constitution. . . . State courts . . . are . . . increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court. 61

Moreover, Montana's bold recognition of positive rights could have significant implications for other states with comparable constitutional provisions for environmental protection.⁶² State courts frequently look to sister states for developments in interpretation and precedent.⁶³

No state has yet implemented explicit constitutional protections for paid family leave. It remains an issue that legislators prefer to address through ordinary legislation, as further discussed *infra* Part II. This is not necessarily the case abroad. Several European

⁵⁹ Recent Case, Held v. State, 137 HARV. L. REV. 1491, 1495 (2024).

⁶⁰ See Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 Fordham L. Voting Rts. & Democracy F. 261, 261–62 (2023).

⁶¹ Michigan v. Mosley, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting); see also Brennan, supra note 25, at 489, 502.

New York and Pennsylvania also have environmental protections in their constitutions. See N.Y. Const. art. I, § 19 ("Each person shall have a right to clean air and water, and a healthful environment."); PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment.").

⁶³ See, e.g., Hershkoff, supra note 46, at 1139 nn.41–42 and accompanying text ("[S]tate constitutional interpretation takes place in the context of a 'universe of constitutions,' in which state judges actively rely on precedent from other jurisdictions." (quoting G. Alan Tarr, Understanding State Constitutions 199–200 (1998))).

constitutions—including those of Germany,⁶⁴ Ireland,⁶⁵ Switzerland,⁶⁶ and Poland⁶⁷—contain protections for maternity leave. The recent rise of reproductive freedom amendments in several U.S. states suggests a growing willingness to address policy through concrete, durable constitutional provisions.⁶⁸ As this trend progresses, it becomes more salient to interrogate precisely what rights these provisions do—and do not—protect.

II. Reproductive Justice and Paid Family Leave in a Post-Dobbs Era

A. Primer on Reproductive Justice

In 1994, the Black Women's Caucus created the "reproductive justice" framework in direct response to dominant strains of reproductive advocacy that overemphasized choice rhetoric. Where mainstream reproductive *rights* advocacy focuses almost exclusively on the nominal "right to an abortion," the reproductive *justice* movement reflects a "fundamentally different approach to social change" that recognizes "reproductive choice' does not occur in a vacuum, but in the context of all other facets of a woman's life, including barriers that stem from poverty, racism, immigration status, sexual orientation, and disability." The Caucus defined reproductive justice as bearing three main tenets: "(1) the right to have children; (2) the right to not have children; and (3) the right to

⁶⁴ GRUNDGESETZ [GG] [CONSTITUTION] art. 6, § 4 (Ger.) ("Every mother shall be entitled to the protection and care of the community").

⁶⁵ Constitution of Ireland 1937 art. 41, § 2.2 (Ir.) ("The State shall therefore endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.").

⁶⁶ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101., art. 41, § 2 (Switz.) ("The Confederation and Cantons shall endeavor to ensure that every person is protected against the economic consequences of ... maternity"). But see id. at § 4 ("No direct right to state benefits may be established on the basis of these social objectives.").

⁶⁷ CONSTITUTION OF THE REPUBLIC OF POLAND art. 71, § 2 (Pol.) ("A mother, before and after birth, shall have the right to special assistance from public authorities to the extent specified by statute").

Relatedly, see generally Emily Zackin & Mila Versteeg, *De-judicialization Strategies*, 133 YALE L.J. F. 228 (2023), for a discussion of the historical background and re-emerging trend of states employing their constitutions to "de-judicialize" policy, specifically in legal areas of labor rights, debtor rights, and, most recently, abortion rights.

⁶⁹ See Reproductive Justice, supra note 15.

⁷⁰ Sarah London, Reproductive Justice: Developing a Lawyering Model, 13 Berkeley J. Afr.-Am. L. & Pol'y 71, 72, 77 (2011).

nurture the children we have in a safe and healthy environment."⁷¹ Reproductive justice broadens the scope of the reproductive rights movement by adopting a holistic approach that integrates social and economic justice.

Pivoting from an abortion-oriented framework to a holistic reproductive justice framework is critical. Centering reproductive rights advocacy only on the right to "choose" ignores the full reality of what it means to *freely and meaningfully* choose whether to have a child. Extensive literature has analyzed how choice rhetoric fails to address the fact that low-income women, disabled women, and women of color face a uniquely harsh reproductive policy landscape. For example, the Hyde Amendment excludes most abortions from Medicaid funding, so even low-income pregnant people in states that permit abortion may have a nominal "right" to an abortion but no substantive *access to* an abortion. The disturbing legacies of forced procreation and sterilization policies have stripped reproductive autonomy away from Black women, disabled people, and immigrant women in detention centers. A framework centered on the "right to an abortion" spares the state from having to provide the resources before, during, and after pregnancy which make true reproductive freedom possible. That is, abortion rights and the absence of a welfare state can exist without contradiction.

Reproductive justice, on the other hand, calls on the state to provide citizens with positive rights, including "the complete economic, social, and political power and resources

⁷¹ Reproductive Justice, supra note 15.

⁷² See, e.g., London, supra note 70, at 77, 79–80; Cynthia Soohoo, Reproductive Justice and Transformative Constitutionalism, 42 CARDOZO L. REV. 819, 821, 823–24 (2021). See generally Elizabeth Tobin-Tyler, Putting Your Money Where Your Mouth Is: Maternal Health Policy After Dobbs, 53 Seton Hall L. Rev. 1577 (2023).

⁷³ ACLU, Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion (1994), https://www.aclu.org/documents/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion [https://perma.cc/SC7C-3HC2].

⁷⁴ See Brief for Howard U. Sch. of L. Hum. & C.R. Clinic as Amici Curiae Supporting Respondents at 11, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (detailing the U.S. government's control over enslaved women's reproductive autonomy and the forced sterilization of an estimated 150,000 Black women post-slavery).

⁷⁵ See, e.g., Buck v. Bell, 274 U.S. 200 (1927) (upholding the constitutionality of a Virginia law permitting the forced sterilization of patients in state mental institutions).

⁷⁶ See Consolidated Second Amended Class Action Complaint for Declaratory and Injunctive Relief and for Damages, Oldaker v. McMiller, 724 F. Supp. 3d 1315 (M.D. Ga. 2024) (No. 7:20-cv-00224-WLS-MSH) (lawsuit alleging immigrant women were forcibly sterilized while detained).

to make health decisions about [their] bodies, [their] families, and [their] communities in all areas of [their] lives."⁷⁷ As a framework, reproductive justice directly challenges the United States' deep history of liberalism when it comes to reproductive rights. Martha Fineman's research on privatized dependency explains this schema very well: the state absolves itself of providing any positive rights to parents by adopting a laissez-faire approach that relies almost entirely on private actors to support reproduction. Family goods, like others, are best distributed by the 'invisible hand of the market' rather than the state. Families are presumed to be self-supporting, with no need for more robust, affirmative social supports. Peproductive justice rejects the notion that the state's role in reproduction is merely that of a passive observer; instead, the state must do its part in providing positive rights to families. Thus, a reproductive justice framework is necessary to achieve true reproductive freedom for all individuals.

B. The Importance of Paid Family Leave as a Component of Reproductive Justice

Paid family leave, as a policy mechanism, enables parents to raise their children in safe and healthy environments and thus furthers the goals of reproductive justice.

Research shows that access to paid family leave produces significant benefits for the health of both parents and children. For example, paid family leave policies are linked to "decreased low-birth-weight births and infant mortality, increased breastfeeding, and improved maternal mental health." These benefits are especially critical in the United States, which currently ranks thirty-second out of the thirty-five wealthiest nations for infant mortality rates and severely lags behind its peers for maternal mortality. In 2022,

⁷⁷ Id.

⁷⁸ See generally Martha L. A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181 (1995).

⁷⁹ Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 472 (2019).

⁸⁰ Julia M. Goodman et al., Racial/Ethnic Inequities in Paid Parental Leave Access, 5 HEALTH EQUITY 738, 739 (2021).

⁸¹ Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. Times Mag. (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html [https://perma.cc/SC7C-3HC2].

⁸² See Munira Z. Gunja et al., Insights into the U.S. Maternal Mortality Crisis: An International Comparison (2024), https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-

the U.S. maternal mortality rate was 22 per 100,000 live births, with the rates being over twice as high for Black mothers.⁸³ Two-thirds of these maternal deaths occur during the postpartum period, from one day after giving birth to a full year later, which means paid leave policies that allow postpartum recovery are critical.⁸⁴ Additionally, standard medical advice suggests new mothers should take at least twelve weeks of postpartum rest to fully recover.⁸⁵

Notably, it is specifically paid leave—not unpaid leave—that drives improved outcomes. One literature review found that paid leave reduced the maternal rehospitalization rate by 51% more and the infant rehospitalization rate by 47% more than unpaid or no leave. 86 Paid leave is also associated with reduced rates of postpartum depression. 87

Paid family leave also confers critical economic benefits, enabling parents to choose when to have a child and ensuring they have the resources to take care of that child. Paid leave provides families with increased incomes and a decreased risk of poverty, especially "among less-educated and low-income single mothers." Many parents postpone reproduction because of the high financial burden it imposes. The economic benefits of paid leave are particularly relevant in the wake of *Dobbs*, where a rise in unplanned pregnancies carried to term will logically lead to more precarious financial situations for many expecting and new families.

maternal-mortality-crisis-international-comparison [https://perma.cc/26XD-VZXF].

⁸³ Id.

⁸⁴ See id.

⁸⁵ See, e.g., Katelin R. Kornfeind & Heather L. Sipsma, Exploring the Link between Maternity Leave and Postpartum Depression, 28 Women's Health Issues 321, 321 (2018), https://pubmed.ncbi.nlm.nih.gov/29729837/ [https://perma.cc/4K92-NPE7].

⁸⁶ See SARAH COOMBS, PAID LEAVE IS ESSENTIAL FOR HEALTHY MOMS AND BABIES 2 (Jorge Morales ed., 2021), https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-is-essential-for-healthy-moms-and-babies.pdf [https://perma.cc/NF6L-ERDE].

⁸⁷ See Darcia C. Grayer et al., Paid Leave: A Health Justice Imperative for Maternal Mental Health (2022), https://www.aamchealthjustice.org/news/policy/paid-leave [https://perma.cc/Q3ZY-VK3U].

⁸⁸ Alexandra Boyle Stanczyk, *Does Paid Family Leave Improve Household Economic Security Following a Birth? Evidence from California*, 93 Soc. Serv. Rev. 262, 262 (2019).

⁸⁹ See Nat'l P'ship for Women & Fams., Voters' Views on Paid Family and Medical Leave 9 (2018), https://nationalpartnership.org/wp-content/uploads/2023/02/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf [https://perma.cc/25HK-48PB].

Socially, paid family leave offers one pathway to break down patriarchal systems of oppression, including the gender wage gap and traditional, gendered parenting roles. Historically, women have shouldered the majority of child-rearing responsibilities, a burden that has persisted even as women's participation in the labor force has steadily climbed upwards. In many two-parent, heterosexual families, it is far less common for fathers to assume the role of a stay-at-home parent. This dynamic perpetuates the gender wage gap: when women must pause or leave their careers, they lose out on professional advances and promotions that men, who remain in the workforce, continue to accumulate. Paid family leave has the potential to alleviate these social and economic inequities because women may fulfill their caregiving responsibilities without permanently leaving the workforce. Moreover, when paid family leave programs distribute benefits equally between parents regardless of gender, they can equalize the share of caregiving among parents.

C. Federal and State Disparities in Paid Family Leave

1. The Federal Paid Family Leave Landscape

In 1919, the International Labor Organization adopted the Maternity Protection Convention, recommending that countries provide their citizens with a minimum of twelve weeks of paid maternity leave (later extended to fourteen weeks in 1952⁹³) as both a medical necessity and a social right.⁹⁴ Nations across the globe began adopting the convention, for reasons ranging from a fundamental belief in their welfare obligations to

⁹⁰ See, e.g., Jill E. Yavorsky et al., The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood, 77 J. MARRIAGE & FAM. 662, 674 (2015).

⁹¹ See, e.g., id.; Laura Sanchez & Elizabeth Thomson, Becoming Mothers and Fathers: Parenthood, Gender, and the Division of Labor, 11 GENDER & Soc. 747, 757 (1997); see also Leah Ruppanner et al., Norms, Childcare Costs, and Maternal Employment, 35 GENDER & Soc. 910, 933 (2021) (finding that "[m]aternal employment suffers when childcare is expensive and gender norms traditional").

⁹² See, e.g., PAID LEAVE WILL HELP CLOSE THE GENDER WAGE GAP, NAT'L P'SHIP FOR WOMEN & FAMS. 1 (2024), https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-will-help-close-gender-wage-gap.pdf [https://perma.cc/Z724-FP5E] ("The lifetime effects of this lost income are stark. By the time they reach retirement age, women typically receive about 20 percent less in Social Security retirement benefits than men, and simultaneously have lower private retirement savings, leaving them more likely to live in poverty and making Social Security a vital source of retirement income.").

⁹³ See Maternity Protection Convention, Nov. 29, 1919, ILO Convention No. 3, 38 U.N.T.S. 53.

⁹⁴ See Convention (No. 103) Concerning Maternity Protection (Revised 1952), June 28, 1952, ILO Convention No. 103, 214 U.N.T.S. 322.

practical adaptations to gender demographic shifts in post-World War I labor markets.⁹⁵ In stark contrast, the United States has long treated paid family leave benefits "as a privilege rather than a right," leaving many workers dependent on the generosity of their individual employers.⁹⁶

More than seven decades later, in 1993, Congress passed the Family and Medical Leave Act (FMLA), which marked the United States' most significant step in addressing family leave needs to date. The FMLA guarantees twelve weeks of unpaid leave for employees working for public agencies or private companies with fifty or more workers. He covers leave for the birth or adoption of a child, the care of a seriously ill family member, personal medical needs, and family emergencies related to active military service. However, the FMLA is still far from comprehensive. Despite its broad application, only 56% of the workforce qualifies for unpaid leave under the FMLA, with the remaining 44% of workers—often low-income, younger, or less educated uncovered. Furthermore, while the FMLA ensures job protection, it fails to provide any financial assistance during the leave period. The lack of paid leave creates significant financial strain for many workers, with a majority of workers reporting that taking unpaid leave would result in "serious financial hardship." Unfortunately, many workers, unable to afford time off, must return to work before they are physically or emotionally ready.

⁹⁵ Mona L. Siegel, Opinion, *The Forgotten Origins of Paid Family Leave*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/opinion/mothers-paid-family-leave.html [https://perma.cc/QBL4-SU6N].

⁹⁶ Id. at 9.

⁹⁷ Family and Medical Leave Act, 29 U.S.C. § 2612.

⁹⁸ See id.

⁹⁹ See id.

Helene Jorgensen & Eileen Appelbaum, Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements? 5 (2014), https://cepr.net/documents/fmlaeligibility-2014-01.pdf [https://perma.cc/B4WC-N7UK].

¹⁰¹ See Abt Assoc., Employee and Worksite Perspectives of the Family and Medical Leave Act: Results From the 2018 Surveys 3 (2020), https://www.dol.gov/resource-library/employee-and-worksite-perspectives-family-and-medical-leave-act-results-2018 [https://perma.cc/JH6C-KYA4].

¹⁰² NAT'L P'SHIP FOR WOMEN & FAM., VOTERS' VIEWS ON PAID FAMILY AND MEDICAL LEAVE: FINDINGS FROM A NATIONAL SURVEY 11 (2018), https://nationalpartnership.org/wp-content/uploads/2023/02/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf [https://perma.cc/N4LJ-AU97]; see also Thea Garon et al., Unpaid and Unprotected: How the Lack of Paid Leave for Medical and Caregiving

In 2020, Congress passed the Federal Employee Paid Leave Act, which allows federal workers to receive payment during their twelve weeks of FMLA leave. ¹⁰³ However, this only covers the roughly two million Americans employed by the government, and the vast majority of the American workforce remains unsupported. ¹⁰⁴ Laws like the 1978 Pregnancy Discrimination Act and the 2023 Pregnant Workers Fairness Act provide essential workplace protections for pregnant workers, but they do not provide any financial support, leaving a significant gap in welfare benefits for working parents. ¹⁰⁵

2. The State Paid Family Leave Landscape

Paid family leave varies widely across states, especially with respect to length, wage replacement rate, and employee eligibility criteria. Thirteen states and the District of Columbia have passed mandatory paid family leave policies via statute: California, 108

Purposes Impacts Financial Health 2 (2021), https://finhealthnetwork.org/wp-content/uploads/2021/11/PulsePaidLeave_UnpaidUnprotected.pdf [https://perma.cc/4Z4G-59Z5].

¹⁰³ Federal Employee Paid Leave Act, 5 U.S.C. § 6382 (2019).

¹⁰⁴ See Cong. Rsch. Serv., The Federal Employee Paid Parental Leave Benefit (2023), https://www.congress.gov/crs_external_products/IF/PDF/IF12420/IF12420.2.pdf [https://perma.cc/45XE-TKB2]; U.S. Off. of Pers. Mgmt., Report on the Use of the Federal Employee Paid Parental Leave Benefit 14 n.2 (2024), https://www.opm.gov/about-us/reports-publications/agency-reports/paid-parental-leave-report.pdf [https://perma.cc/A2UV-6RTR].

¹⁰⁵ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg (2023).

¹⁰⁶ See generally Overview of Paid Family and Medical Leave Laws in the United States, A Better Balance, https://www.abetterbalance.org/family-leave-laws/ [https://perma.cc/8SBG-Z8SB].

¹⁰⁷ See D.C. Code Ann. §§ 32-541.01–32-541.12 (West, Westlaw through July 21, 2025) (providing twelve weeks of paid leave at a 50-90% wage replacement rate, with a weekly cap adjusted based on inflation).

¹⁰⁸ See Cal. Unemp. Ins. Code §§ 3300–3308 (West, Westlaw through Ch. 764 of the 2025 Reg. Sess.) (providing eight weeks of paid leave to part- and full-time employees, who meet a minimum earnings requirement, at a 70–90% wage replacement rate, capped weekly at the statewide average weekly wage).

Colorado, 109 Connecticut, 110 Delaware, 111 Maine, 112 Massachusetts, 113 Maryland, 114

¹⁰⁹ See Colo. Rev. Stat. Ann. §§ 8-13.3-501–8-13.3-524 (West, Westlaw through 1st Reg. and Extr. Sess. 2025) (providing twelve weeks of paid leave to all workers that meet a minimum earnings requirement at a 50–90% progressive wage replacement rate, capped at 90% of the state's average weekly wage).

¹¹⁰ See Conn. Gen. Stat. Ann. §§ 31-57r–31-57w (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks to workers who meet a minimum income requirement at a 60–95% wage replacement rate, capped weekly at 60 times the state minimum wage).

¹¹¹ See Del. Code Ann. tit. 19, §§ 3701–3724 (West, Westlaw through Ch. 231 of the 153rd Gen. Assemb. 2025–26) (providing twelve weeks of paid leave, beginning January 2026, to all workers who have worked at least 1,250 hours and whose employers have at least 10 employees at an 80% wage replacement rate, with a weekly cap adjusted based on inflation).

¹¹² See ME. REV. STAT. ANN. tit. 26, §§ 850-A-850-R (Westlaw through 2025 Reg. and 1st Spec. Sess. of the 132nd Leg.) (providing twelve weeks of paid leave, beginning January 2026, to workers who meet a minimum earnings requirement at a 66%–90% wage replacement rate, capped weekly at the state average weekly wage).

¹¹³ See Mass. Gen. Laws Ann. ch. 175M, §§ 1–11 (West, Westlaw through Ch. 13 of the 2025 1st Annual Sess.) (generously providing up to 26 weeks of paid leave at a 50%–80% wage replacement rate, capped weekly at 64% of the state average weekly wage, to workers who meet a minimum earnings requirement; the 26-week maximum period is comprised of 12 weeks maximum family leave for bonding with a newborn and 20 weeks maximum medical leave for one's own health).

¹¹⁴ See MD. CODE ANN., LAB. & EMPL. §§ 8.3-101–8.3-1001 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave, beginning January 3, 2028, to all workers who have worked at least 680 hours within the last year at a 50%–90% wage replacement rate, with a weekly cap adjusted based on inflation).

Minnesota,¹¹⁵ New Jersey,¹¹⁶ New York,¹¹⁷ Oregon,¹¹⁸ Rhode Island,¹¹⁹ and Washington.¹²⁰ With the exception of New York, these states' policies generally operate through employer-or employee-funded payroll taxes that pool into a statewide social insurance fund, similar to how Social Security operates.¹²¹ New York instead mandates that employers purchase a paid family leave plan from private insurance companies.¹²²

Ten states have opted for voluntary policies (also through statute) by permitting private insurance companies to provide paid family leave benefits: Alabama, ¹²³ Arkansas, ¹²⁴

¹¹⁵ See Minn. Stat. Ann. §§ 268B.01–268B.30 (West, Westlaw through 2025 Reg. Sess. and 1st Spec. Sess.) (providing twelve weeks of paid leave, beginning January 2026, to all workers who meet a minimum earnings requirement at a 50%–90% wage replacement rate, capped weekly at the statewide average weekly wage).

¹¹⁶ See N.J. Stat. Ann. §§ 34:11B-1–34:11B-16 (West, Westlaw through L. 2025, Ch. 146 and J.R. 10) (providing twelve weeks of paid leave to all employees who meet minimum earnings requirements, at an 85% wage replacement rate capped weekly at 70% of the state average weekly wage).

¹¹⁷ See N.Y. Workers' Comp. Law §§ 200–242 (McKinney, Westlaw through L. 2025 Chs. 1 to 525) (creating a mandatory private insurance system, overseen and regulated by the New York Government, and providing up to twelve weeks of paid leave to private employees who meet a minimum hour requirement, and self-employed workers, at a 67% wage replacement rate, capped weekly at 67% of the state average weekly wage).

¹¹⁸ See Or. Rev. Stat. Ann. §§ 657B.005–657B.925 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave to all workers who meet a minimum earnings requirement at a 50%–100% wage replacement rate, capped weekly at 120% of the state average weekly wage).

¹¹⁹ See 28 R.I. GEN. LAWS ANN. §§ 28-39-1–28-39-41 (West, Westlaw through Ch. 473 of the 2025 Reg. Sess.) (providing seven weeks of paid leave to part- and full-time workers that meet minimum earnings requirements at an approximately 60% wage replacement rate, with further increases in the duration and wage replacement rate as the program phases in, and a weekly cap of 85% of the state average weekly wage).

¹²⁰ See Wash. Rev. Code Ann. §§ 50A.05–50A.50 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave to those who have worked at least 820 hours within the last year at a 90% wage replacement rate, with a weekly cap of 90% of the state average weekly wage).

¹²¹ See Sarah A. Donovan, Paid Family and Medical Leave in the United States 9 (2023), https://sgp.fas.org/crs/misc/R44835.pdf [https://perma.cc/TAP2-M528].

¹²² See N.Y. Workers' Comp. Law § 211 (McKinney, Westlaw through L. 2025 Chs. 1 to 525).

¹²³ ALA. CODE §§ 27-19-150–27-19-160 (Westlaw through 2025 Reg. Sess.).

¹²⁴ ARK. CODE ANN. § 23-62-112 (West, Westlaw through 2025 Reg. Sess.).

Florida, 125 Kentucky, 126 New Hampshire, 127 South Carolina, 128 Tennessee, 129 Texas, 130 Vermont, 131 and Virginia. 132 Of these voluntary-mechanism states, New Hampshire contracts with a single insurance carrier to provide a base plan for the entire state. 133

The most generous state-mandated paid family leave policy in the United States is twenty-six weeks long,¹³⁴ and the average length is roughly twelve weeks; in contrast, the global averages for paid maternity and paternity leave are twenty-nine and sixteen weeks, respectively.¹³⁵

It would be remiss to not mention that some smaller localities offer public paid family leave programs. For example, Chicago has its own city-run paid family leave program.¹³⁶

¹²⁵ FLA. STAT. ANN. \S 627.445 (West, Westlaw through 2025 Spec. Sess. and July 1 of the 2025 1st Reg. Sess.).

¹²⁶ Ky. Rev. Stat. Ann. §§ 304.53-010–304.53-070 (West, Westlaw through 2025 Reg. Sess.).

¹²⁷ N.H. REV. STAT. ANN. §§ 21-I:99-21-I:111 (Westlaw through Ch. 304 of the 2025 Reg. Sess.).

¹²⁸ S.C. Code Ann. §§ 38-103-10–38-103-90 (Westlaw through 2025 Act 94).

¹²⁹ TENN. CODE ANN. §§ 56-7-3601–56-7-3605 (West, Westlaw through 2025 1st Reg. Sess.).

¹³⁰ Tex. Ins. Code Ann. §§ 1255.001–1255.108 (West, Westlaw through 2025 Reg. and 2d Called Sess.).

¹³¹ See Governor Phil Scott Launches Voluntary Paid Family and Medical Leave Program, Off. of Gov. Phil Scott (Dec. 6, 2022), https://governor.vermont.gov/press-release/governor-phil-scott-launches-voluntary-paid-family-and-medical-leave-program [https://perma.cc/3WGL-QWTU]; Request for Proposals: Voluntary Paid Family and Medical Leave Insurance (FMLI) Administrator, Vt. Bus. Registry (July 2022), http://www.vermontbusinessregistry.com/BidPreview.aspx?BidID=56122 [https://web.archive.org/web/20230603233315/http://www.vermontbusinessregistry.com/BidPreview.aspx?BidID=56122].

¹³² VA. CODE ANN. § 38.2-107.2 (West, Westlaw through 2025 Reg. Sess. and Reconvened Sess.).

¹³³ N.H. Rev. Stat. Ann. \S 21-I:105 (Westlaw through Ch. 304 of the 2025 Reg. Sess.); Donovan, supra note 121, at 10.

¹³⁴ Massachusetts generously provides 26 weeks of paid leave. See Mass. Gen. Laws Ann. ch. 175M, § 2(c)(1) (West, Westlaw through Ch. 13 of the 2025 1st Ann. Sess.).

¹³⁵ Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. TIMES (Oct. 25, 2021), https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html [https://perma.cc/K8TA-5DJ8].

¹³⁶ Chicago Paid Leave and Paid Sick and Safe Leave Ordinances, MUNICIPAL CODE OF CHICAGO ch. 6-130.

However, many states preempt cities from having their own paid leave policies.¹³⁷ For example, Dallas attempted to pass a paid sick leave ordinance, but a Texas federal district court determined that the Texas Minimum Wage Act preempted any city benefits and enjoined the ordinance.¹³⁸

3. The Private Employer Paid Family Leave Landscape

Some employers elect to provide their employees with paid family leave, but this is uncommon. In fact, many employers have rolled out changes to shorten the length of the paid leave benefits they offer to their employees. ¹³⁹ Currently, only 27% of private sector workers have access to paid family leave. ¹⁴⁰ Those employees are also more likely to be working in full-time, high-paying occupations at large companies. ¹⁴¹ For example, 39% of workers in management and professional industries have access to paid leave benefits, compared to only 16% of workers in the service industry. ¹⁴² It follows that richer workers typically have better benefits. Among the lowest 10% of earners, only 6% (one in twenty) have access to paid family leave, whereas among the top 10% of earners, 43% have access to paid family leave. ¹⁴³ Unfortunately, this means that those who need paid family leave the most—vulnerable low-income workers that cannot afford unpaid leave—have the least amount of coverage.

There are also racial disparities in the paid family leave landscape—white workers have greater access to paid family leave than Asian, Black, and Hispanic workers, even

¹³⁷ See Jennifer L. Pomeranz & Mark Pertschuk, State Preemption: A Significant and Quiet Threat to Public Health in the United States, 107 Am. J. Pub. Health 900, 901 (2017).

¹³⁸ See ESI/Employee Sols., L.P. v. City of Dallas, 531 F. Supp. 3d 1181 (E.D. Tex. 2021).

¹³⁹ See Kathryn Dill & Angela Yang, Companies Are Cutting Back on Maternity and Paternity Leave, Wall St. J. (Aug. 22, 2022) ("New data show that the share of employers offering paid maternity leave . . . dropped to 35% this year"), https://www.wsj.com/articles/the-surprising-benefit-some-companies-are-taking-awayparental-leave-11661125605 [https://perma.cc/QV77-6TPD].

¹⁴⁰ See What Data Does the BLS Publish on Family Leave?, U.S. BUREAU LAB. STAT. (Sep. 21, 2023), https://www.bls.gov/ebs/factsheets/family-leave-benefits-fact-sheet.htm [https://perma.cc/5RTM-CBTY].

¹⁴¹ See Donovan, supra note 121, at 4.

¹⁴² See U.S. Bureau Lab. Stat., supra note 140.

¹⁴³ See id.

when controlling for job characteristics.¹⁴⁴ It is important to remember that these disparities contribute to worse Black maternal mortality and postpartum depression rates.¹⁴⁵ Biological sex disparities also exist—some employers' paid parental leave benefits differ depending on whether the employee physically gave birth to a child.¹⁴⁶

This patchwork of family leave policies causes millions of Americans to slip through the cracks. Pregnant workers that cannot find coverage through their employers must rely on an amalgamation of saved-up paid vacation hours, paid sick leave hours, and temporary claims for disability insurance. In turn, this reliance precludes workers from using sick leave and vacation time for their intended purposes.

III. Integrating Paid Family Leave into State Constitutional Protections

A. International Legal Understandings of "Reproductive Freedom"

Reproductive freedom amendments are a new legal phenomenon in the United States, so it is useful to briefly examine how foreign jurisdictions have approached comparable constitutional rights. That being said, it is distinctly challenging to find analogous foreign precedent for paid family leave because most nations have enacted paid leave through statutory frameworks. While some countries have incorporated paid family leave provisions into their constitutions, as mentioned in Part I, these provisions are typically enacted alongside or after statutory paid leave programs. This leaves little room for individuals to initiate lawsuits compelling legislatures to create a new welfare regime.

A more relevant comparison may be found in lawsuits involving foreign countries' Equal Rights Amendments (ERAs). These amendments usually declare sweeping guarantees of equal protection but do not explicitly mandate the creation of statutory programs. For example, in Germany, the legislature invoked its ERA to enact the Federal Parental Benefit

¹⁴⁴ See Julia M. Goodman et al., Racial and Ethnic Inequities in Paid Family and Medical Leave: United States, 2011 and 2017-2018, 112 Am. J. Pub. Health 1050, 1050–58 (2022).

¹⁴⁵ See Grayer, supra note 87.

There have been a few successful lawsuits against employers that distinguished paid leave benefits on the basis of gender. *See, e.g.*, Rotondo v. J.P. Morgan Chase Bank, No. 2:19-CV-2328, 2019 U.S. Dist. LEXIS 201616 (S.D. Ohio Nov. 20, 2019); EEOC v. Estée Lauder Cos., No. 2:17-CV-03897-JP (E.D. Pa. Aug. 30, 2017); *see also* Dill & Yang, *supra* note 139 ("The share of employers giving paternity time off fell to 27%" compared to 35% of employers offering maternity leave.").

and Parental Leave Law. 147 This invocation demonstrates a legislative acknowledgment that women's equality and liberty are intrinsically linked to access to paid leave during and after pregnancy. In contrast, the French judiciary rejected a constitutional argument that the ERA conferred enforceable individual rights. 148 Instead, it held that the ERA merely reflected foundational republican principles and did not impose any state obligations to pass gender equality legislation. 149 This differing approach suggests the importance of prioritizing legal challenges in U.S. states where the reproductive freedom amendments are more obviously self-executory and provide stronger grounds for judicial intervention.

Specifically, within the context of reproductive freedom, the Inter-American Court of Human Rights interpreted the American Convention on Human Rights' provisions for a right to "a private life" and a right to "reproductive autonomy" as imposing a positive obligation upon the Costa Rican government to provide in vitro fertilization (IVF) services to all its citizens. This case demonstrates a judicial acknowledgment that reproductive autonomy is an expansive concept, extending beyond traditional negative rights to abortion or contraception, and it can provide a rational basis for positive entitlements. As a result, the court ordered Costa Rica to incorporate IVF coverage into its national health insurance system. U.S. state courts could reasonably adopt a similar approach with respect to paid leave, such as mandating that employers incorporate coverage of paid leave into existing employee health insurance benefits.

B. State Amendment Language

Currently, six states have passed constitutional amendments enshrining "reproductive freedom" or "reproductive liberty": Michigan, Vermont, Missouri, Maryland, Montana,

¹⁴⁷ See Julie C. Suk, An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home, 28 Yale J.L. & Feminism 381, 416 (2017).

¹⁴⁸ See id. at 429.

¹⁴⁹ See id.

¹⁵⁰ The Court found that "the right to have access to scientific progress" was necessary "to exercise reproductive autonomy," and thus gave rise to a right "to have access to the best health care services in assisted reproduction techniques." Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, 46 (Nov. 28, 2012).

¹⁵¹ See id. at 42-45.

¹⁵² See id. at 97.

and Ohio.¹⁵³ Of course, the specific language of these amendments varies significantly across states, which will affect their scopes of enforceability. This section will provide an overview of the similarities and differences between these amendments before focusing more closely on Michigan and Maryland. Michigan's amendment is particularly noteworthy due to its breadth, its specificity in coverage, and its inclusion of a self-executory clause, ¹⁵⁴ which makes it one of the amendments most conducive to potential litigation expanding the scope of protections. Maryland's amendment is more imprecise in its protections and does not feature a self-executory clause, but it is worth analyzing in detail because it is the only state in this group that has an existing statutory paid family leave program.¹⁵⁵

1. Defining Reproductive Freedom

Some of the states' amendments explicitly outline examples of reproductive rights. Michigan and Missouri both specify that reproductive freedom includes decisions related to prenatal care, childbirth, contraception, abortion care, and miscarriage care. Michigan extends these protections to sterilization and infertility care, while Missouri uniquely includes the right to "respectful birthing conditions." Ohio similarly provides examples of reproductive freedom but overall adopts a narrower scope, only naming contraception, fertility treatment, "continuing one's pregnancy," miscarriage care, and abortion. Michigan and Missouri's references to postpartum care suggest a recognition that the ability to recover from childbirth and care for a newborn is a fundamental component of reproductive freedom. Ohio's lack of parallel language and narrower examples, on the other hand, may signal less sympathy for a paid family leave argument.

In contrast, Maryland, Montana, and Vermont offer very minimal definitions of reproductive freedom in their amendments. Maryland merely references the "ability to make and effectuate decisions to prevent, continue, or end one's pregnancy" without

¹⁵³ The full texts of these amendments are located in the Appendix.

¹⁵⁴ See Mich. Const. art. I, § 28(5).

¹⁵⁵ See Md. Const. art. 48.

¹⁵⁶ See Mich. Const. art. I, § 28(1); Mo. Const. art. I, § 36(2).

¹⁵⁷ See MICH. CONST. art. I, § 28(1).

¹⁵⁸ Mo. Const. art. I, § 36(2).

¹⁵⁹ Oнio Const. art. I, § 22(A).

further elaboration. ¹⁶⁰ Montana similarly provides for the "right to make and carry out decisions about one's own pregnancy" without elaboration, and does not use the phrases "reproductive freedom" or "reproductive liberty" anywhere in the amendment or its title. ¹⁶¹ Vermont's amendment is perhaps the vaguest of all, merely declaring a broad "right to personal reproductive autonomy" and leaving its interpretation entirely open. ¹⁶² Although these amendments are less explicit in their protections, the broad recognition of the concept of "reproductive liberty" or "decisions about one's . . . pregnancy" could actually leave *more* room for arguments that the amendments encompass the social supports necessary to exercise such rights. ¹⁶³ In the same vein, Vermont's ambiguous language may be preferable to Maryland and Montana's focus on "pregnancy," as opponents could argue that the amendments' protections should end at childbirth (the biological conclusion of pregnancy).

2. Negative Versus Positive Rights

A unifying feature of the amendments is their use of negative strict scrutiny language, requiring the state to justify any limitation on reproductive freedom with a compelling state interest achieved by the least restrictive means. However, Michigan and Missouri go even further by restricting the definition of a "compelling" state interest to solely the "limited purpose" or "limited effect" of "protecting" or "improving or maintain[ing] the health of an individual seeking care, consistent with accepted clinical practice and evidence-based medicine, and [not] infring[ing] on that individual's autonomous decision-making." Ohio and Montana set similar parameters "to advance the individual's health in accordance with widely accepted and evidence-based standards of care" and "address[] a medically acknowledged, bona fide health risk to a pregnant patient," respectively. Maryland and Ohio also specify that the government is prohibited from engaging in both "direct[] or indirect[]" actions that limit reproductive freedom. These provisions significantly curtail acceptable state action, and they notably require third-party input (e.g., from the medical community). This is favorable in the context of paid family leave, given the wealth of

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160 Md. Const. art. 48.
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¹⁶¹ Mont. Const. art. II, § 36(1).

¹⁶² Vt. Const. art. 22.

¹⁶³ Md. Const. art. 48; Mont. Const. art. II, § 36(1); Vt. Const. art. 22.

¹⁶⁴ MICH. CONST. art. I, § 28(1)–(4); Mo. CONST. art. I, § 36(3).

¹⁶⁵ Ohio Const. art. I, § 22(B); Mont. Const. art. II, § 36(4)(a).

¹⁶⁶ Md. Const. art. 48; Ohio Const. art. I, § 22(B).

evidence demonstrating the health benefits of paid parental leave, as discussed *supra* Part II.B.

The amendments reflect varying degrees of positive rights language. Michigan, Ohio, Maryland, and Montana appear to establish a distinct, fundamental right to reproductive freedom in the first sentence of their amendments before beginning a separate sentence outlining standards for constitutional review.¹⁶⁷ This structure suggests that individuals possess a right to reproductive freedom independent of state interference—that is, they have a right to an abortion and other necessary reproductive benefits, not merely a right to be free from government obstruction in exercising reproductive choices. Syntactically, the first clause thus establishes positive rights to reproductive freedom, while the second clause outlines negative rights against state infringement. This language raises the possibility that individuals in Michigan, Ohio, Maryland, and Montana could bring a claim against non-state actors, such as employers who infringe upon or burden their rights.

Conversely, Missouri frames its entire amendment in traditional negative rights language by beginning with a directive prohibiting the government from "deny[ing] or infring[ing]" reproductive freedom. Missouri's amendment language is otherwise nearly identical to Michigan's; this syntactical distinction suggests that Missouri intentionally altered its language in a recognition that Michigan's approach *does* confer positive rights. Missouri even has a section defining who exactly qualifies as the "government," again limiting the scope of the amendment. Of course, this poses significant challenges for arguments that Missouri intended to guarantee any positive rights to reproductive freedom. Vermont's amendment occupies a middle ground—it declares a right to reproductive freedom but, unlike Michigan, Ohio, Maryland, and Montana, continues into negative rights language within the same sentence without clear separation. This again raises uncertainty about whether Vermont courts would interpret the amendment as conferring positive rights.

¹⁶⁷ See Mich. Const. art. I, § 28(1); Ohio. Const. art. I, § 22(A); Md. Const. art. 48; Mont. Const. art. II, § 36(1).

¹⁶⁸ Mo. Const. art. I, § 36(2) ("The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom").

¹⁶⁹ *Id.* § 36(8)(2) (defining the term government as "a. the state of Missouri; or b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.").

¹⁷⁰ See Vt. Const. art. 22.

Maryland and Vermont also notably ground their right to reproductive freedom in existing rights. Vermont's amendment says that the "individual right to personal reproductive autonomy" is "central to the liberty and dignity to determine one's own life course." Maryland's amendment similarly describes the "fundamental right to reproductive freedom" as a "central component of an individual's rights to liberty and equality." These references to liberty—traditionally understood as a negative right—may suggest that reproductive freedom is not an independent, positive right but rather a derivative right dependent on the broader principles of liberty and equality. This could further limit the scope and enforceability of these amendments' reproductive freedom guarantees.

3. Enforceability

Michigan and Ohio are the only states whose amendments include a self-executing clause, which has significant practical implications.¹⁷³ The amendments in Missouri, Maryland, Montana, and Vermont are silent on self-execution, making it more challenging to assert that these amendments are directly enforceable in court. As discussed *supra* Part I, self-executing clauses enable citizens to bring legal actions to remedy infringements of their rights without waiting for legislative action. As a result, plaintiffs in Michigan and Ohio likely have a better chance of successfully claiming that their rights have been violated than those in Missouri, Maryland, Montana, or Vermont. In the latter group of states, courts may interpret the amendments as merely declaratory, moral mandates for the legislature to decide to act upon rather than providing any independent, enforceable right to reproductive freedom. The outcomes of such cases will likely depend on a state's self-execution doctrine. For example, as discussed *supra* Part II, Montana courts have recognized that the state's environmental protection amendment was self-executing despite the absence of an explicit clause saying so;¹⁷⁴ Montana courts could adopt a similar approach to reproductive rights.

4. Case Study: Michigan

Michigan's reproductive freedom amendment reads, in relevant part:

¹⁷¹ Id.

¹⁷² Md. Const. art. 48.

¹⁷³ See MICH. CONST. art. I, § 28(1) ("This section shall be self-executing."); OHIO CONST. art. I, § 22(D) ("This Section is self-executing.").

¹⁷⁴ See Cape-France Enters v. Est. of Peed, 29 P.3d 1011, 1016–17 (Mont. 2001).

(1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means. . . (4) For the purposes of this section: A state interest is "compelling" only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making. . . . (5) This section shall be self-executing. 175

The language of Michigan's amendment aligns closely with the core concepts of reproductive justice, and Michigan plaintiffs may have an easier time establishing the amendment's commitment to reproductive justice than plaintiffs in states where constitutional protections are vaguer, like Montana. The amendment reflects reproductive justice's support of both having a child and not having a child by explicitly protecting prenatal care, childbirth, contraception, sterilization, abortion care, miscarriage care, and infertility care. Arguably, the amendment also recognizes reproductive justice's third tenet, supporting a person's ability to raise a child in safe conditions, by covering "postpartum care." Because the amendment acknowledges that reproductive health extends beyond pregnancy, it is a natural and persuasive argument that the amendment should cover policies like paid family leave that support individuals' recovery post-birth.

As discussed *supra* Part III.B.3, a key feature of Michigan's amendment is its self-executing clause, which empowers citizens to bring actions in court to remedy infringements of their reproductive freedoms. This clause distinguishes Michigan's amendment from other states' amendments and increases the likelihood that Michigan courts will directly enforce reproductive rights rather than dismissing the amendment as a non-enforceable legislative mandate.

For litigants, it will be crucial to demonstrate the difference between the amendment's first clause, which establishes a positive right to reproductive freedom, and the second clause, which affirms citizens' negative rights by prohibiting state interference. Reading the first sentence as creating a separate positive right would allow courts to extend reproductive

¹⁷⁵ MICH. CONST. art. I, § 28(1), (4)–(5).

freedom protections against non-state actors. For example, a private workplace policy that offers no paid maternity or paternity leave could be construed as imposing a burden on reproductive freedom.

However, even the negative rights language in the second sentence is significant for expanding access to paid family leave. In 2015, Michigan's state legislature passed H.B. 4052, which, *inter alia*, prohibited local governments from "adopt[ing], enforc[ing], or administer[ing] an ordinance, local policy, or local resolution requiring an employer to provide to an employee paid or unpaid leave time." In other words, the statute preempted all Michigan cities from passing their own paid leave policies. Michigan's reproductive freedom amendment could provide grounds for a constitutional challenge to H.B. 4052; by banning local paid leave policies (such as one passed by city ordinance), the state has acted to burden an individual's right to reproductive freedom. Plaintiffs would then argue H.B. 4052 fails strict scrutiny, given the amendment's narrow definition of a "compelling state interest" as protecting health "consistent with accepted clinical standards of practice and evidence-based medicine." As discussed *supra* Part II.B, paid family leave is widely accepted as improving maternal and infant outcomes.

5. Case Study: Maryland

Maryland's reproductive freedom amendment reads, in relevant part:

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The state may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling state interest achieved by the least restrictive means.¹⁷⁸

Maryland's amendment presents some significant challenges for framing a positive right to paid family leave. It grounds the right to reproductive freedom in the broader, existing rights to liberty and equality, which suggests that reproductive freedom may merely be a derivative of existing negative rights. Furthermore, the amendment generally

¹⁷⁶ Codified at Mich. Comp. Laws Ann. § 123.1388 (West, Westlaw through P.A. 2025, No. 30, 2025 Reg. Sess., 103d Leg.).

¹⁷⁷ MICH. CONST. art. I, § 28(4).

¹⁷⁸ Md. Const. art. 48.

characterizes reproductive freedom as decisions about "pregnancy" without addressing reproductive decisions such as post-birth recovery. This makes it harder to argue the amendment explicitly protects rights related to parental leave. Additionally, the absence of a self-executory clause could allow courts to dismiss the amendment's promises as non-enforceable or declaratory. Nevertheless, there remains some room for flexible interpretation. Plaintiffs could argue that individuals cannot fully exercise their right to make decisions about pregnancy if the lack of parental leave effectively forces them to choose between having a child and maintaining financial stability.

However, beginning July 1, 2026, Maryland will offer its citizens paid family leave through the Maryland Family and Medical Leave Insurance (FAMLI) system.¹⁷⁹ FAMLI is a joint employer- and employee-funded, state-run insurance system that provides parttime and full-time workers with a wage replacement of up to \$1,000 a week for up to twelve weeks per year. 180 The creation of the FAMLI system shifts the strategic focus for paid family leave advocates. Rather than arguing for the establishment of a paid family leave program at all, the issue may become whether the state's existing benefit system is inadequate and indirectly abridges an individual's reproductive freedom. FAMLI ties benefits to employment and other eligibility requirements, such as a minimum of 680 hours worked.¹⁸¹ This excludes a significant portion of the population, including self-employed individuals, newly employed workers, independent contractors, and the unemployed. Plaintiffs could argue that these eligibility restrictions infringe upon the right to reproductive freedom and should be relaxed or eliminated altogether. Alternatively, plaintiffs could argue that FAMLI benefits are insufficient for meaningful postpartum recovery because the available time off should be longer than twelve weeks or the wage replacement rate should be higher than \$1,000 per week.

C. Potential Judicial Remedies

Even if courts were receptive to interpreting reproductive freedom amendments as conferring positive rights, there remains an open question of what exactly a court-ordered paid family leave program would look like in practice. The most common model, as discussed *supra* Part II.C, involves joint employer and employee-funded payroll taxes that pool into a general welfare system. New York offers an alternative approach by requiring employers to purchase paid leave insurance. Courts could also take a more unconventional

¹⁷⁹ See Md. Code Ann., Lab. & Empl. §§ 8.3-101–8.3-1001 (West, Westlaw through 2025 Reg. Sess.).

¹⁸⁰ See id.

¹⁸¹ See id.

path, like mandating lump-sum welfare payments that are independent of employment status or wage replacement. In those cases, states could consider implementing means testing to ensure the allocation of benefits to the most vulnerable populations.

The more likely scenario, however, is that courts will refrain from defining the specific contours of a paid leave policy for fear of overstepping into the realm of legislative authority. 182 Courts may issue broad directives requiring legislatures to "establish" a paid family leave program in compliance with the reproductive freedom amendments, but they would likely stop short of dictating nuanced criteria such as funding mechanisms. For states with existing paid leave programs, like Maryland, courts may have greater flexibility to identify inadequacies in the current system because doing so implicates less legislative power than does drafting an entire welfare schema. In a state education case, the Ohio Supreme Court ordered the legislature to create a new school funding system because the existing scheme was inadequate to fulfill the promises of the state's constitutional education amendment.¹⁸³ The court did not give precise instructions on what the new system had to look like, but they did highlight broad areas of concern, like adopting strict academic guidelines or funding through local property taxes. 184 State courts may adopt a similar approach in the context of reproductive freedom amendments, exercising a considerable amount of judicial power but also remaining cognizant of overstepping into legislative territory with unduly prescriptive orders.¹⁸⁵

From a strategic standpoint, legal advocates for paid family leave and reproductive justice should push for the broadest and most comprehensive protections possible, framing a robust paid family leave system as an essential component of reproductive freedom and emphasizing how inadequate policies disproportionately harm marginalized communities. Even a meager court-mandated policy could provide a crucial starting point for broader reforms by signaling judicial acknowledgment of the link between reproductive freedom and paid leave. It could also inspire other beneficial policy changes, such as universal

¹⁸² See generally Yeju Hwang, Silent Today, Conversant Tomorrow: Education Adequacy as a Political Question, 118 Nw. U. L. Rev. 1663 (2024), for an overview of how courts frequently refrain from specificity in education litigation remedies. *Infra* Part III.D and *infra* note 189 also discuss the separation of powers concerns that courts may have.

¹⁸³ See DeRolph I, 78 Ohio St.3d 193, 212-13 (Ohio 1997).

¹⁸⁴ See DeRolph II, 89 Ohio St.3d 1, 35–38 (Ohio 2000).

¹⁸⁵ See infra Part III.D and infra note 196 for further discussion on how courts may avoid separation of powers problems.

daycare or generous child tax credits, that would similarly further the goals of reproductive justice.

D. Addressing Counterarguments

Paid family leave garners wide bipartisan support in American politics,¹⁸⁶ yet it consistently fails to lodge a foothold in the federal welfare scheme—largely due to congressional gridlock over policy details.¹⁸⁷ Even among states that have implemented paid family leave, there is no one-size-fits-all policy structure.¹⁸⁸ This Note has proposed that one solution for solving the paid leave crisis may be turning away from the legislature and instead towards the courts through constitutional amendment arguments. However, several potential counterarguments may complicate the achievement of paid family leave through state constitutional litigation.

First, a court challenge for constitutional paid family leave might face roadblocks similar to a traditional legislative route. Many legal scholars have cited political question concerns about the expansion of positive economic and social rights, such as the dangers of judicial overreach into legislative policymaking. However, the rebuttal to these separation of powers critiques is that, \hat{a} la Marbury, one of the core responsibilities

¹⁸⁶ See Bryan Bennett, Navigator, Americans Overwhelmingly Support Paid Family and Medical Leave (2022), https://navigatorresearch.org/americans-overwhelmingly-support-paid-family-and-medical-leave/ [https://perma.cc/RS9U-53UW] ("Overwhelming and bipartisan majorities support the creation of [a paid family leave] program, including more than three in four independents (76%) and seven in ten Republicans (70%) ").

¹⁸⁷ See, e.g., Jonathan Weisman, Why Paid Family Leave's Demise This Time Could Fuel It Later, N.Y. TIMES (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/politics/paid-family-leave.html [https://perma.cc/M2XK-BJRB] (detailing how recent Republican- and Democrat-backed paid leave bills consistently failed in Congress).

¹⁸⁸ See discussion supra Part II.C.2.

See, e.g., Positive Rights, supra note 46, at 1135 n.10 (citing a multitude of legal scholars' apprehension towards federal judicial enforcement of welfare rights); Usman, supra note 25, at 1498–1500. See generally Cass R. Sunstein, Against Positive Rights, 2 E. Eur. Const. Rev. 35 (1993) (arguing against proposals for integrating positive rights into European constitutions due, in part, to the difficulties around judicial enforceability); Nat Stern, Don't Answer That: Revisiting the Political Question Doctrine in State Courts, 21 U. Pa. J. Const. L. 153 (2018) (surveying how some state courts have dismissed state constitutional rights cases on political question grounds); Wiles, supra note 38 (exploring the range of socio-economic rights enforcement abroad).

¹⁹⁰ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

of the judiciary is to interpret the constitution; if the constitution imposes some positive guarantee, then "the judiciary is the branch best able to define its parameters." ¹⁹¹ In one Kentucky education litigation case, the court wrote: "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable." ¹⁹² Moreover, a state's separation of powers doctrine need not mirror the federal political question doctrine; ¹⁹³ in fact, most states' approaches to analogous constitutional education rights cases do not. ¹⁹⁴ Helen Hershkoff provides a compelling reframing:

The presence of a positive right in a state constitution should . . . be understood as constraining the legislature's otherwise unfettered discretion to choose from among competing policy alternatives. The legislature can choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end.¹⁹⁵

Determining, as a threshold issue, whether these amendments confer a responsibility on the legislature to meaningfully protect citizens' reproductive freedoms need not trigger

¹⁹¹ Feldman, supra note 50, at 1061.

¹⁹² Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (cited in Alabama Coalition for Equity, Inc. v. Hunt, 624 So.2d 107 (Ala. 1993)) (citing Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978)); see also Jensen, supra note 43, at 36 ("[I]t is a judicial not legislative duty to interpret the state constitution.").

¹⁹³ See Jonathan L. Marshfield, America's Other Separation of Powers Tradition, 73 DUKE L.J. 545, 626–29 (2023) (explaining how state separation of powers doctrine differs from its federal counterpart and thus state courts should "avoid reliance on tropes about checks and balances or formalistic articulations of executive, judicial, or legislative power," instead "apply[ing] text even in the face of outcomes that appear to imbalance power between branches" especially in order to affirm citizens' political preferences in constitutional amendment ballot initiatives); Hwang, supra note 182, at 1696 ("The reality is that the foundations of justiciability—thus, the political question doctrine—are tethered to Article III of the federal Constitution and the federal courts. This creates an absurdity when the political question doctrine appears in state courts; the principles of justiciability that these state courts raise are ones to which they have no obligation to be faithful."). See generally Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 HARV. L. REV. 1834 (2001) (arguing that state courts take a different approach to justiciability than federal courts).

¹⁹⁴ See Stern, supra note 189, at 192–94 (surveying many state courts' willingness to confront constitutional education rights arguments and rejecting justiciability challenges); Usman, supra note 25, at 1506–08.

¹⁹⁵ Helen Hershkoff, Welfare Devolution and State Constitutions, 67 FORDHAM L. REV. 1403, 1414 (1999).

justiciability concerns. Courts can avoid judicial overreach by limiting the specificity or scope of their remedies. ¹⁹⁶ Alternatively, suits against private employers may not even raise these concerns at all; a court could determine that a private employer's leave policy burdens an employee's fundamental reproductive freedom rights and provide judicial remedies without mandating legislative action.

Second, as discussed *supra* Part I, courts may view these amendments as insufficiently explicit to mandate paid leave and reject an enforceable positive rights argument altogether. However, enforceable state rights have derived from constitutional provisions that were not explicitly self-executory; see, for example, Montana's recognition of enforceable environmental rights and many state courts' recognition of enforceable education rights. The success of legal challenges may depend on existing state self-executory doctrine or explicit self-execution provisions, but if there are any places to attempt to advance radical legal arguments in the United States, it is at the state constitutional level. Rights expansion has happened before, and it can happen again with strategic legal arguments and legislative drafting.

A third challenge is that some critics may question whether paid family leave is best framed as an issue of reproductive rights. Is paid leave solely within the realm of economic and/or employment policy, given its effect on workforce participation and income stability? This criticism overlooks the interconnectedness of economic security and reproductive justice, which implores a holistic approach to reproductive rights that considers how economic conditions may have undue influence on reproductive freedom. Access to paid leave directly impacts an individual's ability to make family planning decisions, and its potential effects on long-term gender parity in the workplace should not be understated.

Finally, a more radical critique may probe whether we should be relying on an employment-based system for welfare benefits at all. By tying paid leave to employment, we may exclude independent contractors and anyone outside of the labor market. Why not implement a no-strings-attached lump-sum payment, akin to universal basic income?

¹⁹⁶ See Wiles, supra note 38, at 47 ("[J]udicial review of a socio-economic right does not necessarily involve the determination of a particular level of resources to be spent by the state or the exact way they are to be spent; a judgment can simply consist of pointing out where a violation has occurred, and instructing that it should be remedied in which ever way the public authority deems most appropriate, or simply that an appropriate inquiry should be instigated.").

¹⁹⁷ See also Usman, supra note 25, at 1500–02. See generally José L. Fernandez, State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?, 17 HARV. ENV'T. L. REV. 333 (1993) (explaining the roadblocks that self-execution doctrine might present to rights enforcement).

This could be a more equitable solution that avoids reinforcement of notions that one must "earn" their welfare benefits. While this critique raises valid points, it would certainly face several political and practical challenges: the unfortunate reality is that programs tied to employment are more palatable to both lawmakers and voters. ¹⁹⁸ An employment-based paid leave policy, though imperfect, is likely the most politically viable starting point.

CONCLUSION

Although this Note focuses on paid family leave, these constitutional arguments are equally applicable to other aspects of reproductive justice. For example, public funding for abortions or even IVF care may present a more legally intuitive and straightforward path to positive reproductive rights protections. Court rulings incorporating abortion care into insurance coverage would likely face less political and legal resistance than establishing an entirely new welfare system. Of course, reproductive rights advocates should not overlook these opportunities.

However, the integration of paid family leave into the umbrella of reproductive freedom presents a unique opportunity to reshape the discourse around workers' rights. By pushing for robust paid family leave supports, activists can illuminate the deep connections between employment law and an individual's ability to exercise reproductive freedom beyond the workplace. Paid family leave is not just an employment issue—it intersects with race, gender, disability, healthcare, and bodily autonomy. The reproductive justice framework urges us to think beyond mainstream advocacy, which has so often left behind individuals at the margins, particularly Black women, disabled people, and low-income individuals.

Indeed, data shows that over two-thirds of Americans support tying welfare to work requirements. See Linley Sanders, How Americans Evaluate Social Security, Medicare, and Six Other Entitlement Programs YouGov (Feb. 8, 2023), https://today.yougov.com/politics/articles/45187-americans-evaluate-social-security-medicare-poll [https://perma.cc/HM8Z-Q3NV]; see also, e.g., Clyde Haberman, 20 Years Later, Welfare Overhaul Resonates for Families and Candidates, N.Y. TIMES (May 1, 2016), https://www.nytimes.com/2016/05/02/us/20-years-later-welfare-overhaul-resonates-for-families-and-candidates.html [https://perma.cc/7W65-VX6B] (detailing how New Deal welfare backlash culminated in the late 90s as Aid to Families with Dependent Children was overturned, replaced with employment-tied TANF, and "entitlement' became a dirty word, certainly among conservative Republicans but also among many centrist Democrats. Americans on welfare, hardly a powerful political force, found themselves routinely characterized as loafers and cheats."). See generally Nick Burns, Welfare Queens and Work Requirements: The Power of Narrative and Counter-Narrative, 10 Tenn. J. Race, Gender, & Soc. Just. 29 (2020) (discussing the power of the welfare queen narrative in American politics).

Broadly, states should embrace their role in leading the movement for reproductive justice, whether it be through legal challenges in state courts or state constitutional reforms. When states implement paid family leave policies and other reproductive protections, they lay the foundation for similar expansions at the federal level. Reproductive freedom cannot exist as a theoretical right alone. It requires material policies that empower all individuals to make meaningful choices about their bodies, families, and futures.

APPENDIX

APPENDIX 1 – CONSTITUTION OF MICHIGAN OF 1963 (EXCERPT)

§ 28 Right to reproductive freedom.

(1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.

Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

- (2) The state shall not discriminate in the protection or enforcement of this fundamental right.
- (3) The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall the state penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.
 - (4) For the purposes of this section:

A state interest is "compelling" only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.

"Fetal viability" means: the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(5) This section shall be self-executing. Any provision of this section held invalid shall be severable from the remaining portions of this section.

APPENDIX 2 – CONSTITUTION OF MISSOURI (EXCERPT)

Article I, § 36 Right to Reproductive Freedom Initiative

- 1. This Section shall be known as "The Right to Reproductive Freedom Initiative."
- 2. The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom, which is the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions.
- 3. The right to reproductive freedom shall not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means. Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid. For purposes of this Section, a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintain the health of a person seeking care, is consistent with widely accepted clinical standards of practice and evidence-based medicine, and does not infringe on that person's autonomous decision-making.
- 4. Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical r mental health of the pregnant person.
- 5. No person shall be penalized, prosecuted, or otherwise subjected to adverse action based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.
- 6. The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so.
- 7. If any provision of this Section or the application thereof to anyone or to any circumstance is held invalid, the remainder of those provisions and the application of such provisions to others or other circumstances shall not be affected thereby.
 - 8. For purposes of this Section, the following terms mean:
 - (1) "Fetal Viability", the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is

a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

- (2) "Government",
 - a. the state of Missouri; or
 - b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.

APPENDIX 3 – CONSTITUTION OF MARYLAND (EXCERPT)

Article 48.

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The State may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling State interest achieved by the least restrictive means.

APPENDIX 4 – CONSTITUTION OF OHIO (EXCERPT)

Article I, § 22. The Right to Reproductive Freedom with Protections for Health and Safety.

- A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
 - 1. contraception;
 - 2. fertility treatment;
 - 3. continuing one's own pregnancy;
 - 4. miscarriage care; and
 - 5. abortion.
- B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
 - 1. An individual's voluntary exercise of this right or
 - 2. A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

- C. As used in this Section:
 - 1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
 - 2. "State" includes any governmental entity and any political subdivision.
- D. This Section is self-executing.

APPENDIX 5 – CONSTITUTION OF MONTANA (EXCERPT)

Article II, § 36. Right to make decisions about pregnancy.

- (1) There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion. This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means.
- (2) The government may regulate the provision of abortion care after fetal viability provided that in no circumstance shall the government deny or burden access to an abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life or health of the pregnant patient.
- (3) The government shall not penalize, prosecute, or otherwise take adverse action against a person based on the person's actual, potential, perceived, or alleged pregnancy outcomes. The government shall not penalize, prosecute, or otherwise take adverse action against a person for aiding or assisting another person in exercising their right to make and carry out decisions about their pregnancy with their voluntary consent.
 - (4) For purposes of this section:
 - (a) A government interest is "compelling" only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to a pregnant patient and does not infringe on the patient's autonomous decision making.
 - (b) "Fetal viability" means the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

APPENDIX 6 – CONSTITUTION OF VERMONT (EXCERPT)

Article 22. Personal reproductive liberty.

That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.