CONSTITUTIONAL CRIMES

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ABSTRACT

Studies of criminal laws tend to focus on statutory, regulatory, and common law offenses. Discussions of constitutional law often revolve around abstract, concise statements, particularly those in, or which mirror, the Federal Constitution. In the interest of exploring new territory in both fields, this Article introduces and analyzes a family of crimes that has gone unanalyzed until now: criminal laws that appear in the text of the federal and state constitutions. As it turns out, there are a host of criminal laws contained in the federal and state constitutions, ranging from widespread crimes against treason, bribery, criminal contempt, and corrupt solicitation, to niche offenses, including prohibitions on certain forms of net fishing, the theft of legislative bills, stem cell and cloning practices, and bingo-related crimes.

This Article presents the first survey and taxonomy of these constitutional crimes. Along the way, I uncover nuances that have previously gone unnoticed—such as an unexplored set of state constitutional treason provisions that are significantly broader than the United States Constitution's treatment of the crime. I address parallels and patterns between the states—highlighting common constitutional crimes and reasons for their inclusion in constitutions rather than the statute books. Beyond the survey and exploration, I conduct an initial, higher-level analysis of constitutional crimes, including their implications for research into constitutional drafting, constitutional interpretation, the democratic legitimacy of federal and state constitutions, and zombie constitutional provisions. Still, much remains to be said about constitutional crimes. To that end, the Article concludes with a research agenda that identifies additional aspects of constitutional crimes that are worth exploring.

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I. INTRODUCTION

Criminal laws are everywhere. We expect to find them in the statute books and, indeed, every state has a set of statutes that define crimes and their penalties.[1] But criminal law pops up in other places too. Criminal law arises from regulatory schemes, with hundreds of thousands of federal regulations carrying criminal penalties for their violations.[2] Municipalities create a myriad of crimes–drafting ordinances in a broad and archaic fashion, setting forth blanket penalty provisions, and often failing to contemplate violators' intent.[3] Despite strong claims by courts and scholars to the contrary, the common law continues to exert a significant force in shaping the substance of modern criminal law.[4]

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1. *See* Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 436, 442 (2006) (arguing against a common law approach to teaching law in light of every state adopting its own criminal code); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 63-65 (1993) (describing the shift to codification of crimes from the common law system).

2. *See* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995); *see also* Richard E. Myers II, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1864-66 (2011) (describing the breadth of criminal regulations and arguing that this pervasive system of crimes "undermines the law").

3. *See generally* Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837 (2020) (describing and critiquing local offenses and how they are drafted); *see also* LOS ANGELES COUNTY, CAL., CODE § 1.24.020(A) (1994) ("Violation of the ordinance codified in this chapter or any other ordinance of this county, unless otherwise provided in such ordinance, is punishable by a fine not to exceed $1,000.00 or by imprisonment in the County Jail for not to exceed six months, or by both such fine and imprisonment."); SAN ANTONIO, TEX., CODE § 1-5 (1959) (setting forth a general penalty of five hundred dollar fines for violations of all chapters except for several listed chapters, most of which are to be punished with fines of two thousand dollars).

4. Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 978-92 (2019) (describing formal and informal means in which courts and legislatures have continued to use the common law to define crimes and shape their approach to criminal law).

This Article addresses criminal laws set forth in another unexpected, and thus far unexplored, place: constitutions. Those familiar with the United States Constitution may be surprised to hear that constitutions contain criminal laws as well. The Federal Constitution, after all, is a relatively short document containing foundational rules of government and broad statements of rights. But even the concise Constitution manages to include a few clauses setting forth the crimes of treason, counterfeiting, and piracy.[5]

Constitutional criminal provisions are far more intricate and prevalent at the state level. State constitutions are all longer than the U.S. Constitution—more akin to legislation than the shorter, sweeping phrases of the U.S. Constitution.[6] State constitutions are also amended far more frequently than the U.S. Constitution.[7]

State constitutions contain numerous criminal provisions that resemble statutory crimes. Unlike statutes, however, these provisions vary in completeness. Some of these crime provisions aren't self-executing but require the legislature to pass laws criminalizing certain behavior. Some provisions go further, telling the legislature what minimum penalties must be affixed to certain violations. And some go even further, setting forth a definition of a crime and a complete penalty provision, all within the constitution's text.

To date, no one has attempted to survey these constitutional crimes. A few specific crimes attract attention, particularly those that are more high-profile and widespread.[8] The term "constitutional crime" occasionally appears in the literature, although it tends to be used in a figurative manner. For example, the label "constitutional crime" may be used to describe the criminalization of violations of rights guaranteed by constitutional provisions,[9] to emphasize a crime's severity or significance rather than a label

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5. *See* U.S. CONST. art. III, § 3, cls. 1-2; *id.* art. I, § 8, cls. 6, 10.

6. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 9 (1998) ("State constitutions, particularly those adopted during the late nineteenth century, are replete with 'constitutional legislation,' provisions that in their length and detail are indistinguishable from statutes but that nonetheless have been elevated to constitutional status."); *see also* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 494-95 (1984).

7. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 866 (2021); *see also* G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 9 (2001) ("Most state constitutions have been amended more than once for every year that they have been in operation . . . .").

8. The constitutional crime of treason is a good example of this, likely due to its place in the United States Constitution. *See infra* Section III.A. For scholarly attention devoted to individual, state-specific constitutional crimes, see, for example, Marlene K. Stern, *Judicial Activism in Enforcement of Florida's Net Ban*, 16 J. LAND USE & ENV'T L. 55 (1999), discussing Florida's constitutional ban on fishing nets in certain coastal waters.

9. *See, e.g.*, United States v. Lanier, 73 F.3d 1380, 1383 (6th Cir. 1996), *vacated by* 114 F.3d 84 (6th Cir. 1997), *aff'd*, 520 U.S. 259 (describing "constitutional crimes" as a theory of crimes that

of a certain type of widely occurring phenomenon,[10] to designate a crime defined in a statute or elsewhere as rising to the level of an impeachable offense,[11] or to simply designate a crime as not unconstitutional.[12]

Avoiding this hodgepodge of definitions, I treat the term "constitutional crime" as a crime set forth—in whole or in part—within a constitution. Using this definition, I undertake the first survey and taxonomy of constitutional crimes in the United States Constitution and state constitutions. This descriptive task includes novel contributions to the literature of state and federal constitutional law along the way—including the revelation of thus far unnoticed variations in the law of treason among the states and trends among states in enshrining crimes like bribery, misappropriation of funds, and public embezzlement in their constitutions rather than in the statute books alone.

Sections II and III lay some groundwork. Part II defines constitutional crimes. I use a fairly liberal definition—including provisions that are not only self-executing through their inclusion of penalty provisions but also provisions that define criminal conduct and require or permit the legislature to criminalize that defined conduct. I also include potential borderline cases like constitutional contempt provisions, which give legislatures the power to punish members and nonmembers for disorderly conduct or violation of rules governing the legislative process. While there may be meaningful distinctions between these categories, and while not all of these categories may be precisely analogous to self-contained criminal statutes, I adopt this inclusive approach in the interest of getting as complete a picture of constitutional crimes as possible and to take advantage of insights that may develop through comparisons between these varying provisions.

Section III surveys and categorizes constitutional crimes. In the interest of ease of presentation and to help flag trends among constitutions, I group crimes together based on their goals and subject matter—such as a single category for voter fraud, campaign contributions, and other election-related crimes.[13] While this grouping of numerous laws into a small number of

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attain constitutional status through their violation of individuals' constitutional rights, and analyzing 18 U.S.C. § 242, which criminalizes the deprivation of rights protected by the constitution by those acting under color of law); *see also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 465 n.59 (1991).

10. *See* Henry Mark Holzer, *Why Not Call it Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 220 (2002) (labeling treason as a "constitutional crime").

11. *See, e.g.*, Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 534 (2018) ("In their summations, neither counsel for the president nor counsel for the House managers addressed the issue of whether the president had committed a constitutional crime: whether a nexus had been shown between his official duty to uphold the Constitution and a concerted effort by him to imperil the country through acts that undermined his unique duties as president.").

12. *See* Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 31 (1988).

13. *See infra* Section III.F.

categories makes review and summary easier, I err on the side of including a diverse range of categories to avoid creating a misleading impression of overlap in instances where meaningful differences exist.

In Section IV, I begin the work of analyzing constitutional crimes. This analysis begins with a discussion of crimes that are sensible candidates for inclusion in constitutions rather than in criminal statutes alone: crimes like treason, bribery, and corrupt solicitation. It makes sense to include these crimes in constitutions due to the danger of legislative hijacking and the severity of the prohibited conduct. I then address potential concerns over "zombie" constitutional crimes—provisions that are inoperative because they have been deemed unconstitutional under the U.S. Constitution—and the complications these provisions create for present-day constitutional interpretation.

From there, I turn to constitutional crimes and their implications for potential intra-constitutional conflicts. As a part of state constitutions, there is a strong argument that constitutional crimes are immune from challenges under state due process provisions and other safeguards that may otherwise restrict criminal laws. While it may seem axiomatic that a state constitution cannot deem itself unconstitutional, some instances of fast-and-loose litigation over constitutional crimes push the limits of this notion and veer dangerously close to the paradoxical result of finding constitutional provisions unconstitutional.

Finally, I address the implications of constitutional crimes for constitutional practices, as well as how they shed light on deeper issues of law. In doing so, I discuss implications of constitutional crimes for democratic legitimacy. I argue that constitutional provisions that require supermajoritarian efforts to change may lead to the entrenchment of anti-democratic criminal provisions.

Because of the number and diverse subject matter of constitutional crimes, the analysis here only scratches the surface of constitutional crimes and their broader study. I therefore conclude with a research agenda identifying other angles that future work may take in discussing constitutional crimes and their implications for other areas of law. As a phenomenon at the intersection of the rapidly developing field of state constitutional law and the fields of criminal law, statutory interpretation, legal history, and constitutional law more generally, constitutional crimes are a promising subject of future study and a helpful vehicle for shedding new light on other areas of the law.

One final note on scope: this Article accounts for the contents of the United States Constitution, state constitutions, and the constitution of Puerto

Rico.[14] I do not address tribal constitutions, although I do not count out the possibility of tribal constitutions being a potentially fruitful area for further research.[15] I also limit my discussion to the United States. I do so only out of the need to constrain the scope of the article, as there is a universe of international constitutional criminal law that awaits exploration.[16]

II. DEFINING CONSTITUTIONAL CRIMES

I define constitutional crimes as constitutional provisions that prohibit certain conduct and provide for criminal penalties for those who engage in the conduct, either independently or through the operation of legislation. This definition ends up containing a multitude of prohibitions that vary in their completeness. Notably, my formulation includes constitutional crimes that are not complete or self-executing criminal laws. Even so, because a broader view of the landscape of constitutional crimes sheds more light on trends, variations, and the substance of criminalized behavior, I err on the side of an inclusive definition.

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14. The last of which, as it turns out, contains no constitutional crimes. *See* P.R. CONST.

15. A limited search of tribal constitutions available through Westlaw did not turn up any apparent constitutional criminal provisions. This search, however, was limited by keywords (including searches for both "punish!" and "crim!") and may therefore have excluded provisions that might count as constitutional crimes. Additionally, the search was limited only to those tribal constitutions available through Westlaw, which include the constitutions of the Absentee Shawnee Tribe of Indians, Confederated Tribes of the Colville Reservation, Confederated Tribes of Siletz Indians, Coquille Indian Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Kalispel Tribe of Indians, Leech Lake Band of Ojibwe, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Oneida Tribe of Indians of Wisconsin, Poarch Band of Creek Indians, Ponca Tribe of Nebraska, Prairie Band Potawatomi Nation, Sac and Fox Tribe of the Mississippi in Iowa, Snoqualmie Indian Tribe, Squaxin Island, Standing Rock Sioux, Swinomish Indian Tribal Community, White Earth Nation, and the Yurok Tribe of California. *Tribal Codes*, WESTLAW, https://1 next.westlaw.com/Browse/Home/StatutesCourtRules/TribalCodes (last visited Jan. 27, 2024). These twenty constitutions represent a fraction of the hundreds of written constitutions adopted by tribal nations. *See Tribal Constitutions*, U. ARIZ. NATIVE NATIONS INST.: INDIGENOUS GOVERNANCE DATABASE, March 26, 2015, https://nnigovernance.arizona.edu/tribal-constitutions [https://perma.cc/V427-KLSZ] ("[O]f 566 tribal nations, just under half have adopted written constitutions.").

16. *See e.g.*, BURUNDI CONST. May 17, 2018, tit. II, § 2, art. 69 (providing that "acts of sabotage, vandalism, corruption, embezzlement, profligacy, or all other acts which damage the public good" are to be "punished according to the conditions determined by law"); CHILE CONST. 1980, ch. IV, art. 32, § 20 (providing that Ministers of State or other government officials who "authorize or approve expenditures which contravene the provisions of this number, will be jointly and personally liable for their reimbursement, and guilty of the crime of embezzlement of public funds"); EGYPT CONST. 2014, ch. 2, § 1, art. 18 ("Denying any form of medical treatment to any human in emergency or life-threatening situations is a crime."), § 2, arts. 49-50 (criminalizing attacking and trafficking monuments, as well as the destruction of cultural heritage objects); MEX. CONST. May 1, 1917, tit. I, ch. I, art. 20(B)(II) ("All forms of intimidation, torture and lack of communication are forbidden and shall be punished by the law."); NIGER CONST. 2010, tit. II, art. 35 ("The transit, importation, storage, landfill, [and] dumping on the national territory of foreign pollutants or toxic wastes, as well as any agreement relating [to it] constitute a crime against the Nation, punished by the law." (alterations in original)).

My definition of constitutional crimes, while broad, still excludes many provisions that are relevant to criminal law and practices. Constitutional crimes do not include broad provisions granting power or authority to government branches, entities, or agencies to criminalize general categories of conduct—including provisions that set forth guidelines or limits for such criminalization. For example, provisions prohibiting local or special laws that punish misdemeanors are not included in the definition of constitutional crimes because these provisions do not specify conduct that may or may not be prohibited.[17] I also do not include provisions that govern what is to be done with proceedings obtained by the government through criminal fines, as these provisions do not, themselves, specify prohibited conduct.[18]

Rules of constitutional criminal procedure, like the Fourth, Fifth, and Sixth Amendments, as well as their state analogs, are also excluded from this definition because these provisions are not crimes and instead govern procedures relating to crimes and criminal investigations.[19] State constitutions that set forth the purpose of criminal punishment,[20] list permissible forms of punishment,[21] or define terms used in the criminal context[22] are also excluded to the extent that these provisions do not describe or define conduct that is to be punished.[23] Even if a constitutional provision specifies prohibited conduct and states that it is self-executing, it is not included among the constitutional crimes discussed here if it does not provide for criminal penalties, require criminal penalties to be imposed by the legislature, or otherwise state that the prohibited behavior is a criminal act.[24]

Constitutional crimes vary in their completeness. At its most complete, a constitutional crime defines prohibited conduct and sets forth a specific

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17. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 19 (prohibiting local or special laws in twenty circumstances, one of which is "[p]unishment of crimes and misdemeanors").

18. *See, e.g.*, MICH. CONST. art. VIII, § 9 (requiring that "[a]ll fines assessed and collected" by "counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of . . . public libraries, and county law libraries").

19. *See* U.S. CONST. amends. IV-VI; *see also id.* amend. VIII (prohibiting cruel and unusual punishment); MASS. CONST. pt. 1, art. XXV (prohibiting the legislature from declaring anyone guilty of treason or felony).

20. *See* N.H. CONST. pt. 1, art. XVIII ("All penalties ought to be proportioned to the nature of the offense. . . . The true design of all punishments being to reform, not to exterminate mankind.").

21. *See* N.C. CONST. art. XI, § 1 (setting forth a list of the only forms of punishment the state's laws may permit).

22. *See* COLO. CONST. art. XVIII, § 4 (defining "felony"); FLA. CONST. art. 10, § 10 (same).

23. Although to the extent that these terms may shed light or help define the scope of other constitutional crimes, they may be relevant.

24. *See, e.g.*, FLA. CONST. art. II, § 7 (prohibiting drilling for oil or natural gas and stating that "[t]his subsection is self-executing," but not specifying any punishment or penalties that will result from violation of the subsection).

punishment for anyone who engages in the prohibited behavior.[25] Other constitutional provisions are effectively complete by referring to punishment provisions that already exist in a statute.[26]

Some provisions are less complete. Several constitutional crimes identify prohibited behavior and require certain minimum requirements for punishments—such as stating that violation of the provision is a felony or misdemeanor—but are not self-executing because they require the legislature to pass criminal laws prohibiting the identified conduct.[27] Other provisions don't specify punishment minimums at all, instead requiring the legislature to pass laws penalizing the specified behavior.[28] At the broadest level, I have included constitutional provisions that define certain crimes but stop short of requiring the legislature to pass laws criminalizing the specified conduct.[29] While provisions that are not self-executing due to their lack of specific penalty provisions may not be the sole basis for a criminal prosecution, their role in defining criminal conduct and requiring penalties for this conduct warrants the label of "constitutional crime," albeit with an "incomplete" or "non-self-executing" qualifier.[30]

In borderline cases, I tend to err on the side of inclusion. For example, I classify as constitutional crimes provisions that grant state legislatures the power to impose punishments of fines and imprisonment in response to actions in contempt of the legislature. The criminal activity these provisions cover is less defined than the activities specified in other constitutional criminal provisions, as it may be dependent on particular rules set by legislative houses or orders issued by these houses. Still, the fact that these

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25. *See, e.g.*, ARK. CONST. amend. 51, § 15 (prohibiting the malicious or intentional destruction, theft, mutilation, detention, or obtaining of voter registration forms or records and providing that anyone who does so is guilty of a felony and will be fined between one hundred and one thousand dollars, imprisoned between one and five years, or both); MO. CONST. art. III, § 38(d)(3) (criminalizing human cloning and providing for punishment by "up to fifteen years" imprisonment, by "a fine of up to two hundred fifty thousand dollars, or by both").

26. *See, e.g.*, FLA. CONST. art. X, § 16(e) (banning the use of certain nets in offshore waters and incorporating penalties set forth in the version of a statute in effect during a particular year).

27. *See, e.g.*, FLA. CONST. art. I, § 8 (requiring a waiting period for gun periods, stating that violation of the waiting period will be a felony, and requiring the legislature to pass legislation that enacts this requirement); KY. CONST. § 204 (making bank officers who receive deposits with knowledge that the bank is insolvent guilty of felonies, punished as provided by law).

28. *See, e.g.*, GA. CONST. art. I, § 2, para. VIII(a) (prohibiting gambling and requiring the legislature to enforce the prohibition through the penal law); IDAHO CONST. art. I, § 4 (prohibiting bigamy and polygamy and stating that "the legislature shall provide by law for the punishment of such crimes").

29. *See* U.S. CONST. art. III, § 3, cl. 1-2 (defining the crime of treason); WIS. CONST. art. 1, § 10 (same).

30. *See, e.g.*, Neville Cox, *Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law*, 35 J.L. & RELIGION 33, 51 (2020) (describing Ireland's former constitutional provision outlawing blasphemy as a "constitutional crime," even though the Ireland Supreme Court ruled that it was unenforceable absent further action by the legislature).

provisions may lead to fines and imprisonment, coupled with the U.S. Supreme Court's recognition that "there is no substantial difference between serious contempts and other serious crimes" in the context of a right to a jury trial, prompts me to include these provisions.[31]

I do not include references to crimes in the context of constitutional provisions that describe the basis for impeaching government officials. While impeachment provisions may specify particular conduct that may be impeachable beyond merely referencing other crimes, the consequences of impeachment tend to be limited to expulsion from office and disqualification from holding office in the future.[32] While impeachment provisions frequently reference criminal penalties and prosecution, these references are to penalties separate from the impeachment conviction itself.[33] Because impeachment

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31. *See* Bloom v. Illinois, 391 U.S. 194, 201-02 (1968).

32. *See* VT. CONST. ch. II, § 58 ("Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold or enjoy any office of honor, or profit, or trust, under this State. But the person convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law."); S.C. CONST. art. XV, § 2 ("Judgment in such case shall be limited to removal from office."); N.C. CONST. art. IV, § 4 ("Judgment upon conviction shall not extend beyond removal from and disqualification to hold office in this State, but the party shall be liable to indictment and punishment according to law."); N.Y. CONST. art. VI, § 24 ("Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law."); NEB. CONST. art. III, § 17 ("[J]udgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust, in this State, but the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law."); MICH. CONST. art. XI, § 7 ("Judgment in case of conviction shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law."); MASS. CONST. pt. 2, ch. 1, § 2, art. VIII ("[J]udgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this commonwealth: but the party so convicted, shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land."); ME. CONST. art. IV, pt. 2, § 7 ("[J]udgment, however, shall not extend farther than to removal from office, and disqualification to hold or enjoy any office of honor, trust or profit under this State. But the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law."); ILL. CONST. art. IV, § 14 ("Judgment shall not extend beyond removal from office and disqualification to hold any public office of this State. An impeached officer, whether convicted or acquitted, shall be liable to prosecution, trial, judgment and punishment according to law."); IDAHO CONST. art. V, § 3 ("[J]udgment shall not extend beyond removal from, and disqualification to hold office in this state; but the party shall be liable to indictment and punishment according to law."); CAL. CONST. art. IV, § 18 ("Judgment may extend only to removal from office and disqualification to hold any office under the State, but the person convicted or acquitted remains subject to criminal punishment according to law.").

33. For example, a number of impeachment provisions note that further criminal proceedings may occur after the impeachment proceedings—which are limited in effect to removal from office. *See* VT. CONST. ch. II, § 58; S.C. CONST. art. XV, § 2 ("Impeachment proceedings, whether or not resulting in conviction, shall not be a bar to criminal prosecution and punishment according to law."); *see also* N.C. CONST. art. IV, § 4; N.Y. CONST. art. VI, § 24; NEB. CONST. art. III, § 17; MICH. CONST. art. XI, § 7; MASS. CONST. pt. 2, ch. 1, § 2, art. VIII; ME. CONST. art. IV, pt. 2, § 7; ILL. CONST. art. IV, § 14; IDAHO CONST. art. V, § 3; CAL. CONST. art. IV, § 18.

proceedings and convictions tend to explicitly separate themselves from the prosecution and conviction of crimes, I do not classify these impeachment provisions as constitutional crimes.

III. THE LANDSCAPE OF CONSTITUTIONAL CRIMES

One of my main goals is to identify and categorize constitutional crimes at the state and federal level. A comprehensive understanding of the constitutional criminal landscape lays a foundation for future work analyzing these crimes, parsing out trends, and evaluating whether they are beneficial or harmful.

This section develops a taxonomy of constitutional crimes, starting with crimes identified in the United States Constitution and moving on to state constitutional crimes. Section III.A begins the discussion with the crime of treason. In doing so, I uncover an omission in the scholarly treatment of treason. The few scholars who have contemplated these provisions, their meanings, and their limits, frequently assume that most states' provisions mirror the Federal Constitution's definition of treason.[34] As addressed below, however, this isn't entirely correct. Many state constitutional definitions of treason are, as a result of a tiny change to their text, broader than the United States Constitution's definition of treason.

As for the remainder of Section III's subsections, they vary in length and detail depending on the number of states that include such provisions and the frequency with which these provisions are addressed by the courts. Where relevant or interesting information on their adoption or execution is readily available, I have attempted to include that information. But each constitutional crime is presented in an introductory fashion. A deep dive into each would likely warrant its own independent treatment, and further detail on all would expand this already lengthy article into a book-length tome. This section proposes a means of organizing these disparate provisions to some extent, which may guide further work that parses out additional details, background, and applications.

A. TREASON

Treason is one of the few constitutional crimes contained in the United States Constitution.[35] Article III, Section Three, Clause One sets forth the

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34. *See, e.g.*, J. Taylor McConkie, *State Treason: The History and Validity of Treason Against Individual States*, 101 KY. L.J. 281, 300 (2013). *See also* U.S. CONST. art. III, § 3, cl. 1.

35. *See* United States v. Greathouse, 26 F. Cas. 18, 21 (N.D. Cal. 1863) ("Treason is the only crime defined by the constitution."); Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331, 331 (1918) ("Treason is the only crime specifically described in the

following definition of treason and limitation on when one may be convicted of the crime: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[36] Punishment is left up to the legislature, with additional limitations prohibiting corruption of the blood or forfeiture "except during the Life of the Person attainted."[37]

Commentators note that the Constitution's definition of treason is, and has been treated as, a restrictive one.[38] The requirement of two witnesses sets an evidentiary minimum for the prosecution of treason. William Mayton argues that the same is true of the "overt Act" requirement, noting that the Constitution's framers were concerned about England's "crime of 'constructive treason'" that could consist of little more than speaking out against the King.[39] The provision's "only" qualifier further confirms its restrictive nature—ensuring that the definition set forth in the provision is all that treason may be and thereby prohibiting Congress from enacting a more expansive version of the crime.

Treason is the most common state constitutional crime. Thirty-seven states define the crime of treason in their constitutions.[40] The constitutions of Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, Oklahoma, Oregon, Texas, West Virginia, and Wisconsin define treason in language almost identical to the

Constitution."); *see also* Ian Mitchell, *The Trial of Jefferson Davis and the Treason Controversy*, 39 N. KY. L. REV. 757, 757 (2012).

36. U.S. CONST. art. III, § 3, cl. 1.

37. *Id*. cl. 2.

38. *See* MITCHELL, *supra* note 35, at 760-62.

39. William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 257-59 (1982); *see also* Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1027-28 (2005); *but see* Benjamin A. Lewis, Note, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215, 1262-65 (2006). The author argues for an expansive framing of treason so that the clause may be used to aid in the prosecution and detention of United States citizens in the War on Terror. *Id.* Yikes!

40. I'll be listing them all in a moment, but for those seeking immediate verification, see McConkie, *supra* note 34, at 291-93.

language of the U.S. Constitution,[41] with only minor changes that do not change the provision's meaning.[42]

Several states' treason provisions include an apparently minor change from the U.S. Constitution that may result in a far broader constitutional crime of treason. Using Wyoming's constitution as an example, its treason provision begins: "Treason against the state shall consist only in levying war against it, or in adhering to its enemies, *or in* giving them aid and comfort."[43] Other state constitutions include a separate variation that ends up having the same effect. Nevada is an example. Its treason provisions begin with the sentence: "Treason against the State shall consist only in levying war against it, adhering to its enemies *or* giving them Aid and Comfort."[44] States that include either of these structures, with the additional "or in" or a list that includes a single "or" before "giving them aid and comfort," include Arizona, California, Florida, Georgia, Iowa, Kansas, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming.[45]

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41. ALA. CONST. art. I, § 18; ALASKA CONST. art. I, § 10; ARK. CONST. art. II, § 14; COLO. CONST. art. II, § 9; CONN. CONST. art. IX, § 4; DEL. CONST. art. VI, § 3; IDAHO CONST. art. V, § 5; IND. CONST. art. I, §§ 28-29; KY. CONST. § 229; MICH. CONST. art. I, § 22; MINN. CONST. art. I, § 9; MISS. CONST. art. III, § 10; MO. CONST. art. I, § 30; MONT. CONST. art. II, § 30; NEB. CONST. art. I, § 14; N.J. CONST. art. I, § 17; N.C. CONST. art. I, § 29; OKLA. CONST. art. II, § 16; OR. CONST. art. I, § 24; TEX. CONST. art. I, § 22; W. VA. CONST. art. II, § 6; WIS. CONST. art. I, § 10. As noted later in this subsection, there is a notable difference in the wording of North Carolina's framing of aid and comfort, but the effect ends up being in accord with how the U.S. Supreme Court has interpreted the U.S. Constitution's definition of treason. *See infra* note 54 and accompanying text. Indiana also includes the requirement of two witnesses to an overt act or a confession in open court in a section separate from the definition of treason. *See infra* note 53 and accompanying text. Colorado's provision lacks a comma before "adhering to its enemies," a notable difference discussed later in this subsection. *See infra* note 54 and accompanying text. The provision also includes a further cosmetic modification by being only a single sentence, bisected by a semicolon, rather than two sentences. *See infra* note 54 and accompanying text. Missouri and Texas take the same approach. *See* MO. CONST. art. I, § 30; TEXAS CONST. art. I, § 22.

42. These changes include the removal of the Constitution's eclectic capitalization of terms, the substitution of "state" or "commonwealth" in the place of "United States," including variations on "on Confession in open court" by sometimes removing "on" or replacing it with "upon," and the substitution of "the state," "it," or "the same" in place of the "them" pronoun that refers to the United States. *See* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States shall consist only in levying War against *them* . . . .") (emphasis added).

43. WYO. CONST. art. I, § 26 (emphasis added). The remainder of the treason provision is the same as the U.S. Constitution, other than changes to the capitalization of various terms. *Id.*

44. NEV. CONST. art. I, § 19 (emphasis added).

45. ARIZ. CONST. art. II, § 28; CAL. CONST. art. I, § 18; FLA. CONST. art. I, § 20; GA. CONST. art. I, § 1, ¶ XIX; IOWA CONST. art. I, § 16; KAN. CONST. B. OF RTS. § 13; NEV. CONST. art. I, § 19; N.M. CONST. art. II, § 16; N.D. CONST. art. I, § 17; S.D. CONST. art. VI, § 25; UTAH CONST. art. I, § 19; WASH. CONST. art. I, § 27; WYO. CONST. art. I, § 26. New Mexico's constitutional crime of treason begins with the sentence: "Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort." N.M. CONST. art. II, § 16. By including a single "or" at the end of a comma-separated list, the effect is the same as including an "or" between all items on the list. *Id.* North Dakota's provision simply includes an additional "or" rather than "or in," but the effect is still the same as noted in the explanation of New Mexico's definition *supra*. N.D. CONST. art. I, § 17.

These seemingly minor differences are, in fact, notable divergences from the United States Constitution's definition of treason. In the United States Constitution and the state constitutions that duplicate it, "giving them aid and comfort" modifies the phrase "adhering to its enemies" because it is separated from that phrase by a comma.[46] The U.S. Supreme Court has confirmed this interpretation by construing "giving them aid and comfort" as a necessary element to prove the crime of treason.[47] There's a reason for this. Requiring "aid and comfort" as a necessary element ensures that one will not be guilty of treason simply for "intellectually or emotionally . . . favor[ing] the enemy and harbor[ing] sympathies or convictions disloyal to this country's policy or interest" and nothing more.[48]

The inclusion of an additional "or in" or the inclusion of a single "or" at the end of a list of three items in these other state constitutions communicates that "aid and comfort" is a third way to commit treason. "Levying war against" the state and "adhering to its enemies" are the first and second forms of treason. This alternate interpretation veers away from the U.S. Supreme Court's treatment of "aid and comfort" as a necessary element of treason and accomplishes that which the Court hoped to avoid—a constitutional crime of treason in which evidence of "adhering to the enemies" is, alone, sufficient to prove guilt.[49]

It appears that this difference has gone unnoticed and undiscussed in the limited literature on state-level treason provisions.[50] Because this difference permits a significantly broader interpretation of treason—one which may apply to instances of "adhering" to states' enemies alone—it's a difference that must be addressed in further discussion of state constitutional treason provisions, their scope, and their applicability to modern circumstances.

Not all states' treason provisions fall neatly into the two categories. Maine's constitution is an oddball—it does not include any "or" language at

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46. *See* U.S. CONST. art. III, § 3, cl. 1.

47. Cramer v. United States, 325 U.S. 1, 29 (1945).

48. *Id*.

49. *See id*.

50. J. Taylor McConkie does an admirable job of surveying state-level treason laws, exploring their historic use, and raising questions regarding their application, but appears to overlook this distinction, asserting that "[t]hirty-four of the fifty states inserted constitutional provisions that copied the definition of treason from the Treason Clause almost verbatim, merely substituting the name of the state for 'the United States.'" *See* McConkie, *supra* note 34, at 293. While the language is certainly close, the tiny differences end up having a significant impact on sentence structure and the overall impact of each provision. The only other sustained treatment of state treason clauses is that of Alexander Gouzoules in his 2020 article—he too appears to overlook the distinction I describe, asserting that many of the different state constitutional provisions "mirror" the U.S. Constitution's definition of treason. *See* Alexander Gouzoules, *Dual Allegiance: Federal and State Treason Prosecutions, the Treason Clause, and the Fourteenth Amendment*, 53 IND. L. REV. 593, 623-25 (2020).

all in its definition of treason—instead stating that treason "shall consist only in levying war against [the State], adhering to its enemies, giving them aid and comfort."[51] Because each of these items on the list appears to be its own independent entry due to the absence of any connectors, this provision appears in line with those states that add the additional "or in" or end their list with an "or." South Carolina's constitution defines the crime of treason as "consist[ing] alone in levying war or in giving aid and comfort to enemies against the State."[52] Indiana's definition of treason proceeds along similar lines, stating that "[t]reason against the State shall consist only in levying war against it, and in giving aid and comfort to its enemies."[53] Colorado and North Carolina's provisions effectively mirror the United States Constitution—albeit through different wording.[54]

While West Virginia is listed above as a state that replicates the U.S. Constitution's definition of treason, its constitutional crime goes further and includes an explicit punishment provision.[55] Article II, Section Six of the West Virginia Constitution provides that "[t]reason shall be punished according to the character of the acts committed, by the infliction of one, or more, of the penalties of death, imprisonment or fine, as may be prescribed by law."[56]

As a final note, the constitutional crime of treason is limited in the twenty-one states that only include constitutional provisions regarding treason. There is a strong argument that, absent a penalty provision in the constitution, the definition of treason does not form a self-executing crime of treason.[57] Of the constitutional provisions discussed, only West Virginia's includes a penalty provision—requiring that death, imprisonment, and/or fines be imposed "according to the character of the acts committed."[58]

The fact that treason provisions aren't self-executing does not mean that the constitutional crime of treason is meaningless. These provisions still set

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51. ME. CONST. art. I, § 12.
52. S.C. CONST. art. I, § 17.
53. IND. CONST. art. I, § 28.
54. Colorado's constitution states "[t]reason against the state can consist only in levying war against it or in adhering to its enemies, giving them aid and comfort." COLO. CONST. art. II, § 9. The lack of a comma before the "or" results in a clearer statement that the provision is referring to two different things: (1) levying war; and (2) adhering to its enemies, giving them aid and comfort. North Carolina's constitution defines treason by including the phrase, "adhering to [the State's] enemies *by* giving them aid and comfort." N.C. CONST. art. I, § 29 (emphasis added). This "by" language makes explicit what the Court read into the U.S. Constitution's definition of treason and confirms that only instances of giving aid and comfort to enemies may rise to the level of adherence necessary to prove treason.
55. W. VA. CONST. art. II, § 6.
56. *Id*.
57. *See* McConkie, *supra* note 34, at 299-300.
58. *See* W. VA. CONST. art. II, § 6.

forth the definition of the crime and, should state legislators enact penalty provisions, the scope of punished conduct will be dependent on the scope of the state constitutional definitions. As discussed above, the scope of punishable conduct may vary widely between states depending on how their constitutional provisions regarding treason are phrased. Should states ever turn their attention to punishing and prosecuting treason, the considerations above will become deeply important for legislatures, law enforcement, and the courts.

B. COUNTERFEITING

Article I, Section Eight, Clause Six of the United States Constitution grants Congress the "Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."[59] This is a minimal constitutional crime, both because it does not go into any detail on what "counterfeiting" means, and because it is non-self-executing—leaving it up to Congress to pass laws punishing counterfeiting. Nevertheless, the provision qualifies as a constitutional crime as it defines—albeit minimally—certain conduct and permits Congress to criminalize that conduct.[60]

The provision is also worth noting because of its unique place within the United States Constitution and its relationship with other federal constitutional crimes. The U.S. Constitution grants the federal government alone the power to coin money and to regulate its value.[61] It is, therefore, less of a surprise that the Federal Constitution also includes a provision regarding the crime of counterfeiting currency. Still, this hasn't stopped states from also criminalizing counterfeiting and other federal constitutional crimes like treason and piracy.[62] The constitutional crime of counterfeiting is also notable to the extent it relates to the law of treason. While "counterfeiting was a species of treason at common law," the Constitution's narrower definition of treason sets counterfeiting apart—meaning that the common law of treason was no longer applicable to counterfeiting crimes.[63]

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59. U.S. CONST. art. I, § 8, cl. 6.

60. *See* Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1040 (2023) (noting that the crime of counterfeiting is "listed in the Constitution itself").

61. *See* U.S. CONST. art. I, § 8, cl. 5 (granting Congress the coinage power); *id.* art. I, § 10, cl. 1 (prohibiting states from coining money); *see also* Houston v. Moore, 18 U.S. 1, 48-49 (1820) (recognizing that the power to "coin money or emit bills of credit" is exclusive to the federal government).

62. *See* Blondel, *supra* note 60, at 1060-61.

63. Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 40-41 (1996).

C. PIRACY AND CRIMES AGAINST THE LAW OF NATIONS

For the last of the federal constitutional crimes—and the last pair of constitutional crimes contained in the United States Constitution rather than the state constitutions—the United States Constitution grants Congress the "Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[64] The Articles of Confederation, which preceded the United States Constitution, did not contain any provisions regarding "assaults and affronts to foreign ambassadors," an omission that raised concerns after multiple incidents of United States citizens and state law enforcement officials assaulting and otherwise imposing on foreign ambassadors.[65] This led the framers of the U.S. Constitution to draft a clause giving Congress the power to define the law and punishment of piracies and offenses against the law of nations.[66]

The constitutional crimes of piracy and violating the law of nations are arguably even more minimal than the constitutional crime of counterfeiting, as they leave it up to Congress to define the crimes of piracy and offenses against the law of nations.[67] As for counterfeiting, however, the Constitution does not grant Congress the power to define "counterfeiting" and only grants Congress the power to punish it.[68] This suggests that Congress has more leeway to define the crimes of piracy and violating the law of nations while it may be tied to some constitutionalized definition of "counterfeiting"—albeit, one that is not spelled out explicitly in the Constitution.[69]

D. CONSTITUTIONAL CRIMINAL CONTEMPT

Many state constitutions include provisions that grant the legislature power to punish behavior in violation of its rules and authority. These provisions often govern the existence and scope of penalties for those who act in contempt of legislative rules or otherwise seek to obstruct

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64. *See* U.S. CONST. art. I, § 8, cl. 10.

65. *See* Lyle D. Kossis, *The Define and Punish Clause and the Political Question Doctrine*, 68 HASTINGS L.J. 45, 50-52 (2016).

66. *Id*. While counterfeiting was initially included in this provision of crimes that Congress could define and punish, this crime was ultimately relocated to its own constitutional provision. *Id*.; *see also* Kurland, *supra* note 63, at 39-40.

67. *See* U.S. CONST. art. I, § 8, cl. 10.

68. *See* U.S. CONST. art. I, § 8, cl. 6; *see also* Kurland, *supra* note 63, at 40 (highlighting that Congress's power to define "did not necessarily apply to Congress's power over counterfeiting," which creates "a slight dichotomy" in the provisions relating to counterfeiting and piracy and laws of nations).

69. *But see generally* Kossis, *supra* note 65, at 94 (noting that while the definitional language in Clause 10 suggests a flexibility that may prevent courts from overriding congressional definitions and laws relating to piracy and international law on political question grounds, courts have nevertheless invalidated such laws on constitutional grounds in the past).

congressional business. I refer to these provisions as "constitutional criminal contempt" provisions.[70]

Many state constitutions include provisions providing specifically for the punishment or discipline of members of the legislature. Many of these provisions appear modeled on the United States Constitution, which contains a provision that "[e]ach House [of the legislature] may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[71] The Court has construed this provision to permit the imprisonment of members for rule violations or to "compel the attendance of absent members" in violation of congressional rules.[72] Courts have also construed the rules created pursuant to this provision as holding the "force of law" and binding members of Congress.[73] These provisions appear in the constitutions of Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nevada, New Jersey, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia.[74]

Other state constitutions include provisions providing a mechanism for legislatures to punish members and non-members for violations of rules. Many of these rules reflect the Supreme Court's discussion of legislative contempt and the limits of such contempt in *Anderson v. Dunn*.[75] There, the

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70. I use this label because these provisions grant power to legislatures to impose criminal contempt sanctions. In doing so, I do not mean to state that these contempt provisions may not be used to allow for civil contempt—such as orders to require compliance with orders issued by a legislative committee. I also acknowledge that this distinction may not always be a clear one. *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 347 (highlighting the confusion between civil and criminal contempt, and noting that civil contempt "serves to benefit the plaintiff to the action by providing compensation or coercion" while "[c]riminal contempt functions to punish defendants for their disobedience of the court and the flouting of the court's authority"); *see also* Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1254-55 (2011) (describing factors a court may examine to determine "whether a contempt is civil or criminal").

71. U.S. CONST. art. I, § 5, cl. 2.

72. *See* Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1880).

73. *See* Shape of Things to Come, Inc. v. County of Kane, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984); *see also* Yellin v. United States, 374 U.S. 109, 114 (1963) ("[R]ules of Congress and its committees are judicially cognizable. And a legislative committee has been held to observance of its rules just as, more frequently, executive agencies have been." (citations omitted)).

74. ARIZ. CONST. art. IV, pt. 2, § 11; CONN. CONST. art. III, § 13; DEL. CONST. art. II, § 9; FLA. CONST. art. III, § 4; GA. CONST. art. III, § 4, ¶ VII; HAW. CONST. art. III, § 12; IND. CONST. art. IV, § 15; IOWA CONST. art. III, § 9; KY. CONST. § 39; ME. CONST. art. IV, pt. 3, § 4; MD. CONST. art. III, § 19; MINN. CONST. art. IV, § 7; MISS. CONST. art. IV, § 55; MONT. CONST. art. V, § 10; NEV. CONST. art. IV, § 6; N.J. CONST. art. IV, § 4, ¶ 3; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 19; OR. CONST. art. IV, § 15; S.C. CONST. art. III, § 12; TENN. CONST. art. II, § 12; TEX. CONST. art. III, § 11; UTAH CONST. art. VI, § 10(1); VA. CONST. art. IV, § 7; W. VA. CONST. art. VI, § 25.

75. 19 U.S. (6 Wheat) 204 (1821).

Court held that Congress has an inherent contempt power that permits it to imprison nonmembers for contempt, but this imprisonment power "must terminate with that adjournment."[76] At the state level, numerous states are more explicit about their legislature's contempt powers and have enacted constitutional provisions confirming the ability to punish nonmembers for rule violations and other disruptive or disorderly conduct. These states include Georgia, Hawaii, Indiana, Maine, Massachusetts, Maryland, Minnesota, Mississippi, Nebraska, Nevada, Oregon, South Carolina, Tennessee, Texas, and West Virginia.[77] As these lists demonstrate, several state constitutions include separate provisions setting forth different penalties for members and nonmembers of the legislation.[78]

Other states include broader provisions that enable the legislature to provide for the punishment of both members and nonmembers who engage in disorderly or disruptive behavior or who otherwise violate rules established by the legislative houses. These states include Alabama, Arkansas, Colorado, Illinois (non-members), Missouri, New Hampshire, New Mexico, North Dakota, Pennsylvania, Rhode Island (members), Washington, Wisconsin, and Wyoming.[79]

These provisions contain some common themes. All of them are grants of power to legislative houses that ensure that they have some form of enforcement power behind their rules and orders. But in granting these powers, many of these constitutional provisions also set limitations. Take Nevada's provision as an example: "Either House, during the session, may punish, by imprisonment, any person not a member, who shall have been guilty of disrespect to the House by disorderly or contemptuous behavior in its presence; but such imprisonment shall not extend beyond the final adjournment of the session."[80] Nevada's constitutional contempt crime grants the legislature the power to punish certain behavior in its presence and gives the legislature a fair amount of leeway to do so with its broad "disorderly or

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76. *Id.* at 230-31; *see also* Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 340-41 (1998) (describing "the existence of the legislative inherent contempt power").

77. GA. CONST. art. III, § 4, ¶ VIII; HAW. CONST. art. III, § 18; IND. CONST. art. IV, § 15; ME. CONST. art. IV, pt. 3, § 6; MD. CONST. art. III, § 23; MASS. CONST. pt. 2, ch. 1, § 3, arts. X-XI; MINN. CONST. art. IV, § 25; MISS. CONST. art. IV, § 58; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 7; OR. CONST. art. IV, § 16; S.C. CONST. art. III, § 13; TENN. CONST. art. II, § 14; TEX. CONST. art. III, § 15; W. VA. CONST. art. VI, § 26.

78. These states are Georgia, Hawaii, Indiana, Maine, Maryland, Minnesota, Mississippi, Nevada, Oregon, South Carolina, Tennessee, Texas, and West Virginia. *See supra* note 77.

79. ALA. CONST. art. IV, § 53; ARK. CONST. art. V, § 12; COLO. CONST. art. V, § 12; ILL. CONST. art. IV, § 6; MO. CONST. art. III, § 18; N.H. CONST. pt. 2, art. XXII; N.M. CONST. art. IV, § 11; N.D. CONST. art. IV, § 12; PA. CONST. art. II, § 11; R.I. CONST. art. VI, § 7; WASH. CONST. art. II, § 9; WIS. CONST. art. IV, § 8; WYO. CONST. art. III, § 12.

80. NEV. CONST. art. IV, § 7.

contemptuous behavior" language.[81] But this broad language is limited by the provision's requirement that no punishment extend "beyond the final adjournment of the session."[82] Other provisions include specific time limits. Indiana, Minnesota, and Oregon set a twenty-four-hour limit on imprisonment as punishment.[83] Texas's constitution sets a forty-eight-hour limit.[84] Maryland's limit is ten days.[85]

Are constitutional contempt crimes the same as the constitutional crimes addressed elsewhere in this Article? There's a fair argument that they do not operate at the same level as other constitutional crimes addressed here. Many of these rules do not specify particular punishments, such as fines or incarceration. Rules regarding the punishment of members, for example, tend to allow legislatures to "punish" members without any elaboration—although the option of expulsion is often included as an additional power granted to the legislature.[86] Even where the rules call for incarceration, the terms of incarceration are often tied to the duration of the legislative session rather than a set period of time that one would normally see in criminal statutes.[87] These provisions, at most, seem to be partial constitutional crimes.

On the other hand, these constitutional provisions, like criminal statutes, state what conduct is prohibited and punishable (albeit, often in an abstract manner).[88] And for every example of a constitutional provision lacking a specific penalty provision, there's a counterexample of a constitutional provision setting forth a specific form of punishment for misconduct in

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81. *Id*.

82. *Id*.

83. IND. CONST. art. IV, § 15; MINN. CONST. art. IV, § 25; OR. CONST. art. IV, § 16.

84. TEX. CONST. art. III, § 15.

85. MD. CONST. art. III, § 23.

86. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 11 ("Each house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds of its members, expel any member."); FLA. CONST. art. III, § 4 ("Each house may punish a member for contempt or disorderly conduct and, by a two-thirds vote of its membership, may expel a member."); ME. CONST. art. IV, pt. 3, § 4 ("Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 2/3, expel a member, but not a 2nd time for the same cause.").

87. *See, e.g*., MISS. CONST. art. IV, § 58.Those who are "guilty of disrespect to the House" or other disorderly behavior when the legislature is in session may be imprisoned and fined, but the "imprisonment shall not extend beyond the final adjournment of that session." *Id. See also* W. VA. CONST. art. VI, § 26. Nonmembers' obstruction of proceedings and other enumerated misconduct may be punished by imprisonment, but "such imprisonment shall not extend beyond the termination of the session." *Id.*

88. *See, e.g*., IND. CONST. art. IV, § 15 (permitting punishment of nonmembers who engage in "disorderly or contemptuous behavior" in the presence of the legislature); MD. CONST. art. III, § 23 (permitting punishment of nonmembers for "disrespectful[] or disorderly behavior" or for obstruction of legislative proceedings); HAW. CONST. art. III, § 12 (permitting punishment of members for "misconduct, disorderly behavior or neglect of duty"); ARIZ. CONST. art. IV, pt. 2, § 11 (permitting punishment of members for "disorderly behavior"); DEL. CONST. art. II, § 9 (same).

violation of legislative rules. Provisions specific to nonmembers, in particular, frequently include specific penalty limits. Hawaii's constitution sets a thirty-day limit on how long a legislative house may imprison a nonmember who is guilty of "disrespect" of the house through "disorderly or contemptuous behavior" with respect to committees.[89] Indiana's constitution includes a twenty-four-hour maximum imprisonment limit for similar situations.[90] Maryland's constitution permits imprisonment of those guilty of obstruction of proceedings or other disorderly behavior for up to ten days.[91]

Even if contempt is an abstract or variable form of crime, it is still a crime. The Supreme Court has recognized this, finding that "[c]riminal contempt is a crime in the ordinary sense" and that "there is no substantial difference between serious contempts and other serious crimes."[92] In light of the similarity in penalties between contempt crimes and other crimes, there is ample reason to include constitutional contempt provisions in a discussion of constitutional crimes.

E. BRIBERY, MISAPPROPRIATION OF PUBLIC FUNDS, AND EMBEZZLEMENT

Numerous state constitutions prohibit bribery and corrupt solicitation of legislators and other government officials. Bribery and/or corrupt solicitation is prohibited in the state constitutions of Alabama, Arkansas, California, Colorado, Delaware, Maryland, New Mexico, North Dakota, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[93]

Because of the high number of constitutional prohibitions on bribery and corrupt solicitation, these constitutional provisions serve as a case study of

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89. HAW. CONST. art. III, § 18.

90. IND. CONST. art. IV, § 15.

91. MD. CONST. art. III, § 23.

92. Bloom v. Illinois, 391 U.S. 194, 201-02 (1968). Lawrence Gray elaborates on the similarity between judicial contempt and legislative contempt:

> Crimes of contempt are entirely creatures of legislative enactment. They are conceptual cousins to those inherent powers wielded by courts to vindicate their own authority. The inherent judicial contempt power preserves both the court's authority and the rights of parties to a lawsuit. Under penal laws, courts punish contempt crimes just like any other crime, namely, by imposing a sentence for transgressions of the public's right to peace, security, and good order.

Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 339 (1998).

93. ALA. CONST. art. IV, §§ 79-81; ARK. CONST. art. V, § 35; CAL. CONST. art. IV, § 15; COLO. CONST. art. XII, §§ 6-7; DEL. CONST. art. II, § 22; MD. CONST. art. III, § 50; N.M. CONST. art. IV, §§ 39-40; N.D. CONST. art. V, § 10; S.D. CONST. art. III, § 28; TENN. CONST. art. X, § 3; TEX. CONST. art. XVI, § 41; VT. CONST. ch. II, § 55; WASH. CONST. art. II, § 30; W. VA. CONST. art. VI, § 45; WIS. CONST. art. XIII, § 11; WYO. CONST. art. III, §§ 43-44 (bribery of officials); WYO. CONST. art. IV, § 10 (bribery of governor).

how constitutional crimes may vary in their completeness. At one end of the spectrum, Alabama, North Dakota, South Dakota, and Wyoming call for bribery to be outlawed, but state that it will be punished in a matter provided by law.[94] North Dakota and Wyoming reserve some say in the punishment by including provisions barring those convicted of bribery from holding public office.[95]

Colorado, Delaware, Tennessee, Texas, and Wisconsin go further and set forth the elements of bribery and corrupt solicitation but leave it to the legislature to set the punishment.[96] Washington leaves it up to the legislature to define corrupt solicitation but requires that the punishment be both a fine and incarceration, along with the disqualification from ever holding "any position of honor, trust or profit in this state."[97]

Other constitutional prohibitions of bribery and corrupt solicitation are essentially self-contained criminal statutes. California's constitution states that influencing the vote of a member of the legislature through bribery, intimidation, or "other dishonest means" is a felony.[98] The Arkansas Constitution prohibits the bribery of public officials as well as officials' receipt of bribes and provides that violations of the provision shall be punishable as a felony.[99] Arkansas's constitution also sets forth a detailed scheme regarding limits on the acceptance of gifts from lobbyists and provides that violations of that scheme are punishable as Class B misdemeanors.[100] If, however, a former member of the general assembly registers as a lobbyist within two years of leaving office, that violation is a Class D felony.[101] New Mexico's constitution defines the crimes of bribery and solicitation of bribery and further provides that conviction for these crimes is a felony, punishable by a fine of up to one thousand dollars or imprisonment of "not less than one nor more than five years."[102] Those same felony conviction terms also apply to anyone found guilty of violating Article IV, Section Thirty-Seven or Article XX, Section Fourteen of the New Mexico

94. ALA. CONST. art. IV, § 79; N.D. CONST. art. V, § 10; S.D. CONST. art. III, § 28; WYO. CONST. art. III, § 43 (bribery of government officials); WYO. CONST. art. IV, § 10 (bribery of the governor).

95. *See* N.D. CONST. art. V, § 10; WYO. CONST. art. III, § 44.

96. COLO. CONST. art. XII, §§ 6-7; DEL. CONST. art. II, § 22; TENN. CONST. art. X, § 3; TEX. CONST. art. XVI, § 41; WIS. CONST. art. XIII, § 11.

97. WASH. CONST. art. II, § 30.

98. CAL. CONST. art. IV, § 15.

99. ARK. CONST. art. V, § 35.

100. *Id.* at art. XIX, § 30(a)-(c)(1).

101. *Id.* §§ 29(a), (c)(1).

102. N.M. CONST. art. IV, §§ 39-40.

Constitution, which bars public officials from obtaining railroad transportation "upon terms not open to the general public."[103]

Some constitutions take special effort to single out and criminalize particular forms of bribery from certain actors. Mississippi and Wisconsin criminalize the provision of free or discounted railroad tickets to legislators or public officials.[104] Unlike Wisconsin, however, these states leave it up to the legislature to work out specific punishments for these offenses—although Wisconsin specifies that any such punishment must include expulsion from office.[105]

Some constitutional prohibitions on bribery appear to inadvertently place the prohibition of bribery entirely in the hands of the legislature. Maryland and West Virginia both require the legislature, at its first session, to pass laws prohibiting the bribery of public officials and those officials' receipt of bribes.[106] Both constitutions further provide that those convicted of bribery or receiving bribes shall be barred from office upon conviction.[107] The specificity of these provisions, however, sets the stage for their potential downfall. Should legislatures wish, they may alter or even eliminate their earlier laws against bribery without running afoul of the text of the state constitutions. After all, the legislatures will have fulfilled all the constitution requires—to enact those laws during the legislatures' first session. While such a ploy would be contrary to the spirit of these constitutional provisions, the specificity of the text and the constitution's failure to include an ongoing mandate, e.g., "the legislature shall provide for the punishment of bribery," undermines the effectiveness of any appeal to the motivation behind the provisions.

Similar to bribery, state constitutional provisions prohibiting the misuse of public funds appear with relative frequency. The constitutions of Arkansas, Colorado, Idaho, Kentucky, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming all prohibit private use or profit from public funds or embezzlement of public funds by officials.[108]

There is some variation in completeness of these constitutional crimes, but most tend to include both a description of the prohibited activity and

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103. Id. §§ 37, 40, art. XX, § 14.

104. MISS. CONST. art. VII, § 188; WIS. CONST. art. XIII, § 11.

105. MISS. CONST. art. VII, § 188; WIS. CONST. art. XIII, § 11.

106. MD. CONST. art. III, § 50; W. VA. CONST. art. VI, § 45.

107. MD. CONST. art. III, § 50; W. VA. CONST. art. VI, § 45.

108. ARK. CONST. art. XVI, § 3; COLO. CONST. art. X, § 13; IDAHO CONST. art. VII, § 10, art. XVIII, § 9; KY. CONST. § 173; MINN. CONST. art. XI, § 13; NEV. CONST. art. IV, § 10; N.M. CONST. art. VIII, § 4; N.D. CONST. art. IX, § 11; OKLA. CONST. art. X, § 11; S.D. CONST. art. XI, § 11; UTAH CONST. art. XXII, § 5; WASH. CONST. art. XI, § 14; WYO. CONST. art. XV, § 8.

specific guidance as to punishment. The constitutions of Arkansas and Kentucky provide that punishment for misappropriation of public funds shall be set by the legislature, but the punishment must include disqualification from office.[109] These constitutions are the exception, as all other state constitutions not only prohibit the misuse of public funds, but further provide that such misuse is punishable as a felony.[110] As for the severity of the felony—that is typically left up to the legislature.[111]

A related category of constitutional crimes includes punishments for the making of false or fraudulent reports that are relevant to state funding or government accounts. Alabama's constitution requires that the legislature provide for the punishment of those who make false or fraudulent reports regarding school censuses.[112] Nebraska and Texas's constitutions state that it is perjury to make false reports regarding government agencies' and institutions' financial activities and require that such perjury be punished "accordingly."[113] Oklahoma's constitution states that false reports regarding money disbursed by state agency commissioners shall be punished as provided by law.[114]

Section 172 of Kentucky's constitution contains another related crime, calling for the assessment of all property not exempted from taxation by the constitution, requiring that the assessment be calculated based on the estimated price the property "would bring at a fair voluntary sale," and prohibiting willful error in assessing property values for taxation purposes.[115] Section 172 leaves most of the punishment determination up to the legislature, although it requires that anyone found guilty of willful error shall "forfeit his office."[116] Despite the Section's call for punishment, there appear to be no Kentucky criminal cases reported that involve charges based on Section 172. Instead, the Section's criminal nature is cited in support of the duty it imposes on assessors, serving to emphasize the requirement that they assess property value properly.[117]

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109. ARK. CONST. art. XVI, § 3; KY. CONST. § 173.

110. COLO. CONST. art. X, § 13; IDAHO CONST. art. VII, § 10; *id.* art. XVIII, § 9; MINN. CONST. art. XI, § 13; NEV. CONST. art. IV, § 10; N.M. CONST. art. VIII, § 4; N.D. CONST. art. IX, § 11; OKLA. CONST. art. X, § 11; S.D. CONST. art. XI, § 11; UTAH CONST. art. XXII, § 5; WASH. CONST. art. XI, § 14; WYO. CONST. art. XV, § 8.

111. *See e.g.*, COLO. CONST. art. X, § 13; NEV. CONST. art. IV, § 10; WASH. CONST. art. XI, § 14; WYO. CONST. art. XV, § 8 (all deeming misuse of public funds a felony and stating that punishment shall be further provided or prescribed by law).

112. ALA. CONST. art. XIV, § 268.

113. NEB. CONST. art. IV, § 22; TEX. CONST. art. IV, § 24.

114. OKLA. CONST. art. VI, § 33.

115. KY. CONST. § 172.

116. *Id*.

117. *See* Louisville Ry. Co. v. Commonwealth, 49 S.W. 486, 486-87 (Ky. Ct. App. 1899).

F. VOTER FRAUD AND RELATED CRIMES

Several state constitutions contain provisions requiring criminal penalties for those who engage in misconduct related to campaigns, voting, and elections. Arkansas's constitution contains several such crimes, including prohibitions on election officers permitting people to vote illegally or making false voting returns (felony, punishable by a minimum of five years in prison and a maximum of ten years in prison),[118] voting when not qualified to do so (felony, punishable by a minimum of one year in prison and a maximum of five years in prison),[119] the destruction or unlawful detaining or obtaining of voter registration forms or registration record files (felony, punishable by a fine of between one hundred to one thousand dollars or imprisonment between one to five years),[120] "selling or giving away intoxicating liquors" the day of the "election, and the succeeding night" (punishable by a fine of at least two hundred dollars or at least six months imprisonment or both),[121] and "fraud, bribery, or other willful and corrupt violation of any election law" (felony, no punishment specified other than disqualification from holding office).[122] Arkansas's constitution also requires the legislature to enact laws prohibiting "perjury, forgery, and all other felonies or other fraudulent practices, in securing signatures or filing petitions" for initiatives and referenda.[123] Arkansas also includes a detailed scheme regarding permitted and prohibited sources of campaign donations—the violation of which is a Class A misdemeanor[124] and a catch-all criminal penalty provision for violations of its Fifty-First Amendment, which includes provisions relating to voter registration and administering the registration process.[125]

While Arkansas's state constitution contains the bulk of the country's constitutional crimes related to election misconduct, other states make an effort to criminalize this conduct at the state constitutional level. Article V, Section Seven of Delaware's constitution sets forth a variety of election-related offenses, such as betting on election outcomes, bribing people for votes, and threatening people to get them to vote a certain way.[126] Those who engage in any of this conduct are punishable by fines between one hundred

118. ARK. CONST. sched. § 25.
119. *Id.*
120. *Id.* amend. 51, § 15.
121. *Id.* sched. § 15. Toss out that beer you bought for your election-night party, I guess.
122. *Id.* art. III, § 6.
123. *Id.* art. V, § 1.
124. *Id*. art. XIX, § 28.
125. *Id*. amend. 51, § 15.
126. DEL. CONST. art. V, § 7.

to five thousand dollars and/or imprisonment of one month to three years in jail.[127] Maryland's constitution requires the General Assembly to pass laws that punish—with fines and imprisonment—anyone who moves into any election district or ward of the city of Baltimore for the purpose of voting in an upcoming election rather than the purpose of acquiring a bona fide residence in the district or ward.[128] New Mexico's constitution makes it a felony for anyone to sign a petition or legislative referendum more than once, when one is not a qualified elector in the specified county, or in someone else's name.[129] Louisiana's constitution criminalizes false or fraudulent returns on elections to the 1972 constitutional convention and provides for a penalty of imprisonment between two to five years for those who file such false returns.[130]

Missouri's constitution includes a detailed scheme regarding campaign contribution limits and criminalizes the "transfer [of] anything of value to any committee with the intent to conceal, from the Missouri ethics commission, the identity of the actual source."[131] The first violation of this provision only requires the money to be returned.[132] The second violation is a Class C misdemeanor, and the third and subsequent violations are Class D felonies.[133] Missouri's constitution also prohibits political fundraising activities by members of, or candidates for, the general assembly on property owned by the state and punishes violations with "imprisonment for up to one year or a fine of up to one thousand dollars or both, plus an amount equal to three times the illegal contributions" received as a result of such activities.[134] Nevada's constitution bans campaign contributions in excess of five thousand dollars and calls on the legislature to set forth the punishment—although any such punishment must be a felony.[135] Oregon's constitution prohibits the funneling of money from unqualified donors to campaigns via qualified donors and classifies this conduct as an "unclassified felony."[136]

Louisiana's constitution contains two catch-all provisions that set forth misdemeanor penalties for violations of provisions relating to the establishment of various government services. Section Eleven provides that a willful violation of Part I of Article X is a misdemeanor, punishable by a

127. *Id.*
128. MD. CONST. art. I, § 5.
129. N.M. CONST. art. IV, § 1.
130. LA. CONST. 1972 Const. Conv. § 2(B).
131. *See* MO. CONST. art. VIII, § 23, cl. 3(14).
132. *Id*.
133. *Id*.
134. *Id.* art. III, § 20(c).
135. NEV. CONST. art. II, § 10.
136. OR. CONST. art. II, § 22.

fine of up to five hundred dollars and/or imprisonment of up to six months.[137] That part establishes the state and city civil services, and applies to "all persons holding offices and positions of trust or employment in the employ of the state" or any city with a population of more than four hundred thousand.[138] Much of Part I is fairly descriptive: setting forth various offices, procedures for the appointment and removal of officers, hiring practices and requirements, and appeal procedures for disciplinary actions.[139] The criminal penalties in Section Eleven are most likely to apply to violations of Section Ten of the constitution, which prohibits employees in "the classified service" from participating in political activities, seeking election to most public offices, to "make or solicit contributions for any political party, faction, or candidate; or to take an active role in the management" of a political candidate or campaign.[140] "Classified" employees are defined in the negative in Article X, Section Two of the constitution,[141] and the prohibition on political contributions and activities has been upheld in a case involving police officers.[142]

Article X, Section Forty-Nine contains a similar penalty provision that makes it a misdemeanor punishable by a fine of up to five hundred dollars and/or imprisonment of up to six months for violating Part IV of Article X.[143] This part establishes a state police service, which includes

> all regularly commissioned full-time law enforcement officers employed by the Department of Public Safety and Corrections, office of state police, or its successor, who are graduates of the state police training academy course of instruction and are vested with full state police powers, as provided by law, and persons in training to become such officers.[144]

Part IV also includes a prohibition on those in the "classified service" from engaging in political activities, making or soliciting political contributions, or taking part in the management of any political campaign.[145]

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137. LA. CONST. art. X, pt. I, § 11.

138. *Id.* art. X, pt. I, § 1.

139. *See id.* art. X, pt. I, §§ 2-8, 10.

140. *See id.* art. X, pt. 1, § 9.

141. *Id.* art. X, pt. 1, § 2 (defining the "classified service" as those who are "not included in the unclassified service," followed by a list of officers and employees in the unclassified service).

142. Bruno v. Garsaud, 594 F.2d 1062, 1064 (5th Cir. 1979); *see also* LA. CONST. art. X, pt. II, § 16 (establishing a "system of classified fire and police civil service").

143. LA. CONST. art. X, pt. IV, § 49.

144. *Id*. § 41.

145. *Id.* § 47.

Designation of those in the "classified service" is up to the State Police Commission.[146]

G. UNIONS

Twenty-seven states and the territory of Guam[147] have laws that grant "union-represented employees the right to refuse to pay the union for the services the union is legally obligated to provide."[148] These laws are often referred to as "right-to-work" laws.[149] Supporters of right-to-work laws argue that the laws "are necessary to eliminate 'forced unionism' and to allow workers the 'right to work' without forcing them to pay union dues," while union supporters argue that these laws incentivize "'free riders' to reap the benefits of union representation without paying for them."[150]

These laws often appear in state constitutions. The constitutions of Alabama, Arizona, Arkansas, Florida, Kansas, Mississippi, Nebraska, and South Dakota prohibit agreements between employers and labor unions that require the payment of dues by non-union members, or which require employees to join a labor union as a condition of employment.[151] These provisions do not rise to the level of constitutional crimes because they do not require or set forth criminal penalties for their violation.[152]

Two states go further, however, and make violations of right-to-work constitutional provisions a constitutional crime. Article I, Section Seven of North Dakota's constitution states that citizens are "free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor."[153] The

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146. *Id.* § 42.

147. *See Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., https://www nrtw.org/right-to-work-states/ [https://perma.cc/XW7X-WXSB] (last visited Feb. 19, 2023) (listing the count of such states as of early 2023).

148. Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 857 (2014).

149. *Id.*

150. Denise Oas & Steven Lance Popejoy, *The Right-to-Work Battle Rages on at Both the Federal and State Levels*, 29 MIDWEST L.J. 71, 75 (2019).

151. ALA. CONST. art. I, § 36.05; ARIZ. CONST. art. XXV; ARK. CONST. amend. XXXIV; FLA. CONST. art. I, § 6; KAN. CONST. art. XV, § 12; MISS. CONST. art. VII, § 198a; NEB. CONST. art. XV, §§ 13-15; S.D. CONST. art. VI, § 2.

152. This is not to say that these states do not criminalize practices that require union membership or payment of union dues via statute. *See, e.g.*, ARK. CODE ANN. § 11-3-304(b)(1) (West 1947) (violation of statute prohibiting contracts that exclude non-union members from employment is punishable as misdemeanor, with fines ranging from one hundred to five thousand dollars).

153. N.D. CONST. art. I, § 7.

North Dakota Supreme Court has interpreted this provision to criminalize the requirement of union membership as a condition of employment.[154] The court has rejected attempts to apply the broad language of the provision to other circumstances, such as noncompete agreements[155] or the closure of businesses by executive order during a pandemic.[156]

Article XXIII, Section 1A of Oklahoma's constitution is more explicitly worded than North Dakota's criminalization of required union membership. Section 1A makes it a misdemeanor to require union membership as a condition of employment or to deduct union dues from wages.[157]

H. GAMBLING AND GAMING

Several state constitutions prohibit gambling, although setting penalties for gambling is sometimes delegated to the legislature. Article I, Section Two of Georgia's constitution prohibits "all lotteries, and the sale of lottery tickets, . . . and casino gambling" that aren't provided for elsewhere in the constitution and requires the legislature to enforce this prohibition "by penal laws."[158] Idaho's constitution also prohibits gambling and requires the legislature to set penalties for violating this prohibition.[159] South Carolina's constitutional crime of gambling applies only to "person[s] holding an office of honor, trust or profit" and not only outlaws "gambling or betting on games of chance," but further provides that anyone convicted of violating this prohibition "shall become thereby disqualified from the further exercise of the functions of his office, and the office of said person shall become vacant, as in the case of resignation or death."[160]

Montana's constitution contains a prohibition on gambling but fails to set forth penalties for violation of the prohibition.[161] The prohibition is also fairly permissive—banning "[a]ll forms of gambling, lotteries, and gift enterprises . . . unless authorized by acts of the legislature or by the people through initiative or referendum."[162] In light of the lack of a penalty provision and the constitution's acknowledgment of the legislature's and people's power to act in a contrary manner, it's debatable whether this provision qualifies as a constitutional crime. The debate is complicated by the Montana

154. *See* Minor v. Bldg. & Constr. Trades Council, 75 N.W.2d 139, 148-49 (N.D. 1956).
155. *See* Siegel v. Marcus, 119 N.W. 358, 360 (N.D. 1909).
156. *See* State v. Riggin, 2021 ND 87, ¶ 20, 959 N.W.2d 855, 860-61.
157. OKLA. CONST. art. XXIII, § 1A.
158. GA. CONST. art. I, § 2, ¶ VIII.
159. IDAHO CONST. art. III, § 20.
160. S.C. CONST. art. XVII, § 8.
161. MONT. CONST. art. III, § 9.
162. *Id*.

Supreme Court's treatment of an earlier constitutional ban on gambling, which forbade the legislature from authorizing "lotteries, or gift enterprises for any purpose" and mandated that the legislature prohibit such activities.[163] The court held that the provision was not an independent prohibition on gambling but instead prohibited legislation that permitted gambling.[164] The court distinguished the old provision from other states' bans, which directly prohibited gambling and lotteries, and characterized those bans as self-executing.[165] The present constitutional prohibition on gambling is far more similar to these other bans than Montana's earlier prohibition.

For prohibitions that are far more specific and explicit, Alabama's constitution offers several examples. Alabama's constitution prohibits the legislature from authorizing "lotteries or gift enterprises for any purposes" and further requires the legislature to prohibit the sale of "lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery."[166] The Alabama Supreme Court previously held that this section "does not prohibit the Legislature from authorizing gambling" but emphasized that the state constitution bars "activit[ies] in which a prize is awarded by chance and for consideration, when chance is the dominant element, even when a degree of skill may affect the outcome."[167] With the lessons of Montana's prior prohibition of lotteries in mind, there's a strong argument against this provision being a constitutional crime as it only prohibits legislative activity.

But this isn't the only relevant provision in Alabama's constitution—the longest constitution in the world and one containing constitutional amendments that permit bingo in eighteen jurisdictions.[168] Bingo is serious business in Alabama, with some of the state's largest bingo facilities providing "significant social and economic benefits such as jobs, governmental funding, and access to social services, including health care."[169] Bingo is also the source of litigation, with one example being legal battles over whether electronic bingo qualifies, resulting in the Supreme

163. State *ex rel*. Stafford v. Fox-Great Falls Theatre Corp., 132 P.2d 689, 699 (Mont. 1942) (quoting MONT. CONST. of 1889, art. XIX, § 2).

164. *Id*.

165. *Id*.

166. ALA. CONST. art. IV, § 65.

167. Opinion of the Justices, 795 So. 2d 630, 641-43 (Ala. 2001).

168. *See Effort to Scrap Alabama's Constitution*, NPR (Feb. 13, 2009, 4:00 PM) https://www npr.org/templates/story/story.php?storyId=100691170 [https://perma.cc/J6KC-ZRJC] (describing Alabama's constitution as the longest in the world); J. Mark White et al., *Bingo in Alabama: More Than Just a Game*, 41 CUMB. L. REV. 509, 510 (2011) ("In Alabama, bingo is permitted by constitutional amendment in eighteen jurisdictions.").

169. White et al., *supra* note 168, at 521.

Court of Alabama creating a six-part test to define the game of bingo.[170] Critics accuse bingo of being a cover for gambling to "spread like kudzu into areas that prohibit gambling."[171]

Litigation and literature regarding the history, ongoing controversy, and legal wrangling over the nuances of bingo are (unfortunately) beyond the scope of this Article. Instead, my focus is on the constitutional provisions themselves, which set forth rules governing bingo games operated by nonprofit or charitable organizations in various counties—such as licensing restrictions, age limits, and advertising restrictions. As it happens, the provisions applicable to Greene County and Lowndes County carry misdemeanor penalties for those who violate the rules set forth in the constitutional provisions.[172] Alabama's constitution contains similar restrictions for bingo games in Covington County,[173] Houston County,[174] Limestone County,[175] Morgan County,[176] and Russell County,[177] but does not include criminal penalties—instead permitting the local legislature to make those determinations.[178]

I. MARRIAGE

Several state constitutions include explicit prohibitions on plural or polygamous marriage. Ryan White writes that polygamy was most widely practiced among members of The Church of Jesus Christ of Latter-day Saints, reaching its peak in the mid-1850s.[179] The United States Congress criminalized polygamy in 1862, passing the Morrill Act that prohibited bigamy in United States territories, providing for punishment of fines up to

170. *See* Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 86 (Ala. 2009); *see also* Brandon A. Jackson, *Where Does the Authority Lie?: Constitutional Construction of Alabama's Newest Bingo Amendments*, 5 U.N.L.V. GAMING L.J. 183, 186-87 (2014).

171. *See* Joseph L. Lester, *B-I-N-G-NO! The Legal Abuse of an Innocent Game*, 18 ST. THOMAS L. REV. 21, 21 (2005).

172. ALA. CONST. § 32-7.00. Violation of the bingo laws in Greene County is a Class A misdemeanor. *Id.* In Lowndes County it is a Class C misdemeanor for first violation, and a Class A misdemeanor for subsequent violations. *Id.* § 43A-2.00(c)

173. *Id.* § 20-7.00(b).

174. *Id.* § 35-7.00(b).

175. *Id.* § 42.7.00(b).

176. *Id.* § 52.700(b).

177. *Id.* § 57.700(b).

178. I have omitted constitutional provisions that do not explicitly reference criminal penalties for violations. *See, e.g.*, *id.* § 59-7.00 (setting forth bingo requirements for St. Clair County).

179. Ryan White, *Two Sides of Polygamy*, 2009 UTAH L. REV. 495, 496 (2009).

five hundred dollars and imprisonment of up to five years.[180] The Supreme Court upheld the constitutionality of the Morrill Act in 1878.[181]

This is the context in which state constitutional bans on polygamy were formed. In at least some cases, these provisions resulted from conditions for statehood for states formed in the late 1800s. The 1894 Utah Enabling Act gave the Territory of Utah the authority "to take steps toward obtaining statehood."[182] One condition contained in the Enabling Act, however, was a requirement that Utah's constitution

> provide, by ordinance irrevocable without the consent of the United States and the people of [Utah that] First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: Provided, That polygamous or plural marriages are forever prohibited.[183]

As a result of the Enabling Act, Utah's constitution includes a prohibition on "polygamous or plural marriages."[184] Oklahoma's constitution contains an identical provision.[185] Arizona and New Mexico's constitutions include broader provisions that prohibit polygamous or plural marriages as well as "polygamous co-habitation."[186]

None of these provisions rise to the level of a constitutional crime, however, because they do not contain a punishment provision or call for the legislature to establish some punishment for polygamous or plural marriages. Idaho's constitution is different, providing that "[b]igamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes."[187] Debate over this provision at Idaho's Constitutional Convention sheds light on opinions regarding this provision and on nuances over constitutional crimes more generally. G.W. King noted that labeling bigamy and polygamy a crime suggested that the drafters "might insert any amount of crimes there; murder, treason robbery and all that."[188]

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180. *See* Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862).

181. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878); *see also* Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 122-27 (2006) (describing the context, procedural history, and ruling in the *Reynolds* case).

182. State v. Holm, 2006 UT 31, ¶ 40, 137 P.3d 726.

183. Utah Enabling Act, ch. 138, § 3, 28 Stat. 107 (1894).

184. UTAH CONST. art. III.

185. OKLA. CONST. art. I, § 2.

186. ARIZ. CONST. art. XX, pt. 2; N.M. CONST. art. XIX, § 1.

187. IDAHO CONST. art. I, § 4.

188. 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 132 (I.W. Hart ed., 1912); *see also id.* at 7-9 (listing the names of members of the convention as reported by the Committee on Credentials).

King's concern was that it was "absurd to think any living man would claim exemption from these crimes" and that there was, therefore, no "use to put these clauses in," as they had no independent force and did not relate to the remainder of the article, which addressed religious freedom.[189] George Ainslie spoke out in favor of keeping the "crime" label for bigamy and polygamy, arguing that this would demonstrate the Democratic party's alignment with Republicans in condemning polygamy.[190] King's motion to remove the label of bigamy and polygamy as a "crime" did not succeed, and Idaho's constitution criminalizes bigamy and polygamy to this day.[191]

Bigamy and polygamy aren't the only forms of marriage that are the subject of constitutional crimes. Oklahoma's constitution effectively criminalizes same-sex marriage—stating that marriage is between "one man and one woman" and that "issuing a marriage license in violation of this section . . . [is] a misdemeanor."[192] This provision is no longer constitutional in light of the Supreme Court's ruling in *Obergefell v. Hodges*, which recognized a federal constitutional right to same-sex marriage.[193] But Oklahoma's constitutional crime of same-sex marriage stands as an extreme example among a host of state constitutional relics that continue to restrict the definition of marriage to a union of one man and one woman.[194] And should the Court continue to reconsider and roll back substantive due process protections, Oklahoma's constitutional crime may be law again someday.[195]

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189. *Id*. at 132.

190. *Id*. at 133-34.

191. *Id*. at 133; IDAHO CONST. art. I, § 4.

192. OKLA. CONST. art. II, § 35, *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

193. *See* 576 U.S. at 681.

194. Twenty-nine state constitutions still contain provisions limiting marriage to one man and one woman that have effectively been invalidated by *Obergefell*. *See Obergefell*, 576 U.S. at 681; ALA. CONST. art. I, § 36.03(b); ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, ¶ 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 223a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263a; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEXAS CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-a; WIS. CONST. art XIII, § 13. Hawaii's constitution gives the state legislature the authority to "reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

195. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J. concurring) (calling for the Court to "reconsider all of this Court's substantive due process precedents, including *Griswold* [*v. Connecticut*], *Lawrence* [*v. Texas*], and *Obergefell*"); *see also* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047 (2022) (describing laws that have been deemed constitutionally invalid, but not repealed, as "zombie laws" and noting that these laws may take effect in the future should precedent change).

J. MARIJUANA

The constitutions of Arkansas and Missouri both contain detailed provisions related to the use and sale of marijuana for medical purposes.[196] Each of these constitutional schemes contains provisions that give rise to constitutional crimes.

Arkansas's constitution sets forth a scheme for the issuance of registry identification cards for "qualifying patients and designated caregivers" by the state's Department of Health.[197] Amendment Ninety-Eight, Section Five sets forth details regarding the identification cards, such as who may possess them and how one may go about applying for a registration card.[198] Several subsections of this provision are at least partial constitutional crimes—for instance, a "cardholder who transfers marijuana to a person who is not a qualifying patient or designated caregiver . . . shall have his or her registry identification card revoked and shall be subject to any other penalties established by law."[199] This restriction is immediately followed by a catch-all provision, stating that "any cardholder who knowingly violates any provision of this amendment" may have his or her registry identification card revoked and "is subject to any other penalties established by law."[200] Section Five includes a complete constitutional crime as well: it designates any applications or renewal forms submitted by qualifying patients or designated caregivers as confidential records, sets forth a requirement that the Department of Health maintain a confidential list of those to whom it has issued registry identification cards, and provides that any knowing breach of the confidentiality of this information is a Class A misdemeanor.[201]

Article XIV, Section One of Missouri's constitution includes a detailed scheme governing access to medical marijuana.[202] Section One includes guidance for the state Department of Health in granting and refusing licenses to cultivate and sell marijuana;[203] developing identification forms and applications related to medical marijuana cultivation, sale, and qualification;[204] tracking medical marijuana from seed to sale;[205] establishing standards for the transportation of marijuana; and establishing a "lottery

196. *See* ARK. CONST. amend. 98; MO. CONST. art. XIV.
197. ARK. CONST. amend. 98, § 5.
198. *Id*.
199. *Id*. § 5(g)(1).
200. *Id*. § 5(g)(2).
201. *Id*. § 5(f).
202. MO. CONST. art. XIV, § 1.
203. *Id*. § 1(3)(1)(a).
204. *Id*. § 1(3)(1)(c).
205. *Id*. § 1(3)(1)(d).

selection process to select medical marijuana licensee and certificate applicants,"[206] among many other rules.[207]

Several of these subsections have penalty provisions—including criminal penalties. Selling edible marijuana-infused products that are not packaged in "containers clearly and conspicuously labeled as . . . containing 'Marijuana,' or a 'Marijuana-Infused Product'" results in sanctions, including an administrative penalty of five thousand dollars.[208] Other administrative penalties and fines may follow should one "extract resins from marijuana using dangerous materials or combustible gases without a medical marijuana-infused products manufacturing facility license."[209] Criminal penalties may be imposed as well—although they have recently become less stringent. As of December 8, 2022, possessing more than twice the legal limit of medicinal marijuana is punishable as an infraction.[210] Before then, that possession would have resulted in "imprisonment of up to one year and a fine of up to two thousand dollars."[211]

K. STATE AND MUNICIPAL DEBTS

Article XI, Section 213 of Alabama's constitution is an unpleasant mass of words with no subheadings that sets forth various rules restricting Alabama from incurring new debt, as well as exceptions, restrictions, and limits on new debt that may be created.[212] Violating any provisions of this section is punishable by a fine of up to five thousand dollars and/or imprisonment for up to two years.[213]

Article XII, Section Four of Arkansas's constitution sets forth limits on the powers of municipal corporations. Starting off with the basics, Section Four prohibits municipalities from passing laws "contrary to the general laws of the state," but soon veers into taxation limitations and exceptions, and then rules for the governing of municipalities' fiscal affairs.[214] Relevant to this Article, Section Four prohibits

> any city council, board of aldermen, board of public affairs, or commissioners, of any city of the first or second class, or any incorporated town, enter into any contract or make any allowance

206. *Id*. § 1(3)(1)(h).
207. *See id*. §§ 1(3)(2)-(25), 1(4)-(8).
208. *Id*. § 1(7)(4).
209. *Id*. § 1(7)(7).
210. *Id*. § 1(3)(14).
211. *Id.* § 1(3)(14) (amended 2022).
212. ALA. CONST. art. XI, § 213.
213. *Id*.
214. ARK. CONST. XII, § 4.

> for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip or other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year.[215]

If the annual report of any city or county shows that "scrip, warrants or other certificate of indebtedness had been issued in excess of the total revenue of that year, the officer[s] of the [municipality] who authorized, signed or issued such scrip, warrants, or other certificates" are "guilty of a misdemeanor," fined between five hundred and ten thousand dollars, and "removed from office."[216]

This provision has seen some action. In *Warren v. State*, a county judge was charged with violating the constitutional provision by authorizing the purchase of "$80,000 worth of road machinery," with payments to be made over two years.[217] An audit revealed that "claims for the payments on [the purchase] contract were allowed and warrants of the county were written in 1960 which were for expenses incurred" in the 1959 purchase of the machinery—causing a deficit for the year 1959 of just over one thousand dollars.[218] The judge "kicked back certain claims" allowed in the second year to the first year of the purchase, thinking that this would count against the indebtedness retroactively.[219] The Arkansas Supreme Court characterized Section Four as "a penal law" subject to strict construction.[220] It concluded that the purchase contract "cannot be considered as a certificate of indebtedness" and that the judge, therefore, had not "issued script, warrants or other certificates of indebtedness in excess of the total revenues for the year 1959, as charged."[221]

L. DUELING

Several states have constitutional crimes that prohibit dueling. South Carolina and Tennessee have tougher provisions, stating that anyone who engages in, or aids and abets, duels loses the ability to hold office and "shall be punished" in a manner provided by the legislature.[222] Alabama's constitution mixes mandatory language with discretionary language, stating that the legislature "shall pass such penal laws as it may deem expedient to

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215. *Id*.
216. *Id*.
217. 340 S.W.2d 400, 402 (Ark. 1960).
218. *Id*.
219. *Id*. at 402-03.
220. *Id*. at 403.
221. *Id*.
222. S.C. CONST. art. XVII, § 1B; TENN. CONST. art. IX, § 3.

suppress the evil practice of dueling."[223] Arkansas and Kentucky leave the punishment of dueling to the discretion of the legislature, although dueling in both states has consequences for one's ability to hold office.[224] In Kentucky, dueling disqualifies one from office, while Arkansas sets a ten-year limit on the period of disqualification.[225] Kentucky's constitution further requires members of its General Assembly and government officers to swear that they "have not fought a duel with deadly weapons within this State nor out of it" as part of their oath of office.[226] This same provision requires these members and officers to further swear that they have not "sent or accepted a challenge to fight a duel with deadly weapons," nor acted as a second or aided or abetted any such duels.[227]

Dueling used to be an accepted means of resolving conflicts in early America, with cultural influences and the American Revolution contributing to its popularity.[228] Duels "were regulated by an elaborate set of norms rooted in the concept of honor," which, in turn, governed "a wide range of other behavior of the self-defined elite that embraced it."[229] Attorneys, in particular, seemed drawn to the practice of dueling.[230] Shifting perspectives on honor in the northern states led to dueling's eventual decline, although the practice persisted for a longer period in the South.[231] State constitutional provisions setting forth official penalties for those engaging in the practice reflect this historical practice as well as the eventual shift away from dueling.

M. MISCELLANEOUS CRIMES

This section addresses one-off constitutional crimes that do not fit into any of the categories above. As noted above, while I've endeavored to group

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223. ALA. CONST. art. IV, § 86.

224. ARK. CONST. art. IXX, § 2; KY. CONST. § 239.

225. *See* ARK. CONST. art. IXX, § 2; KY. CONST. § 239.

226. KY. CONST. § 228.

227. *Id*. This provision isn't without controversy and has drawn the occasional call for removal by those who claim it portrays Kentucky as a "backward" state. *See* Stu Johnson, *Kentucky Duels Over Oath of Office*, NPR (March 12, 2010, 11:48 AM), https://www npr.org/2010/03/12/124616129/kentucky-duels-over-oath-of-office [https://perma.cc/F2Y7-QHPL].

228. C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1815-16 (2001).

229. Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUDIES 321, 321-22 (1984).

230. *See* Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1202 (2008).

231. *See* Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 545-56 (2004) (describing the popularity of dueling in the North and South, and the eventual decline of the practice in both regions).

provisions where possible for the sake of organization and efficiency, I'm more concerned about inadvertently obscuring meaningful differences between provisions. To that end, I err on the side of separating provisions—resulting in the scattered list of provisions discussed below. Some of these subsections address groups of provisions, however, such as two Florida provisions adopted by initiative[232] and a cluster of localized, county-level crimes included in Alabama's constitution due to the state's peculiar approach to constitutionalizing local legislation.[233]

1. Alteration or Theft of Bills

We've all seen Schoolhouse Rock's "I'm Just a Bill," a musical cartoon that educated countless schoolchildren on the procedural intricacies a piece of legislation must undergo in order to become law.[234] This canonical cartoon provides an understandable, concise description of the legislative process and, for the most part, holds up.[235] But there are some questions the video leaves unanswered, such as: what happens if the singing piece of legislation is stolen by thieves or wrongfully altered while it is pending or prior to it receiving the governor's signature?

Fear not, there's a constitutional crime for that—at least in New Mexico's constitution. Article IV, Section Twenty-One makes it a felony punishable by a minimum of one year and a maximum of five years imprisonment to "materially change or alter, or make away with, any bill pending in or passed by the legislature."[236] Fortunately, there appear to be no published cases that involve violations of this provision, suggesting that Section Twenty-One has done its job well.[237]

2. Firearm Waiting Periods

While many state constitutions, including Florida's, include rights to keep and bear arms, Florida's right to bear arms is accompanied by a constitutional crime related to the sale of firearms.[238] Florida's constitution requires the legislature to enact a law that requires a three-day waiting period

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232. *See infra* Section III.M.9.

233. *See infra* Section III.M.10.

234. And if you haven't, see PlayNowPlayL8tr, *Schoolhouse Rock – I'm Just a Bill*, YOUTUBE (Nov. 8, 2016), https://www.youtube.com/watch?v=OgVKvqTItto [https://perma.cc/7C8L-K7PM].

235. *See* John Cannan, *Schoolhouse Rock! Rules: Orthodoxies and Unorthodoxies in Congressional Procedure*, 100 U. DET. MERCY L. REV. 49, 50-51, 102-04 (2022).

236. N.M. CONST. art. IV, § 21.

237. *Cf. Third Amendment Rights Group Celebrates Another Successful Year*, ONION (Oct. 5, 2007), https://www.theonion.com/third-amendment-rights-group-celebrates-another-success-1819569379 [https://perma.cc/9T3M-AE2E].

238. *See* FL. CONST. art. I, § 8.

between paying for a firearm and obtaining the firearm.[239] The constitutional provision further requires that violation of such a law shall be punishable as a felony.[240]

3. Antitrust

Twenty-two states "have clauses explicitly referencing monopolies or monopolistic power structures" in their constitutions.[241] Most of these provisions do not rise to the level of constitutional crimes and instead include general directives for the regulation and prohibition of monopolies or other anti-competitive business practices.[242]

Minnesota, however, is an exception. Article XIII, Section Six of Minnesota's constitution provides that: "Any combination of persons either as individuals or as members or officers of any corporation to monopolize markets for food products in this state or to interfere with, or restrict the freedom of markets is a criminal conspiracy and shall be punished as the legislature may provide."[243] There are few cases on record interpreting this provision, although the Minnesota Supreme Court has determined that legislation permitting the formation of co-operative marketing arrangements does not violate the provision—noting these markets' lack of profit and capital stock.[244] The Minnesota Supreme Court tends to treat this provision as a starting point in analyzing whether a business arrangement is an unlawful restraint on commerce, reflecting the state's policy against restricting the freedom of food markets.[245]

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239. *Id.*

240. *Id.*

241. *See* Gary M. Dreyer, Note, *After* Patel*: State Constitutional Law & Twenty-First Century Defense of Economic Liberty*, N.Y.U. J.L. & LIBERTY 800, 846, 846 n.127 (2021) (listing Alabama, Arizona, Arkansas, Georgia, Maryland, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Idaho, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming as states with such provisions). The article states "twenty-one" in the text but lists twenty-two states in the footnote. *See id.*

242. *See, e.g.*, ALA. CONST. art. IV, § 103 ("The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business."); GA. CONST. art. III, § 6, ¶ V (prohibiting the General Assembly from authorizing contracts that encourage monopolies and granting power to the Assembly to regulate competitive activities).

243. MINN. CONST. art. XIII, § 6.

244. *See* Minn. Wheat Growers' Co-Op. Mktg. Ass'n v. Huggins, 203 N.W. 420, 422-23 (Minn. 1925).

245. *See* State v. Duluth Bd. of Trade, 121 N.W. 395, 398 (Minn. 1909).

4. Public Employment of Lawful Resident Aliens

Article XVIII, Section Ten of Arizona's constitution prohibits those who are not citizens of the United States from being employed by the state as well as by any county or municipality.[246] Don't worry—there's an exception for prisoners who are put to work by the state or municipalities.[247] Also exempt from the restriction is "any teacher, instructor, or professor authorized to teach in the United States under the teacher exchange program as provided by federal statutes enacted by the congress of the United States or the employment of university or college faculty members."[248] The section concludes by requiring the legislature to enact laws providing for the enforcement and punishment of any violations.[249] While the section itself is not a complete constitutional crime, as it lacks a penalty provision, the section mandates the enactment of punishment provisions and is therefore worth noting.

It's also worth noting, however, that this Article has been deemed to violate the United States Constitution. In *Miranda v. Nelson*, Maria Miranda, a lawful resident alien, sought employment as an office clerk at a public high school, where she was also enrolled as a student.[250] After being accepted for employment, she was terminated "for the sole reason that she was a non-citizen of the United States."[251] Another plaintiff, Marion Huxtable, sought employment as a social worker and teacher.[252] Her application was denied because she was a legal permanent resident and not a United States citizen.[253]

The district court, citing *Graham v. Richardson*,[254] held that Arizona's constitutional provision barring noncitizens from public employment was unconstitutional.[255] It reasoned that because the United States Constitution "vests in Congress the sole power and authority to determine and grant to aliens right of entry to and residence within the United States and their lawful pursuits therein," and because Congress had not enacted legislation barring permanent resident aliens from public employment, Arizona's attempt to do so imposed on Congress's power and therefore ran afoul of the Constitution's

246. ARIZ. CONST. art. XVIII, § 10.
247. *Id.*
248. *Id.*
249. *Id.*
250. 351 F. Supp. 735, 737-38 (D. Ariz. 1972), *aff'd sub nom.* Nelson v. Miranda, 413 U.S. 902 (1973) (mem.).
251. *Id*. at 738.
252. *Id*.
253. *Id*.
254. 403 U.S. 365 (1971).
255. *Miranda*, 351 F. Supp. at 739-40.

Supremacy Clause.[256] The United States Supreme Court affirmed the district court's opinion in a non-opinion order the following year.[257]

5. The Death Penalty

While it is not a self-contained crime, Article I, Section Forty of Oregon's constitution is worth noting because of its direct relevance to other criminal statutes. This provision requires that "the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law."[258] Accordingly, even if the legislature were to seek to do away with the death penalty, it would be barred by the Oregon constitution from eliminating the death penalty in cases of aggravated murder.

6. Stem Cells and Cloning

Missouri's constitution includes a detailed scheme regarding stem cell research and therapy, and rules as to what related research and therapies are permitted and what behaviors are prohibited.[259] Research "permitted under federal law" is allowed but subject to a number of limitations, including: (1) no cloning of human beings; (2) no production of human blastocysts "by fertilization solely for the purpose of stem cell research"; (3) no taking stem cells from human blastocysts "more than fourteen days after cell division begins" not counting the time the blastocyst is frozen; (4) no selling of human blastocysts or eggs for stem cell research or therapies; (5) a requirement that human blastocysts and eggs used in stem cell research or therapies be voluntarily donated and that written consent forms be signed; and (6) additional certification requirements and requirements that state and local laws be followed.[260]

Violations of the cloning ban are a felony punishable by up to fifteen years in prison and/or a fine of up to two hundred fifty thousand dollars.[261] Violations of the ban on producing human blastocysts by fertilization solely for the purpose of stem cell research or the ban against taking stem cells from blastocysts more than fourteen days after the beginning of cell division is a felony punishable by imprisonment of up to ten years and/or a fine of one

256. *Id*. at 740.
257. *See* Nelson v. Miranda, 413 U.S. 902 (1973) (mem.).
258. OR. CONST. art. I, § 40.
259. MO. CONST. art. III, § 38(d).
260. *Id.* § 38(d)(2).
261. *Id.* § 38(d)(3).

hundred thousand dollars.[262] All of the restrictions may also give rise to civil actions by the state attorney general, in which the state may be awarded civil penalties of up to fifty thousand dollars per violation, along with disgorgement of profits and injunctive relief.[263]

7. Records Inspections

Oklahoma's constitution provides that a railroad company or public service corporation that refuses to allow access by state commissioners to inspect books and papers is to be fined between one hundred twenty-five and five hundred dollars per day for each day it refuses to permit inspection.[264] As for the "officer or other person" who makes the refusal, that person "shall be punished as the law shall prescribe."[265]

8. Deposits to Insolvent Banks

Section 204 of Kentucky's constitution states that any "President, Director, Manager, Cashier or other officer of any banking institution" who receives deposits with knowledge that the "banking institution or association or individual banker is insolvent" is individually responsible for those deposits received.[266] This receipt of deposits with knowledge that the bank is insolvent is a felony "and subject to such punishment as shall be prescribed by law."[267] While the specifics of the penalty are left up to the legislature, Section 204 sets forth a constitutional baseline for the penalty by specifying that such an action is a felony.

9. Florida's Net Ban and Pig Confinement Provisions

Florida's initiative process permits Floridians to propose amendments to Florida's constitution, which has resulted in multiple constitutional crimes.[268] Initiatives are limited to one subject each, and—to get on the ballot—require signatures from half of the state's congressional districts, and from the state as a whole, in an amount "equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding

262. *Id*.
263. *Id*.
264. OKLA. CONST. art. IX, § 28.
265. *Id*.
266. KY. CONST. § 204.
267. *Id*.
268. *See* FLA. CONST. art. X, § 21(a) n.1 ("Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy"). *See generally* P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 425-32 (1995) (describing Florida's initiative process).

election in which presidential electors were chosen."[269] Once on the ballot, the proposed amendment must be approved by a vote of "at least sixty percent of the electors voting on the measure," although Florida House Republicans are now attempting to increase the required percentage to a two-thirds vote.[270]

Article X, Section Sixteen of Florida's constitution "was proposed by initiative and ratified in 1994."[271] The initiative followed attempts by Florida's Marine Fisheries Commission to regulate the use of net fishing—attempts which were met with funding cuts and threats of the commission's elimination from state legislators in Florida's Panhandle counties.[272] When placed to a statewide vote through the initiative process, the initiative passed with strong support, winning "by a 72% majority."[273] Section Sixteen, or the "net ban," prohibits the use of gill nets and entangling nets in Florida's water, and also prohibits the use of nets "containing more than 500 square feet of mesh area . . . in nearshore and inshore Florida waters."[274] The net ban incorporates a penalty from a statute that is no longer on the books but permits the legislature to set more stringent penalties.[275] The penalties and enforcement details for the net ban are set out in Florida Statutes Section 379.407 and range from a third-degree felony penalty of up to five years in prison and five thousand dollars in fines for "flagrant violations" to even more extensive fines and licensing penalties.[276]

Article X, Section Twenty-One prohibits the confinement of pigs during pregnancy in enclosures that prevent the pigs from turning around freely.[277] The amendment passed with the vote of 54.75% of voters as a state ballot initiative after a law banning the practice failed to pass in the Florida legislature.[278] This provision is in line with laws adopted in several other

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269. FLA. CONST. art. XI, § 3.

270. *Id.* art. XI, § 5(e); Douglas Soule, *Should Florida Constitutional Amendments Require 66.67% to Pass? Republicans Make the Push*, TALLAHASSEE DEMOCRAT (Feb. 14, 2023, 7:00 PM), https://www.tallahassee.com/story/news/breaking/2023/02/14/florida-republicans-push-to-make-it-harder-for-citizens-to-pass-amendments/69899128007/ [https://perma.cc/P4F7-TNKQ].

271. Clay Henderson, *The Greening of Florida's Constitution*, 49 STETSON L. REV. 575, 634 (2020).

272. Stern, *supra* note 8, at 59-61.

273. *Id*. at 61.

274. FLA. CONST. art. X, § 16.

275. *Id*. at § 16(e).

276. FLA. STAT. § 379.407(3)(b)(1)-(2) (2016); *id.* § 775.082(8)(e) (2019); *id.* § 775.083(1)(c) (2023).

277. FLA. CONST. art. X, § 21(a).

278. Whitney R. Morgan, *Proposition Animal Welfare: Enabling an Irrational Public or Empowering Consumers to Align Advertising Depictions with Reality?*, 26 U. FLA. J.L. & PUB. POL'Y 297, 309-10 (2015).

states.[279] Violation of this provision is a first-degree misdemeanor, punishable by imprisonment and/or a fine of up to five thousand dollars.[280] Section Twenty-One permits the legislature to adopt "more stringent penalties" for violations.[281] Unlike Florida's net ban, its constitutional ban on pregnant pig confinement has not been subjected to challenges. The only reported Florida case involving litigation arising from the amendment appears to be a claim by a pig farmer who had to stop using gestation crates as a result of the amendment and therefore claimed that the amendment was "a taking of certain improvements on his real property" in an inverse condemnation claim.[282]

10. Alabama's Local Constitutional Crimes

As mentioned previously, Alabama's constitution includes provisions that are specific to certain counties.[283] This results from Alabama's constitutional prohibition on "works of internal improvement" and lending of money "except as may be authorized by the Constitution of Alabama or amendments thereto."[284] As a result, Alabama's constitution is shot through with county-specific rules and authorizations and was amended 534 times between 1901 and 1991.[285]

With so many county-specific amendments, it's little surprise that this Article's tour of constitutional crimes ends with a summary of several county-specific crimes. Section 45-9.01 of Alabama's constitution sets forth the procedures for controlling dangerous dogs in Madison County.[286] The section contains a number of criminal provisions and penalties, including

- If a dog previously declared dangerous by a court kills or seriously injures a person without provocation, the dog's owner is guilty of a Class C felony;[287]
- If a dog not previously declared dangerous by a court attacks and causes serious injury to death to a person, and the dog's owners knew about the dangerous propensities "yet demonstrated reckless

279. *See* Samuel R. Wiseman, *Localism, Labels, and Animal Welfare*, 13 NW. J.L. & SOC. POL'Y 66, 70 (2018) (noting laws prohibiting the confinement of "pregnant pig[s], veal cal[ves], or egg-laying hens" in California, Michigan, Arizona, Colorado, Maine, Florida, and Oregon).

280. FLA. CONST. art. X, § 21(d).

281. *Id*.

282. *See* State v. Basford, 119 So. 3d 478, 480 (Fla. Dist. Ct. App. 2013).

283. *See supra* notes 166-78 and accompanying text.

284. *See* ALA. CONST. art. IV, § 93; *see also* Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 583, 584 (1997).

285. *See* Brewer, *supra* note 284, at 596.

286. ALA. CONST. § 45-9.01.

287. *Id*. § 45-9.01(8)(a).

disregard of the propensities under the circumstances," the dog's owner is guilty of a Class A misdemeanor;[288]

- If a dog is declared dangerous by a court, yet the owner fails to "contain the dog in a proper enclosure," the owner is guilty of a Class C misdemeanor;[289]
- If an owner of a dog declared dangerous by a court fails to properly contain the dog, is found guilty of failing to contain the dog, and again fails to contain the dog after this conviction, the owner is guilty of a Class B misdemeanor;[290]
- Making a false report to a law enforcement or animal control officer that a dog is dangerous is a Class C misdemeanor.[291]

Enough about dogs. Let's talk about prostitution. Section 37-9.20 of Alabama's constitution contains a prohibition on prostitution in Jefferson County, Alabama.[292] This section defines prostitution as "the commission by a person of any natural or unnatural sexual act, deviate sexual intercourse, or sexual contact for monetary consideration or other thing of value."[293] Acts of prostitution are prohibited, as are soliciting patrons for prostitution, providing premises for purposes of prostitution, operating "a house of prostitution or a prostitution enterprise," and carrying notes to a guest in a hotel "in furtherance of unlawful sexual misconduct or prostitution" if one is a "bellhop, elevator operator, desk clerk, servant, or employee of a hotel, motel, inn, boardinghouse, apartment house, or any lodging place of like kind."[294] Violating any of these provisions "is a Class A misdemeanor."[295]

Section 49-3.01 of Alabama's Constitution governs the issuance of bonds by Mobile County, Alabama, and sets forth a one million six hundred thousand dollar limit on aggregate bonds that may be issued, along with other rules regarding borrowing.[296] Violating any of these rules regarding Mobile County bonds is punishable by a fine of up to five thousand dollars and/or by imprisonment for up to two years.[297] Any official violating these rules may also be impeached.[298]

288. *Id.* § 45-9.01(8)(b).
289. *Id.* § 45-9.01(8)(d).
290. *Id.* § 45-9.01(8)(e).
291. *Id.* § 45-9.01(11).
292. *Id.* § 37-9.20.
293. *Id.* § 37-9.20(b).
294. *Id.* § 37-9.20(c), (f)(5), (g).
295. *Id.* § 37-9.20(i).
296. *Id.* § 49-3.01.
297. *Id.*
298. *Id.*

IV. ANALYSIS AND IMPLICATIONS OF CONSTITUTIONAL CRIMES

With a taxonomy of constitutional crimes set forth, this section begins the work of analyzing constitutional crimes—including their democratic implications and desirability, as well as how they shed light on deeper issues of constitutional law and constitutional interpretation.

A. SENSIBLE CONSTITUTIONAL CRIMES

Constitutional crimes prohibiting bribery, corrupt solicitation, and the misuse or embezzlement of public funds are relatively common in state constitutions. Shortly after the passage of several state constitutions, Amasa Eaton asked why states like Wyoming, North Dakota, and South Dakota would enshrine crimes of bribery in their constitutions, suggesting that "of course a statute of the Legislature will provide for all cases of bribery."[299] The opening sentence of Eaton's article suggests a likely answer when he notes that "[o]ne of the most marked features of all recent State constitutions is the distrust shown of the legislature."[300] Eric Foner details that in the later 1800s, economic expansion in the North and the construction of transcontinental railroads were both the source of widespread corruption in state legislatures.[301]

Placing a crime in a constitution is no small act. State constitutions are the supreme law of the state and therefore take precedent over contrary statutory law.[302] Additionally, amending a state constitution often requires a

299. Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 118 (1892).

300. *Id*. at 109; *see also* Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 279 (1994) ("Another reason for lengthy state constitutions is that citizens universally have come to develop an intense, but usually well-deserved, mistrust of state legislatures, bodies which control many of the details of their everyday lives. There are substantial prejudices against executive power as well. Popular attitudes of this sort developed quite early, resulting from both colonial and nineteenth-century abuses.").

301. ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 166-67, 177-78 (2005).

302. *See* 16 C.J.S. *Constitutional Law* § 11; *see also, e.g.*, Alexander v. State *ex rel*. Carver, 150 So. 2d 204, 208 (Ala. 1963) ("The Constitution is the supreme law, limiting the power of the legislature and binding departments of State government and the people themselves subject only to restraints resulting from Federal Constitution and the people themselves."); Lane v. Chiles, 698 So. 2d 260, 263 (Fla. 1997) ("[T]he Florida Constitution is the supreme law of Florida, and, as such, it takes precedence over any contrary provisions of the common law or statutes."); Harbert v. Harrison Cnty. Ct., 39 S.E.2d 177, 184 (W. Va. 1946) ("The Constitution of this State is the supreme law of West Virginia; it is subject only to the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, all of which constitute the supreme law of the land.").

supermajority of legislators or electors—and sometimes both.[303] Accordingly, once a crime is enshrined in a state constitution, it takes more than a simple act of legislation to alter, limit, or eliminate the crime.

In the case of bribery and corrupt solicitation, then, it makes sense to include these in a state's constitution rather than relying solely on the legislature. The legislature, after all, is made up of the very people who may be the recipients of bribes. What's to stop an enterprising individual or corporation from using a bribe as an investment and convincing the legislature to do away with the criminalization of bribery altogether? Once this is accomplished, legislators may be bribed without risk of prosecution or penalty.

Writing a bribery prohibition into a state's constitution complicates this strategy. Placing a ban on bribery in a state constitution insulates the crime from elimination or limitation by way of statutory change. Additionally, critics of permissive federal treatment of bribery emphasize the United States Supreme Court's approach of "eschewing the idea that the appearance of conflicts of interest has any weighty constitutional footing."[304] By creating a constitutional crime of bribery, a stricter, set definition of bribery is grounded in the constitution and takes on the constitutional significance that may otherwise be lost through a statute-focused approach to the crime. It also makes it far more difficult for corrupt legislators to alter the law to insulate themselves from consequences, as removing bribery crimes requires outright constitutional amendment rather than statutory changes.

The expressive purpose of punishment may be a further reason to include certain crimes in constitutions rather than in statutes alone. Joel Feinberg's account of expressive punishment is a foundational example of the theory:

> Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.[305]

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303. *See, e.g.*, FLA. CONST. art. XI, §§ 1, 5(e) (requiring constitutional amendments proposed by the legislature to pass by a vote of at least three-fifths of each legislative house and then requiring the amendment be approved by at least sixty percent of the electors).

304. Anna A. Mance & Dinsha Mistree, *The Bribery Double Standard: Leveraging the Foreign-Domestic Divide*, 74 STAN. L. REV. 163, 195 (2022).

305. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); *see also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedure Divide*, 85 GEO. L.J. 775, 803 (1997) ("Joel Feinberg can be credited with inaugurating the 'expressionist' turn in punishment theory with his influential essay, *The Expressive Function of Punishment*.").

Dan Kahan elaborates on the notion, arguing that the expressive function of punishment may inform theories of punishment grounded in notions of retribution and deterrence.[306] Under a retributivist approach, it may not be immediately apparent what punishment is appropriate, but by making reference to punishment's expressive role, "[t]he proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies."[307] Similarly, under a deterrence approach, the expressive function of punishment supplements the costs that punishment imposes on those who would engage in criminal behavior by also "instilling aversions to the kinds of behavior that the law prohibits."[308] Jean Hampton elaborates on this notion, arguing that the process of publicly punishing criminal acts serves to educate both the offender and society on what is prohibited.[309] Theories of law's expressive force have found their way into constitutional law as well. For example, cases striking down laws that discriminate based on race have emphasized the prevention of harm through stigma caused by the messages these discriminatory laws portray.[310]

To be sure, this is a brief account of the expressive theory of punishment, and whether it is a correct or desirable formulation of criminal law and punishment, is debatable and beyond the scope of this paper.[311] But it may provide some insight into why certain crimes do, and perhaps ought to, appear in constitutions. For notably severe misconduct that is unequivocally worthy of condemnation, prohibiting such behavior in the criminal statutes is not enough. Instead, such conduct deserves a place of especial prominence in a constitution. Treason may be the best example of this, with the United States Constitution and most state constitutions going out of their way to include definitions of treason, along with evidentiary minimums, to ensure that the crime isn't watered down.[312]

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306. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 601-03 (1996).

307. *Id.* at 602.

308. *Id.* at 603.

309. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFS. 208, 212 (1984).

310. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-10 (1976) (describing the Supreme Court's rulings in *Strauder v. West Virginia* and *Brown v. Board of Education* as striking down racially discriminatory laws on the grounds that these laws result in harm through stigma).

311. *See generally* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (describing expressive theories of law in various context and arguing that these theories are ultimately unpersuasive).

312. *See supra* Section III.A (describing and analyzing treason provisions in the United States Constitution and various state constitutions).

An expressionist rubric may assist in evaluating the sensibility of constitutional crimes. Crimes like treason, bribery, and corrupt solicitation may make sense to include in a constitution. While decades or centuries may have passed since these crimes' enactment, society likely still thinks such behavior worthy of strong condemnation, a message served by including these crimes in the most foundational document of a state's law. But this may work in the opposite direction as well, raising skepticism in the cases of crimes that may not rise to the level of severity or near-universal disapproval that might warrant constitutionalizing the criminality of certain behavior.

B. ZOMBIE CONSTITUTIONAL CRIMES

When federal courts rule that a statute is unconstitutional, the statute is not erased from the law.[313] Such a ruling "permits a court to decline to enforce a statute in a particular case or controversy" and "to enjoin executive officials from taking steps to enforce a statute . . . [b]ut the statute continues to exist."[314] Scholars and courts have labeled these provisions as "zombie laws."[315]

The same is true of state constitutional provisions.[316] Maureen Brady discusses numerous examples of zombie state constitutional provisions that were deemed unconstitutional by federal courts,[317] "peripheral cases" that result from constitutional provisions enacted for reasons that are transparently racist,[318] and the "related monsters" of "archaic provisions" that have not been enforced in decades or that are irrelevant due to changes in technology or other social circumstances.[319] Brady notes that these provisions, like zombie laws, pose a risk of "roar[ing] back to life" if "the law rendering these provisions unenforceable is changed."[320] These provisions also have more abstract impacts on the state of the law, signaling ongoing tacit approval of outdated rules and raising a possibility of error

313. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 935-37 (2018).

314. *Id.* at 936.

315. *See generally* Wasserman, *supra* note 195; Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020) (describing a Houston city charter rule that only registered voters may circulate petitions for initiatives and representatives a zombie law because the Supreme Court had "held a similar law unconstitutional twenty years ago").

316. *See* Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1067 (2021).

317. *Id*. at 1067-69.

318. *Id*. at 1070-72.

319. *Id*. at 1075-77.

320. *Id*. at 1081-82; *see also* Wasserman, *supra* note 195, at 1082-84 (2022) (noting that states may keep their zombie laws on the books and push for a change in federal precedent, or develop laws that will come into effect if triggered by a change in precedent, all with the goal of enforcing the zombie laws at some point in the future).

should government officials mistakenly think the provisions remain good law.[321]

A concern that is underemphasized by Brady and others is the danger of outmoded and repugnant constitutional provisions coloring the meaning of other provisions. Brady recognizes that "zombie provisions may shed light on the meaning of other provisions or parts of the constitutional text" but presents this as a potential argument *against* removing such provisions.[322] Such a claim, however, may just as easily be a point in favor of removing zombie constitutional provisions, as outdated provisions may—through context and comparison—color the scope and meaning of other constitutional provisions.

Take, for example, the myriad of state constitutions that continue to retain constitutional provisions stating that marriage may be restricted to one man and one woman.[323] The persistence of these constitutional provisions, even if they themselves have been deemed unconstitutional, may still support a restrictive interpretation of broadly worded state due process or inalienable right protections. Idaho's constitution is one such example. It provides that only marriages "between a man and a woman . . . shall be valid or recognized in this state."[324] Idaho's constitution includes its own provisions guaranteeing due process,[325] along with a further provision guaranteeing the "[i]nalienable rights of man," which recognizes "certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."[326]

Idaho's constitutional provision restricting marriage is no longer constitutional in the wake of *Obergefell v. Hodges*—a decision that recognized a right to marriage grounded in the Fourteenth Amendment's Due Process Clause.[327] But the provision may still have bearing on the scope of the Idaho Constitution's due process and inalienable rights clauses. So long as Idaho's constitution includes a provision stating that marriage is limited to one man and one woman, one would be hard-pressed to claim that Idaho's inalienable rights provision and due process clause protect the right to marriage to the extent of the Fourteenth Amendment. If constitutional provisions are to be read in a harmonious manner, and especially if provisions

321. Brady, *supra* note 316, at 1084-85.

322. *Id*. at 1085.

323. *See supra* note 194.

324. IDAHO CONST. art. III, § 28.

325. *See id.* art. I, § 13 ("No person shall . . . be deprived of life, liberty or property without due process of law.").

326. *Id.* § 1.

327. *See* 576 U.S. 644, 664-65, 681 (2015).

that are more specific are to be read as exceptions to broader provisions, constitutional provisions narrowing the definition of marriage to exclude same-sex couples should be read as an exception to broader due process and rights provisions.[328]

While this won't affect how courts treat gay marriage—as they will be bound by the Supreme Court's decisions on the topic—zombie constitutional provisions may still have an effect. As with zombie laws, they may return to life and restrict the definition of marriage should the Supreme Court revisit and overturn *Obergefell*. They may also restrict plaintiffs who seek to challenge other state laws on due process or similar grounds by requiring narrowed readings of state constitutional provisions.[329]

Brady and others writing on zombie laws have not focused specifically on constitutional crimes. But the survey of constitutional crimes above reveals several instances of zombie constitutional crimes—all of which raise the concerns discussed above. Take Arizona's near-blanket prohibition on public employment of lawful resident aliens, for example.[330] This is likely unconstitutional, yet it continues to exist.[331] And while most constitutional provisions restricting the definition of marriage are not constitutional crimes, Oklahoma's is, making issuing a marriage license to same-sex couples a misdemeanor.[332] In addition to its own constitutional restriction of marriage to one man and one woman, Idaho's constitutional crime prohibiting bigamy and polygamy likely also forecloses attempts at broad readings of its state constitutional due process and inalienable rights provisions in a manner that would protect these forms of marriage.[333] One also wonders whether Florida's constitutional provision requiring a three-day waiting period for

328. *See infra* notes 345-48 and accompanying text.

329. This is of special significance in the wake of the Supreme Court's ruling that the Fourteenth Amendment's Due Process Clause does not protect the right to an abortion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 262 (2022). Following the "seismic shift" in abortion law following *Dobbs*, challenges based in state constitutional law have been advancing through the state courts. *See* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023) (describing the "seismic shift" in abortion law resulting from *Dobbs*); Becky Sullivan, *With Roe Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022, 5:00 AM), https://www npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions [https://perma.cc/37RE-KYFR]. Many of these constitutional challenges are underway, although—of particular note to the discussion here—the Idaho Supreme Court rejected a state constitutional challenge to its near-absolute abortion ban, holding that the Idaho Constitution's inalienable rights provision and due process clause did not support a right to abortion. *See* Planned Parenthood Great Northwest v. State, 522 P.3d 1132, 1167, 1201-02 (Idaho 2023).

330. ARIZ. CONST. art. XVIII, § 10.

331. Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd sub nom.* Nelson v. Miranda, 413 U.S. 902 (1973) (mem.).

332. *See* OKLA. CONST. art. II, § 35.

333. *See* IDAHO CONST. art. I, § 4 (prohibiting bigamy and polygamy and requiring the legislature to criminalize these forms of marriage).

gun purchasers and stating that failure to abide by this restriction shall be a felony will attain zombie status should courts continue to overturn gun restrictions in the wake of the Supreme Court's ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[334]

What's to be done about zombie constitutional crimes? Zombie laws may be targeted through legislative repeal—an activity that is uncommon but which may send a message of abandoning outdated statutes that reflect views that are now recognized as outmoded and repugnant.[335] Joel Johnson suggests that the doctrine of desuetude may be mobilized against crimes that—even if not deemed unconstitutional—haven't been enforced in decades or centuries.[336]

Zombie state constitutional crimes raise concerns for these statute-focused solutions. Supermajoritarian legislative requirements and general election vote requirements make it a more complex undertaking to remove outdated constitutional provisions, and it may not make sense to devote "scarce legislative and other resources" to their amendment or removal.[337] Moreover, like recent debates over the removal of monuments to the Confederacy, "[t]he process of removal itself can cause its own damage, surfacing simmering tensions and prejudices."[338] And the doctrine of desuetude, already a reluctant recourse for courts at the statutory level, may face a higher barrier if called upon in the service of overcoming a constitutional provision.[339] In light of these obstacles, zombie constitutional crimes may be far harder to remove or alter than standard zombie crimes.

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334. 597 U.S. 1 (2022); *see* Alanna Durkin Richer & Lindsay Whitehurst, *Supreme Court Ruling Creates Turmoil Over Gun Laws in Lower Courts*, PBS NEWS HOUR (Feb. 18, 2023, 2:05 PM), https://www.pbs.org/newshour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts (describing a variety of gun laws overturned in the wake of *Bruen*).

335. *See* Wasserman, *supra* note 195, at 1047, 1071-73.

336. *See* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 127-36 (2022).

337. *See* Brady, *supra* note 316, at 1088.

338. *Id.* at 1087-88.

339. *See* Johnson, *supra* note 336, at 107-08 (recognizing "a strong impulse, rooted in the separation of powers, that only the legislature—not the executive or the judiciary—has the authority to invalidate statutory law" and that this presumption has contributed to courts' avoidance of desuetude); *see also* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641, 674-84 (2014) (setting forth a framework for applying desuetude to constitutional provisions, analyzing various United States constitutional provisions under this framework, and describing potential costs of a desuetude approach to constitutional provisions, including potential impacts on democratic legitimacy).

C. CONSTITUTIONAL CRIMES AND STATE CONSTITUTIONAL CHALLENGES

1. The Notion of Constitutional Contradictions

Constitutional crimes are not only resistant to alteration through the democratic process. They are also more resistant to constitutional challenges than state criminal statutes. This is because, to the extent a constitutional challenge relies on the state constitution, it is unlikely that the state constitution may be invoked to invalidate another one of its own provisions. In contemplating the argument "that an amendment to a constitution is unconstitutional," Raymond Ku concludes that such a claim would be "hopelessly circular."[340]

This intuition is reflected in how courts interpret state constitutions. Some courts take an absolute stance, arguing that "[i]t is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself."[341] Other courts urge an interpretation that "harmonizes different constitutional provisions, rather than one that would create a conflict between them."[342] Such an approach may be justified by treating the constitution as though it is "enacted at one time."[343] This applies to situations where the constitution is ambiguous, requiring courts to choose between alternate possible interpretations.[344]

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340. *See* Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 540 (1995).

341. Leandro v. State, 488 S.E.2d 249, 258 (N.C. 1997); *see also* Milewski v. Town of Dover, 899 N.W.2d 303, 327 (Wisc. 2017) ("The constitution may not be put at odds with itself, and we do not countenance penalties on the exercise of constitutional rights."); Estate of Bell v. Shelby Cnty. Health Care Corp., 318 S.W.3d 823, 835 (Tenn. 2010) ("No constitutional provision should be construed to impair or destroy another provision.").

342. Patterson Recall Comm., Inc. v. Patterson, 209 P.3d 1210, 1214 (Colo. App. 2009); *see also* McInerney v. McInerney, 870 S.E.2d 721, 725 (Ga. 2022) ("This Court must construe the Georgia Constitution to make its parts harmonize and to give sensible meaning to each of them." (quoting Blevins v. Dade Cnty. Bd. of Tax Assessors, 702 S.E.2d 145, 148 (Ga. 2010))); Burns v. Ariz. Pub. Serv. Co., 517 P.3d 624, 631 (Ariz. 2022) ("We do not read separate constitutional provisions to determine which prevails over the other; rather, we read them to harmonize the provisions and give effect to each."); Ark. Dept. of Fin. & Admin. v. 2600 Holdings, LLC, 2022 Ark. 140, at 4, 646 S.W.3d 99, 102 ("It is the duty of this court to harmonize all provisions of the Constitution and amendments thereto and to construe them with the view of a harmonious whole." (quoting Smith v. Cole, 61 S.W.2d 55, 57 (Ark. 1933))); Clark v. Pawlenty, 755 N.W.2d 293, 305 (Minn. 2008) (applying the rule of statutory construction that provisions should be interpreted "in light of each other in order to avoid conflicting interpretations" to constitutional provisions); Blanchard v. Berrios, 2016 IL 120315, ¶ 23 ("One [constitutional] provision will not be allowed to defeat another if a reasonable construction will permit them to stand together."); Alaska C.L. Union v. State, 122 P.3d 781, 786 (Alaska 2005); State v. Strom, 2019 ND 9, ¶ 6, 921 N.W.2d 660, 662.

343. Carrigan v. N.H. Dep't of Health & Hum. Servs., 262 A.3d 388, 397 (N.H. 2021).

344. *See* County of Santa Clara v. Super. Ct. of Santa Clara Cnty., 303 Cal. Rptr. 3d 516, 524 (Cal. Ct. App. 2023).

Some courts recognize that conflicts within a constitution may be possible. In those cases, courts sometimes conclude that a provision that addresses "the same subject in a more detailed way . . . will prevail" over a provision that "addresses [the] subject in general terms."[345] Courts urge against constructions that would render a constitutional provision "superfluous, meaningless, or inoperative."[346] Recency may also play a role, with more recent, specific provisions treated as carve-outs and exceptions to older, more general provisions.[347] It's worth noting that these approaches—often drawn from how courts address conflicts between statutes—are not without controversy when applied in the constitutional context.[348] Still, under these approaches, constitutional crimes are likely to be upheld in the face of broader provisions such as due process guarantees or general rights guarantees. To ensure that all provisions continue to have an effect, the constitutional crime may be read as an exception to broader provisions that would otherwise conflict with a similar criminal statute.

None of this is to say that constitutional crimes have any special protection against federal constitutional challenges—they don't.[349] State constitutional crimes may still be challenged on federal grounds, and these challenges sometimes succeed. For example, in *Americans for Medical Rights v. Heller*, the U.S. District Court, District of Nevada, granted preliminary injunctive relief to a party challenging the constitutionality of Article II, Section 10(2) of Nevada's constitution, which limited campaign contributions to five thousand dollars in non-federal elections.[350] The court concluded that the plaintiff would likely succeed on the merits of its suit, as Nevada's restriction on contributions (which, if violated, would result in a felony conviction) violated the First Amendment.[351]

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345. Perschall v. State, 96-0322, p. 22 (La. 7/1/97), 697 So. 2d 240, 255; *see also* State *ex rel.* League of Women Voters of N.M. v. Advisory Comm. to the N.M. Compilation Comm'n, 2017-NMSC-025, ¶ 19, 401 P.3d 734 ("If 'one section is not readily identifiable as the more specific one of the two[,] . . . the latter provision governs "as the latest expression of the sovereign will of the people, and as an implied modification pro tanto of the original provision of the Constitution in conflict therewith."'" (quoting City of Albuquerque v. N.M. State Corp. Comm'n, 605 P.2d 227, 229 (N.M. 1979))).

346. Chiles v. Phelps, 714 So. 2d 453, 459 (Fla. 1998).

347. Izazaga v. Superior Ct. of Tulare Cnty., 815 P.2d 304, 314 (Cal. 1991) ("As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.").

348. *See* R. Stephen Painter, Jr., *Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?*, 36 SETON HALL L. REV. 125, 145, 149-53 (2005).

349. This is because the Constitution, by its own terms, is the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

350. 2 F. Supp. 2d 1307, 1309-10, 1317 (D. Nev. 1998).

351. *Id.* at 1316.

While constitutional crimes may still face federal constitutional challenges, they likely will not face challenges at the state constitutional level because they are part of the state constitution. This is significant because state constitutions may provide greater protections for certain rights than the Federal Constitution.[352] This disparity in protection is likely to grow more pronounced in the wake of restrictions on rights at the federal constitutional level.[353] While a renewed focus on state constitutions and recognition of their stronger protections may impact statutory criminal law, it likely will not affect constitutional crimes that are themselves a part of these newly reinvigorated state constitutions.

2. Constitutional Crimes Put to the Test: Are They Immune?

While the proclamations above sound good on paper, they're only of value if courts are willing to put them into effect. There isn't much direct caselaw on this point for the constitutional crimes surveyed above. Many of the constitutional crimes lack many reported cases, and very few of those reported cases delve into the constitutionality of the provisions. Those few cases that do address constitutionality often address matters of federal constitutionality, as noted in Section IV.C.1.

Occasionally, though, things aren't so clear—suggesting that more may be at play. Litigation over Florida's constitutional net ban exemplifies this puzzle.[354] As discussed above, Article X, Section Sixteen of Florida's constitution includes a variety of prohibitions on fishing with nets of certain sizes in certain coastal locations and incorporates prior statutory penalties into the text of the amendment for those who violate the net restrictions.[355] This net ban faced a constitutional challenge in *Lane v. Chiles* in which defendants charged with violating the ban argued that the provision violated the "due process, equal protection, [and] impairment of contract clauses of the Florida [and] Federal Constitutions."[356] While the Florida Supreme Court

352. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1028-30 (2003) (surveying similarities between state constitutions and the U.S. Constitution and arguing that "state constitutions may offer a level of protection for [individual] liberties that exceeds the level of protection afforded by the U.S. Constitution"); *see also* Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 151, 155-56 (1988).

353. *See generally* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 116 (2022) (arguing that uncertainty regarding the scope of rights protection at the federal level will lead to a reaction in state courts that will provide "a double protection of constitutional rights").

354. *See* FLA. CONST. art. X, § 16.

355. *Id*.

356. Lane v. Chiles, 698 So. 2d 260, 262 (Fla. 1997).

recognized that Florida's constitution was the supreme law of the state, it also recognized that "[i]n most cases the rational basis standard is used to test the constitutional validity of a state statute."[357] It is unclear, however, whether the court based this rational basis test on the Fourteenth Amendment of the United States Constitution[358] or if it referred to Florida's constitution—which includes its own due process provision.[359] The court simply referred to a prior state supreme court case in which it applied the rational basis test to a state law.[360]

One possibility is that the *Lane* court was playing fast and loose with its due process citations. In light of the court's failure to specify whether it was referencing the state or Federal Constitution, one must look to the authority it does cite, *Lite v. State*.[361] There, the court again didn't specify which constitution it was citing—referring only to "the constitutional guarantee of due process."[362] The only authority cited is yet another Florida case, *Department of Insurance v. Southeast Volusia Hospital District*.[363] That case, in turn, refers only to "the constitutional guarantee of due process" without specifying which constitution it references.[364] There, the only cited authority is *Rollins v. State*, another Florida case which (at least before the Supreme Court) did not involve a due process challenge at all, and instead addressed only an equal protection challenge based on both Florida's constitution and the U.S. Constitution.[365]

The other possibility—one with more dramatic implications—is that the *Lane* court relied, in whole or in part, on Florida's constitutional guarantee of due process to evaluate the due process challenge against the constitutional net ban. If this is the case, the *Lane* court reached a determination regarding the constitutionality of its own constitution—suggesting that Florida's constitution may be used to evaluate, and potentially invalidate, other portions of itself.

While not a constitutional crime, Utah's constitutional prohibition on bigamy and polygamy was subject to attack on grounds other than its federal constitutionality in *State v. Barlow*.[366] There, the defendants had been

357. *Id*. at 263.
358. *See* U.S. CONST. amend. XIV, § 1.
359. *See* FLA. CONST. art. I, § 9.
360. *Lane*, 698 So. 2d at 263 (citing Lite v. State, 617 So. 2d 1058, 1059-60 (Fla. 1993)).
361. *Lite*, 617 So. 2d at 1059.
362. *Id*.
363. 438 So. 2d 815 (Fla. 1983).
364. *Id*. at 821.
365. 354 So. 2d 61, 62-63 (Fla. 1978).
366. Although those grounds were certainly one part of the overall challenge. *See* State v. Barlow, 153 P.2d 647, 652-53 (Utah 1944) (addressing the defendants' claim that Utah's prohibition

charged with violating Utah's "crime of unlawful cohabitation" and the prohibition against polygamy—a felony offense.[367] The Utah Supreme Court surveyed the history of Utah's constitutional and statutory prohibitions of bigamy and polygamy and rejected the defendants' claims that Utah's laws violated their right to free exercise of religion.[368]

The argument that relates to the present discussion is the defendants' claim that Utah's constitutional "provision against polygamy was incorporated into [the] State Constitution through duress and coercion of Congress and that in consequence thereof such provision was void ab initio."[369] The court rejected this argument by first noting that in instances where consent is obtained by coercion, a victim may seek to avoid the transaction but "may not claim the benefits and escape the obligations" of the agreement.[370] Following this logic, the court concluded that the defendants "would have to claim that because of alleged duress as to one provision, the ratification of the Constitution was invalid, and that the basis for obtaining statehood never occurred."[371] The defendants' failure to make this argument fatally undermined their claim.[372] The court further noted that even if the provision had been enacted through coercive means, the proper means of righting this wrong would be for the people to amend the constitution—which had not been done.[373]

While the Utah Supreme Court did not engage in the usual analysis of harmonious constitutional interpretation and the superiority of the state constitution over conflicting state laws, the court's reference to the power of the people to adopt and amend the state's constitution carried the same weight as these points. It was not the court's place to void portions of the state's constitution—nor was it the place of analogies to contract law and bases to override an agreement between private parties. Undoing portions of the state constitution required resort to the higher power of the people. Rejecting the attempt at using state law and state courts to undo Utah's constitutional provisions confirms state constitutional prohibitions' resistance to state legal challenges. Here, no penalty provision was included in the challenged

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and criminalization of bigamy and polygamy violated their religious freedoms under the First and Fourteenth Amendments of the U.S. Constitution).

367. *Id*. at 649.
368. *Id*. at 651-53.
369. *Id*. at 654.
370. *Id*.
371. *Id*.
372. *Id*.
373. *Id*.

provision. But this same appeal to the authority of the people could have played out just as easily had such a penalty existed.[374]

D. CONSTITUTIONAL CRIMES AND DEMOCRACY

A prior foray into the notion of criminal laws that persist despite the actual or potential objections of a majority of voters inspired my initial attention to constitutional crimes.[375] In a world of scholarly criticism over overcriminalization, harsh sentencing, and criminal reform, criminal laws that require supermajoritarian efforts to undo seem particularly vulnerable to criticism. Constitutional crimes typically fall into this category, as they often (but not always) require supermajoritarian measures to amend or remove.[376] It is therefore possible for a majority of voters in a state to desire the elimination or scaling back of constitutional crimes yet be unable to accomplish this goal due to supermajoritarian amendment requirements—either at the legislative or ratification stages.[377] This potentially countermajoritarian nature of constitutional crimes warrants particular scrutiny of these crimes in the interest of democratic legitimacy.

This is not to say that every constitutional crime is, in fact, in place despite the will of a majority. Widespread constitutional crimes like treason likely enjoy ongoing majority—or supermajority—support, making the difficulty of amending constitutions of little concern to those interested in the democratic legitimacy of criminal laws.[378]

There's also an argument that constitutional crimes better achieve democratic legitimacy interests. Perhaps constitutional crimes uniquely realize democratic legitimacy because they require supermajoritarian levels

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374. As discussed above, Idaho's constitution is an example of the constitutional crime of bigamy and polygamy. *See* IDAHO CONST. art. I, § 4.

375. *See* Michael L. Smith, *Countermajoritarian Criminal Law*, 43 PACE L. REV. 54, 77-90 (2022).

376. *Id*. To be sure, this may not be true of all constitutional amendments—some of which may pass with only the support of a majority of legislators and voters. *See, e.g.*, N.M. CONST. art. XIX, § 1 (allowing amendments to the state constitution approved by a majority of each legislative house and ratified by a "majority of the electors voting on the amendment" in a subsequent regular or special election). My use of "supermajoritarian" is meant to encompass amendment procedures that involve at least one supermajoritarian step. For example, I categorize Illinois's requirement that an amendment proposed by the legislature obtain the votes of at least three-fifths of the members of each house, yet may pass if voted upon by a majority of those voting in a ratification election, as supermajoritarian due to the initial requirement of a supermajority vote in the legislature. *See* ILL. CONST. art XIV, § 2.

377. *See, e.g*., FLA. CONST. art. XI, § 5 (requiring amendments proposed by the legislature to be approved by a three-fifth vote of both legislative houses, then by sixty percent of electors voting on the amendment).

378. *See* U.S. CONST. art. III, § 3, cl. 1; *see also* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005 (2022) (arguing that the United States Constitution is all but impossible to amend).

of support to become part of constitutions in the first place. Florida's net ban seems to be one such example. When unable to pass a net ban through the legislature due to the opposition of a bloc of legislators, putting the matter to a statewide vote led to the ban's inclusion in the state constitution with the support of a supermajority of the voting public.[379] Despite concerns over whether constitutional crimes may be amended, it may make sense to shift more crimes into constitutions, as doing so ensures that a supermajority of the population signs off on criminalizing conduct.

While this may be appealing in the short term, the countermajoritarian concern draws its strength from the long-term existence of constitutional crimes. A constitutional provision may have supermajoritarian support leading up to its enactment. But this may not remain the case over time. A society that enacts a constitutional crime in one decade may have different opinions on whether the prohibited conduct should be criminalized—or criminalized to the same extent—a decade or two later. This is of particular concern where enhanced criminal laws and penalties may be the result of perceived crime waves without a basis in fact that create a sudden, but soon-dissipating, sense of fear that motivates criminal policy.[380] Perhaps a system that required the supermajoritarian enactment of constitutional crimes but allowed a majoritarian removal or scaling back of these crimes would address these concerns. But no constitutional crime appears to contain such a provision. Indeed, on some occasions, the opposite is true.

A common concern about criminal law is that it is a "one-way ratchet" that criminalizes more conduct or provides for harsher penalties over time without ever really reversing course and decriminalizing conduct or lessening criminal penalties.[381] Sara Sun Beale describes the role of cognitive biases in creating a "one way ratchet toward the enactment of additional crimes and harsher penalties," arguing that media incentives and individual tendencies to focus on more serious crimes and to "overestimate their frequency" result in unreasonably strict criminal legal measures.[382]

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379. *See* Stern, *supra* note 8, at 59-61.

380. *See* Mark Fishman, *Crime Waves as Ideology*, *in* CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS 42, 42-49 (Gary W. Potter & Victor E. Kappeler eds., 2006) (describing crime waves and detailing patterns of media coverage that create the perception of rises in particular crimes).

381. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); *see also* Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 301 (2005); Manuel A. Utset, *Rational Criminal Addictions*, 74 U. PITT. L. REV. 673, 680-81 (2013) (arguing that beliefs in underdeterrence lead to a ratcheting up of sanctions for various crimes).

382. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005).

Some constitutional provisions explicitly support one-way ratcheting of penalties. Florida's constitutional crimes against offshore net use and pig confinement both contain penalty provisions based on external statutes that existed at a certain point in time.[383] Because both of these statutes are referenced in the text of Florida's constitution, those references require supermajoritarian efforts to eliminate or amend.[384] There's one exception to this supermajoritarian requirement, though both constitutional crimes permit amendments to their sentencing provisions through simple legislation, *but only if* the amendments make the penalties harsher.[385] The result: a mere legislative majority can increase constitutional criminal penalties, but reducing or eliminating these penalties requires supermajoritarian efforts to amend the constitution. In addition to potential concerns over the need for supermajoritarian decriminalization, these provisions' apparent embrace of the one-way ratchet characterization of criminal laws deserves attention from those who continue to highlight this phenomenon.[386]

V. CONCLUSION AND RESEARCH AGENDA

This Article's primary purpose is to survey and categorize the broad array of constitutional crimes contained in the Federal Constitution and the constitutions of numerous states. To date, no attention has been paid to that category of criminal law based on constitutional provisions. By bringing these crimes to light, this Article serves to highlight this legal phenomenon and initial insights into constitutional crimes, including the unique concerns that these provisions present for democratic legitimacy, their expressive distinctiveness, and their immunity from state constitutional challenges.

The survey of constitutional crimes also presents several independent insights. Overlap in constitutional crimes provides further evidence of how states borrow from one another in drafting and amending constitutions.[387] Constitutional crimes that are more common across states suggest that there

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383. FLA. CONST. art. X, § 16(e) (the net ban); *id.* § 21(d) (the pig confinement ban).

384. *See id*. art. XI, §§ 1, 5 (requiring amendments proposed by the legislature to obtain a vote of three-fifths of each house before proceeding to a general election and requiring that any amendment proposed by legislation or initiative to obtain at least sixty percent of the vote of electors voting on the amendment measure to become effective).

385. *Id*. art. X, §§ 16(e), 21(d).

386. For two recent examples of this notion being presented and analyzed in new and insightful ways, see Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119, 1138-43 (2022) and Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1023-34 (2021).

387. *See* Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 207-10, 221-22 (2000) (discussing how states borrow from one another in drafting their constitutions); *see also* JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING 166 (1979) ("[T]he history of American constitutionalism is a story of massive plagiarism . . . .").

may be more in play than localized politics and interests. For example, bribery and corrupt solicitation crimes may be as widespread as they are because of their sensibility and the concern that they ought to be set apart from statutes out of concerns over potential legislative alteration or elimination.[388] Patterns in bigamy and polygamy constitutional crimes and provisions also reflect concerns over historical religious practices, as well as federal reactions and prohibitions related to these practices.[389] And setting constitutional crimes alongside each other reveals differences that have thus far gone unnoticed. Most notably, the constitutional crime of treason turns out to have a great deal more variation than commentators appear to have realized—with numerous state constitutions permitting a broader definition of treason than the Federal Constitution.[390]

But all of this is only the beginning. My hope is that this survey of constitutional crimes illustrates their frequency and breadth of subject matter and inspires further work into these provisions and the light they may shed on other areas of the law, including constitutional interpretation, state legal history, criminal law, and criminal procedure. To that end, the remainder of this final section raises an agenda for further work and research regarding constitutional crimes.

Specialized treatment of the categories of law addressed above would add further context and depth to a scholarly understanding of the variety of constitutional crimes. This does not only include separate treatment of the categories discussed in Section III, but also higher-level distinctions between provisions, such as the differences between constitutional contempt provisions and other constitutional crimes. Another distinction worthy of further study may include differences between self-executing constitutional crimes, constitutional crimes that mandate legislative action, and constitutional crimes that permit legislative action. Research into the origins of these provisions and whether any trends may be derived that suggest why particular types of crimes are adopted over others may provide insights into underexplored dimensions of criminal law and constitutional interpretation.

Further research into constitutional crimes should account for other constitutional provisions that relate to crime and criminal law. As noted at the outset of this Article, my focus here is on those provisions that criminalize behavior, either independently or by requiring the legislature to pass certain laws.[391] But there are additional constitutional provisions that may also be

388. *See supra* Part IV.A.
389. *See supra* Part III.I.
390. *See supra* Part III.A.
391. *See supra* Section II.

worthy of study. Provisions and constitutional rights related to criminal procedure and safeguards are the most apparent candidates and receive attention—although perhaps not enough at the state level.[392] But other provisions are worth highlighting as well. New Hampshire and Oregon's constitutions both include provisions setting forth the purpose of criminal punishment.[393] New Hampshire's provision prohibits disproportionate punishments, while Oregon's provision sets forth the foundational principles for criminal law, which are "protection of society, personal responsibility, [and] accountability for one's actions and reformation."[394]

The history of constitutional crimes is worthy of further exploration. Research into the circumstances, debates, and votes that led to the inclusion of certain crimes in constitutions may offer valuable insight into the meaning and scope of constitutional crimes, as well as historical perspectives and priorities regarding crime on a more general level. The Supreme Court's turn to history and tradition, and the adoption of this approach to constitutional law at the state level, grants additional importance and urgency to research from this perspective.[395]

These are just a few suggestions. The number of constitutional crimes and the scope of behavior they restrict mean that this is likely just the beginning of a research agenda for this unique intersection of constitutional law and criminal law. This Article serves as a foundation for this future work and raises several initial insights and conclusions to get the conversation started.

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392. *See generally* Sam Newton, *Giving Teeth to State Constitutions: Using History to Argue Utah's Constitution Affords Greater Protections to Criminal Defendants*, 3 UTAH J. CRIM. L. 40 (2018).

393. *See* N.H. CONST. pt. 1, art. XVIII; OR. CONST. art. I, § 15.

394. *See* N.H. CONST. pt. 1, art. XVIII; OR. CONST. art. I, § 15.

395. *See generally* Marc. O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. L. ISSUES 9 (2024) (discussing the United States Supreme Court's adoption of a traditionalist method in its recent decisions); *see also* Planned Parenthood Great Northwest v. State, 522 P.3d 1132, 1171-90 (Idaho 2023) (recognizing the Supreme Court's reliance on history and tradition in determining the scope of constitutional rights and applying that approach to arguments in favor of a constitutionally protected right to abortion).