Foreword: Giving State Constitutions Their Due

*Alicia L. Bannon**

TABLE OF CONTENTS

When it comes to protecting rights, the U.S. Constitution and other federal laws are a floor, not a ceiling: state constitutions, and the state courts that interpret them, are free to provide more expansive rights and remedies than their federal counterparts. This is a foundational principle of American federalism. Yet for much of the past century, it has also been largely an afterthought. Today, however, we are at a new inflection point. As illustrated by the wonderful symposium organized by the *Harvard Civil Rights-Civil Liberties Law Review*, state constitutions and the judicial federalism values that underlie them are now an increasingly significant part of legal and scholarly conversations.

State constitutionalism has deep historical roots. During the first 150 years of American history, most constitutional rights litigation took place in the states.[1] The Bill of Rights constrained only the federal government—which was itself just a small fraction of its current size and importance.[2] The framers of the U.S. Constitution expected that it would be the states, not the federal government, that would serve as "the principal protectors of individual rights."[3] To be clear, such state-level protections were never adequate, as evidenced most obviously and profoundly by the persistence of slavery. The Civil War and the Reconstruction Amendments ultimately brought about the incorporation of most of the Bill of Rights to apply to the

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[1] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 12-13 (2018).

[2] Lee H. Rosenthal & Gregory P. Joseph, *Foundations of U.S. Federalism*, 101 JUDICATURE 38, 44 (2017) (observing that prior to the Civil War, "the federal government remained small and had little impact on the lives of most citizens").

[3] Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400-01 (1987).

states, beginning in the 1920s, which dramatically expanded the scope of federal constitutional rights.[4] The rights revolution of the Warren Court soon followed, as did the passage of a series of landmark civil rights laws, all of which directed most legal—and cultural—attention toward federal courts and federal law as the primary site for protecting rights.[5]

But throughout, state constitutions and state courts remained baked into our system of federalism, offering both "a one-way ratchet in the protection of individual rights"[6] and a "redundancy in interpretive authority" that can serve as an "important way that our system of government channels disagreement in our diverse democracy."[7] In some arenas, such as fights over educational funding, state constitutional rights have been actively litigated for decades.[8] Indeed, nearly fifty years ago, Justice William J. Brennan, himself a former New Jersey Supreme Court justice, saw the beginning of the roll-back of Warren-era precedents and, in a landmark article, called on state judges to "step into the breach" and remember that "[s]tate constitutions, too, are a font of individual liberties."[9] Brennan's call to action helped bring about an era of "New Judicial Federalism" in the 1970s and 1980s, in which a number of state courts first embraced more expansive protections under their constitutions than what was provided for under the U.S. Constitution.[10] Among other insights, proponents of judicial federalism pointed to the existence of a "federalism discount" in many Supreme Court rulings, highlighting instances where the Court expressed concern about its capacity to mandate a single national rule for all fifty states and, as a result, underenforced federal rights.[11] This pattern, proponents argued, makes the

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[4] *See generally* Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 Wm. & Mary Bill Rts. J. 121 (1992) (tracing the history of rights incorporation).

[5] *See generally* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 Wash. & Lee L. Rev. 5 (1993) (describing the legal "revolution" of the Warren Court); Madison Minges, *The Legacy of the Civil Rights Act, 60 Years Later*, Am. Univ. Sch. Int'l Serv. News (June 28, 2024), https://www.american.edu/sis/news/20240628-the-legacy-of-the-civil-rights-act-60-years-later.cfm [https://perma.cc/H4UQ-CCNP] (discussing the "landmark" Civil Rights Act of 1964).

[6] Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 773 (2021).

[7] Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1312 (2017).

[8] Sutton, *supra* note 1, at 28-41.

[9] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491, 503 (1977).

[10] *See* Michael Milov-Cordoba & Alicia L. Bannon, *Foreword: The Promise & Limits of State Constitutions*, 99 N.Y.U. L. Rev. 1915, 1916 (2024). *See generally* Robert F. Williams, *The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 Rutgers U. L. Rev. 949 (2020).

[11] Sutton, *supra* note 1, at 17, 75; Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 203-04 (2023); Robert F. Williams, *State Constitutional Law After* Dobbs *and* Bruen, State Ct. Rep. (Sept. 7, 2023), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-law-after-dobbs-and-bruen [https://perma.cc/E5RP-F97B].

case for enhanced state-level protections.[12] More recently, state constitutional litigation in the 2000s and 2010s over marriage equality[13] helped set the stage for the U.S. Supreme Court to establish a federal right to marriage for same-sex couples in 2015 in *Obergefell v. Hodges*.[14]

But it has been in the current era of rights retrenchment by the U.S. Supreme Court—characterized most notably by *Dobbs v. Jackson Women's Health Organization*,[15] in which the Court overturned the federal right to abortion—that state constitutionalism has taken on unprecedented prominence. Put simply, there is a new federal rights vacuum in a number of high stakes and publicly salient arenas due to Supreme Court rulings that have weakened or eliminated rights long protected under federal law, including the right to abortion and many civil rights protections,[16] and that closed the door to constitutional claims against antidemocratic practices such as partisan gerrymandering.[17] These trends have drawn new attention toward state constitutions as independent sources of rights,[18] with broad engagement from judges, scholars, and practitioners—including prominent conservative and liberal voices—in questions about when and how state constitutions should be interpreted to offer different protections than their federal counterpart and what the content of those rights should be.[19] This has prompted, among other things, a bevy of scholarship,[20] the launch of new publications

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[12] Williams, *State Constitutional Law After* Dobbs *and* Bruen, *supra* note 11.

[13] *See generally* Mary L. Bonauto, *Equality and the Impossible: State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481 (2016).

[14] 576 U.S. 644 (2015).

[15] 597 U.S. 215 (2022).

[16] *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down the Voting Rights Act's coverage formula for identifying jurisdictions required to obtain preclearance prior to making changes to their voting laws or practices); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (narrowing Section 2 of the Voting Rights Act to make it more difficult to challenge discriminatory voting laws).

[17] Rucho v. Common Cause, 588 U.S. 684 (2019).

[18] *See* Eyal Press, *Can State Supreme Courts Preserve—Or Expand—Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights [https://perma.cc/7EQH-9RGM].

[19] For example, numerous state supreme court justices from different states and with different ideological perspectives have written recent articles about state constitutional rights. *See, e.g.*, Scott L. Kafker & William R. Blanchette, *The Supreme Judicial Court Provides Greater Protections Against Cruel or Unusual Punishment for Juveniles and Young Adults: A Convergence of Science and Law*, 77 RUTGERS U. L. REV. (forthcoming 2025); R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 OHIO STATE L.J. (forthcoming 2025); Jake Mazeitis & Melissa Hart, *The Role of State Justices in Advancing State Constitutional Law: Some Thoughts from Colorado*, 2024 WIS. L. REV. 1447; Bolick, *supra* note 6; Loretta H. Rush & Marie F. Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALBANY L. REV. 1353 (2019).

[20] *See, e.g.*, Miriam Seifter, *Scholarship Roundup: New Year Edition*, STATE CT. REP. (Jan. 27, 2025), https://statecourtreport.org/our-work/analysis-opinion/scholarship-roundup-new-year-edition [https://perma.cc/26AH-5R7G]; Miriam Seifter, *Scholarship Roundup: September 2024 Back to School Edition*, STATE CT. REP. (Sept. 13, 2024), https://statecourtreport.org/our-work/analysis-opinion/scholarship-roundup-september-2024-back-school-edition [https://perma.cc/HKR3-PE5N].

(including the Brennan Center for Justice's *State Court Report*,[21] where I serve as editor-in-chief), the creation of new research centers,[22] and an expanded slate of state litigation.[23]

This heightened attention is also increasingly reflected in state jurisprudence that tackles state constitutional issues, which, while decidedly uneven, has included in many states the recognition of new or expanded state constitutional rights and the rejection of approaches taken by federal courts hearing similar claims.

Nowhere has there been more activity than in the arena of abortion rights, where state courts have seen a surge of litigation post-*Dobbs*.[24] Currently, eleven state supreme courts recognize at least a limited state constitutional right to abortion,[25] with rulings or reaffirmations of prior precedents post-*Dobbs* in Kansas, Montana, North Dakota, and Oklahoma.[26] In 2024, for example, the Kansas Supreme Court affirmed lower court decisions striking down a state law that banned dilation and evacuation, a commonly-used abortion procedure,[27] and a law imposing onerous licensing requirements

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[21] STATE CT. REP., statecourtreport.org [https://perma.cc/6YS2-VN5C] (last visited Apr. 2, 2025).

[22] For example, the University of Wisconsin's State Democracy Research Initiative publishes resources and legal briefs and holds conferences and symposia on state constitutional issues. STATE DEMOCRACY RSCH. INITIATIVE, https://statedemocracy.law.wisc.edu/ [https://perma.cc/ZLN6-LAT4] (last visited Apr. 2, 2025).

[23] For example, in 2023 the ACLU launched a new State Supreme Court Initiative to focus on advancing rights at the state level. *ACLU Launches New State Supreme Court Initiative to Advance Rights at the State Level*, AM. C.L. UNION (May 2, 2023), https://www.aclu.org/press-releases/aclu-launches-new-state-supreme-court-initiative-to-advance-rights-at-the-state-level [https://perma.cc/U8KM-VB3M].

[24] *See, e.g.*, Mary Ziegler, *In States with Abortion Bans, When Does a Medical Emergency Trigger an Exception?*, STATE CT. REP. (Jan. 28, 2025), https://statecourtreport.org/our-work/analysis-opinion/states-abortion-bans-when-does-medical-emergency-trigger-exception [https://perma.cc/9BMT-FBUY]; Alicia Bannon, *So You Passed a State Constitutional Amendment Protecting Abortion. Now What?*, STATE CT. REP. (Dec. 12, 2024), https://statecourtreport.org/our-work/analysis-opinion/so-you-passed-state-constitutional-amendment-protecting-abortion-now-what [https://perma.cc/7VQG-FVEK]; Mary Ziegler, *An Eventful Summer for State Constitutional Abortion Rights Litigation*, STATE CT. REP. (Aug. 21, 2024), https://statecourtreport.org/our-work/analysis-opinion/eventful-summer-state-constitutional-abortion-rights-litigation [https://perma.cc/35MA-GU3Y].

[25] *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/ [https://perma.cc/Q5WA-HM35] (last visited Feb. 23, 2025).

[26] Julia R. Livingston, *Kansas Supreme Court Reaffirms State Constitutional Right to Abortion*, STATE CT. REP. (July 24, 2024), https://statecourtreport.org/our-work/analysis-opinion/kansas-supreme-court-reaffirms-state-constitutional-right-abortion [https://perma.cc/Z6AG-HYMZ]; Gabriella Sanchez, *Montana Supreme Court Expands Abortion Access*, STATE CT. REP. (May 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/montana-supreme-court-expands-abortion-access [https://perma.cc/LVD2-S67J]; Alicia Bannon, *The Post-*Dobbs *Patchwork of Abortion Rights*, STATE CT. REP. (Mar. 28, 2023), https://statecourtreport.org/our-work/analysis-opinion/post-dobbs-patchwork-abortion-rights [https://perma.cc/7R-MU-KW5U] (discussing Oklahoma and North Dakota).

[27] Hodes & Nauser, MDs, P.A. v. Kobach, 551 P.3d 37 (Kan. 2024).

on abortion providers.[28] The Kansas constitution, the court explained, "protects a fundamental right to personal autonomy, which includes a pregnant person's right to terminate a pregnancy," and any infringement of that right must withstand strict scrutiny.[29] States are also seeing affirmative suits seeking to expand abortion access beyond what the federal Constitution required even before *Dobbs*.[30] In 2024, the Pennsylvania Supreme Court reversed prior precedent to rule that a state ban on Medicaid funding for abortion services constituted sex discrimination under Pennsylvania's Equal Rights Amendment and was "presumptively unconstitutional."[31] The court sent the case back to the trial court to assess whether the state can meet the "high burden" of establishing both a "compelling state interest" and that there are "no less intrusive methods" available to accomplish that interest.[32] In Nevada, a trial court ruled that its state's Medicaid funding ban violated the Nevada Equal Rights Amendment.[33] The state did not appeal and announced it would be expanding Medicaid coverage.[34]

On the other side, five state high courts have ruled that their state constitutions do not provide for a right to abortion (including in three states, Iowa, Florida, and South Carolina, where the courts overruled prior precedents protecting abortion rights).[35] And the Alabama Supreme Court drew national headlines when it held that frozen embryos are "persons" subject to the state's wrongful death statute, leaning heavily on a state constitutional provision protecting "the rights of the unborn child."[36] Meanwhile, state litigation over abortion bans or the scope of medical exceptions is ongoing in Arizona, Georgia, Indiana, Kentucky, Missouri, North Dakota, Ohio, Tennessee, Utah, Wisconsin, and Wyoming.[37]

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[28] Hodes & Nauser, MDs, P.A. v. Stanek, 551 P.3d 62 (Kan. 2024).

[29] *Kobach*, 551 P.3d at 46.

[30] Bannon, *supra* note 24; Alicia Bannon, *State ERAs Take Center Stage*, State Ct. Rep., https://statecourtreport.org/our-work/analysis-opinion/state-eras-take-center-stage [https://perma.cc/N4TW-ZKZ2] (last updated Sept. 20, 2024).

[31] Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 891 (Pa. 2024); *see also* David S. Cohen, *Pennsylvania Supreme Court Ruling Overturns Decades-Old Precedent in Abortion Ruling*, State Ct. Rep. (Feb. 14, 2024), https://statecourtreport.org/our-work/analysis-opinion/pennsylvania-supreme-court-ruling-overturns-decades-old-precedent [https://perma.cc/5WZ4-ZMBV].

[32] *Allegheny Reprod. Health Ctr.*, 309 A.3d at 891.

[33] Judgment and Order Granting Petition for Writ of Mandamus, Silver State Hope Fund v. Nev. Dep't of Health & Hum. Servs., No. A-23-876702 (Nev. Dist. Ct. Aug. 8, 2024).

[34] Bannon, *State ERAs Take Center Stage*, *supra* note 30.

[35] *State Constitutions and Abortion Rights*, *supra* note 25.

[36] LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591, at *5-6 (Ala. Feb. 16, 2024); *see also* Alicia Bannon, *Alabama IVF Ruling Puts Spotlight on Fetal Personhood Rights*, State Ct. Rep. (Feb. 29, 2024), https://statecourtreport.org/our-work/analysis-opinion/alabama-ivf-ruling-puts-spotlight-fetal-personhood-rights [https://perma.cc/WYT5-VYXW].

[37] *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF, https://www.kff.org/report-section/state-and-federal-reproductive-rights-and-abortion-litigation-tracker-state-litigation/ [https://perma.cc/ENS4-FYR2] (last updated Mar. 17, 2025).

There has also been significant state constitutional activity far beyond the context of abortion rights. In 2024, among many notable cases,[38] the Montana Supreme Court applied a state constitutional right to a "clean and healthful environment" to uphold a trial court ruling striking down a state law that barred consideration of carbon emissions in environmental assessments—the result of a first-of-its-kind climate change trial.[39] In Massachusetts, the state high court barred sentences of life in prison without parole for people under the age of twenty-one as "cruel or unusual" punishment under its state analogue to the Eighth Amendment.[40] The Alaska Supreme Court ruled that aerial surveillance of a house using a zoom lens requires a warrant under the Alaska constitution's protections against unreasonable searches,[41] a departure from a 1989 U.S. Supreme Court precedent that allowed for aerial surveillance from a helicopter without a warrant.[42] And in Utah, the state supreme court ruled that Utahns have a fundamental right to reform their government through the citizen initiative process, subjecting legislation that would impair that right to strict scrutiny.[43]

At the same time, this surge of interest and activity also risks obscuring the patchwork and incremental nature of state constitutional development. In most states and on most issues, state courts have interpreted state constitutional rights in lockstep with how federal courts have considered similar federal claims—both substantively and in the doctrines courts deploy.[44] State courts likewise often fail to give enforceable meaning to provisions that do not have a federal analogue, particularly when those provisions establish positive rights.[45] In particular, state courts routinely limit remedies or conclude that such provisions do not provide for a private cause of action.[46]

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[38] *See, e.g.*, Leah Litman, Ting Ting Cheng, Erwin Chemerinsky, Kathrina Szymborski Wolfkot, Anya Bidwell, Julie Murray, Jessica Bulman-Pozen, Quinn Yeargain, Marcus Gadson, Daniel Rodriguez & Miriam Seifter, *2024's Most Significant State Constitutional Cases*, State Ct. Rep. (Dec. 20, 2024), https://statecourtreport.org/our-work/analysis-opinion/2024s-most-significant-state-constitutional-cases [https://perma.cc/29BB-2C34].

[39] Held v. State, 560 P.3d 1235 (Mont. 2024).

[40] Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024). *See generally* Kafker & Blanchette, *supra* note 19 (discussing the "distinct role that the development of science and other empirical research regarding juveniles and young adults" has played in Massachusetts and arguing it could serve as an example to other states).

[41] State v. McKelvey, 544 P.3d 632 (Alaska 2024).

[42] Florida v. Riley, 488 U.S. 445 (1989).

[43] League of Women Voters of Utah v. Utah State Legislature, 554 P.3d 872 (Utah 2024).

[44] *See generally* Robert F. Williams & Lawrence Friedman, *supra* note 11, at 226 (discussing the prevalence of interpreting state constitutional provisions in lockstep with the U.S. Constitution); Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1858 (2023).

[45] *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn. St. L. Rev. 923, 931-32 (2011); Martha F. Davis, *The Greening of State Constitutions*, State Ct. Rep., https://statecourtreport.org/our-work/analysis-opinion/greening-state-constitutions [https://perma.cc/7HXW-JETW] (last updated Aug. 14, 2023).

[46] *Id.*

Many advocates also fail to advance state constitutional claims in the first instance, often foreclosing appellate consideration[47]—a dynamic explored in this symposium series.[48] Other infrastructure—including law school curriculum—also has yet to catch up.[49]

At a moment when a number of federal rights are increasingly vulnerable—including those rooted in substantive due process, which the Supreme Court's reasoning in *Dobbs* has drawn into question[50]—the issue of how to encourage a more robust state constitutionalism has taken on new urgency. Contemplating this question, I am most struck by how much work remains to fully grapple with how profoundly *different* state courts and constitutions are from their federal counterparts. While these institutions may be attracting attention now in response to federal legal developments, they are not simply a second site to relitigate federal controversies. As thematically explored by the excellent essays in this symposium, state difference has broad ramifications for how we understand state constitutional rights, the role of state courts, and ultimately, the project of building a robust state jurisprudence.

I. Taking State Constitutions Seriously

All too often, states are caricatured as miniature versions of the federal government. But state constitutions present a strikingly different read than their federal counterpart. To begin, state constitutions have a vast number of provisions that lack a federal analogue. All but one state provides for an explicit, affirmative right to vote.[51] More than half have gender equality provisions (many modeled on the proposed federal Equal Rights Amendment),[52]

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[47] *See* Judge Caitlin J. Halligan, N.Y. Ct. App., Remarks at the "Judicial Federalism and the Status of State Constitutions" Panel at the Symposium: The Promise and Limits of State Constitutions (Feb. 8. 2024), https://statecourtreport.org/our-work/analysis-opinion/judicial-federalism-and-status-state-constitutions [https://perma.cc/Q4U5-CCKD] (discussing how litigants often do not brief state constitutional issues).

[48] *See generally* Julie A. Murray & Bridget Lavender, *Barriers to Vindicating State Constitutional Rights in Civil Litigation*, 60 Harv. C.R.-C.L. L. Rev. 887 (2025).

[49] Ellie Margolis & Leonore Carpenter, *What Law Schools Teach When They Don't Teach About State Constitutions*, 55 N.M. L. Rev (forthcoming 2025) (manuscript at 17), https://ssrn.com/abstract=4966304 [https://perma.cc/GLB7-SQYS] (finding that 87 out of 197 ABA-approved law schools offer at least one course focused on state constitutional law).

[50] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."); Jodi Kantor, *Kagan Sees Threats to Everyday Rights Beyond Abortion*, N.Y. Times (Sept. 9, 2024), https://www.nytimes.com/2024/09/09/us/politics/supreme-court-kagan-ethics.html (describing an interview in which Justice Kagan warned that she saw the right to same-sex marriage, as well as the rights to contraception and interracial marriage, as vulnerable under *Dobbs*' reasoning).

[51] Wilfred U. Codrington III, *Voting Rights Under State Constitutions, Explained*, State Ct. Rep. (Oct. 23, 2023), https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained [https://perma.cc/D5Y9-L87W].

[52] *State-Level Equal Rights Amendments*, Brennan Ctr. for Just., https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments [https://perma.cc/2GBN-23N8] (last updated Dec. 6, 2022).

two-thirds provide for the protection of "unalienable rights" such as life, liberty, and the pursuit of happiness (sometimes called Lockean Natural Rights Guarantees),[53] and forty provide the right to a remedy in court.[54] Many state constitutions also contain protections for the environment, healthcare, and workers' rights,[55] and they contemplate a wide array of positive rights that can impose spending and other affirmative duties on state governments and even private actors.[56] Even state constitutional provisions with federal analogues often contain notable textual differences, such as the prevalence of prohibitions against "cruel" or "cruel or unusual" punishment—phrasing that may indicate a broader protection than the federal prohibition against cruel *and* unusual punishments.[57]

State constitutions also reflect more than just the sum of their parts. As Robert Williams has documented, these rich and layered documents have provisions that may "enhance" each other.[58] For example, several courts considering cases about school financing have determined that state equality guarantees provide enhanced protections with respect to educational equity in light of other state constitutional provisions providing for a right to education.[59] And as Jessica Bulman-Pozen and Miriam Seifter have compellingly argued in their scholarly work, state constitutions also reflect a "distinct democratic commitment," with "interrelated state constitutional commitments to popular sovereignty, majority rule, and political equality."[60] The New Mexico Supreme Court recently applied this democracy principle in concluding that partisan gerrymandering claims are justiciable under the state constitution,[61] declining to follow the U.S. Supreme Court, which held in *Rucho v. Common Cause* that similar claims under the

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[53] Anthony Sanders, *What the Framers Really Thought About Life, Liberty, and the Pursuit of Happiness*, STATE CT. REP. (Aug. 14, 2024), https://statecourtreport.org/our-work/analysis-opinion/what-framers-really-thought-about-life-liberty-and-pursuit-happiness [https://perma.cc/2572-Q9HY].

[54] Thomas R. Phillips, *The Constitutional Right to Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

[55] *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523-24 (2010); *see also* Davis, *supra* note 45.

[56] *See* Hershkoff, *supra* note 55, at 1523. *See generally* Carlos Chevere-Lugo, *No State Actor, No Problem: State Constitutional Rights and Private Actors*, 75 SYRACUSE L. REV. (forthcoming 2025).

[57] Alicia Bannon, *Protecting Against Extreme Punishments*, STATE CT. REP. (July 31, 2023), https://statecourtreport.org/our-work/analysis-opinion/protecting-against-extreme-punishments [https://perma.cc/L8B8-XF73].

[58] *See generally* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001.

[59] *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1279, 1286-87 (Conn. 1996); Bd. of Educ. of Kanawha v. W. Va. Bd. of Educ., 639 S.E.2d 893, 899 (W. Va. 2006).

[60] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 864 (2021).

[61] Grisham v. Van Soelen, 539 P.3d 272 (N.M. 2023).

U.S. Constitution were not justiciable.[62] In concluding that New Mexico's constitution provided for an enforceable remedy, the state high court interpreted the state constitution's equal protection guarantee "through the 'prism' of" other clauses guaranteeing popular sovereignty, the right of self-government, and free elections, ultimately concluding that the entrenchment of a political party through gerrymandering would render these guarantees "meaningless."[63]

One of the most striking ways that state constitutions differ from their federal counterpart is how—for better and for worse—these documents are much more accessible to public input. Notably, state constitutions are far easier to amend and rewrite than the U.S. Constitution,[64] which requires a two-thirds vote by both houses of Congress or a convention called by two-thirds of the states, coupled with ratification by three-quarters of state legislatures or state conventions.[65] No state's process imposes such onerous requirements,[66] and in seventeen states, amendments can be proposed by the legislature with a simple majority vote.[67] Moreover, unlike in the federal process, in every state but Delaware, proposed constitutional amendments require approval directly by voters, most commonly with a simple majority vote.[68] Additionally, seventeen states provide an option to amend state constitutions by citizen initiative, allowing voters to propose constitutional amendments directly.[69] These processes have led to regular state constitutional change: while the U.S. Constitution has been amended twenty-seven times in its history, across the fifty states, state constitutions have been

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[62] 588 U.S. 684 (2019).

[63] *See Grisham*, 539 P.3d at 281-82, 284; *see also* Leah Litman, Mary Ziegler, Erwin Chemerinsky, Anthony Sanders, Ilya Somin, Michael Burger, Julie Murray, Miriam Seifter, Andrea Lewis Hartung, Marcus Gadson, Joshua A. Douglas, Meryl Justin Chertoff & Kathrina Szymborski Wolfkot, *2023's Most Significant State Constitutional Cases*, STATE CT. REP. (Dec. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/2023s-most-significant-state-constitutional-cases [https://perma.cc/MEC4-GP68].

[64] *See* Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Apr. 18, 2023), https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments/ [https://perma.cc/L7GB-CFGW]; Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191, 194 (2023) ("Constitutional amendment lies at the heart of the distinctive state tradition."). *See generally* Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555 (2024) (calling for the more regular use of state constitutional conventions).

[65] U.S. CONST. art. V.

[66] Bannon, *supra* note 64.

[67] THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES tbl.1.4 (2023), https://bookofthestates.org/tables/2023-1-4/ [https://perma.cc/46R7-CVXF]. Note that in some of the seventeen states that provide for legislative referral of constitutional amendments by a simple majority, the legislature must vote for the amendment in successive sessions and a higher voting threshold is required for certain types of proposed amendments. *Id.*

[68] *Id.*; *see also* John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/EZ43-Q9QL].

[69] Dinan, *supra* note 68.

amended an average of 115 times and rewritten an average of five times.[70] Louisiana is on its eleventh constitution,[71] while the California constitution has more than 500 amendments.[72]

A state constitution can often tell a story of social and political movements over time. Montana's constitution, for example, was drafted and ratified in 1972 and contains provisions reflecting the concerns that animated that era, such as the right to a "clean and healthful environment."[73] Its provisions also reflect Montana's own culture and history, including a focus on open government and a strong libertarian streak, with provisions that include "the right to be left alone" and the "right to know" and to "participate" in government.[74] Likewise, a majority of the states that have Equal Rights Amendments (including Montana) ratified them in the 1970s, during the same period that the federal Equal Rights Amendment was debated and passed by Congress and submitted to state legislatures in an (ultimately unsuccessful) ratification campaign.[75] More recently, there has been widespread activity to amend state constitutions to protect abortion rights in the aftermath of *Dobbs*, particularly in states that provide for initiative processes. Voters in ten states have passed abortion rights amendments since 2022, and in another state, Nevada, an amendment passed in 2024 but must go before voters a second time in 2026.[76] Initiative processes in particular can offer a path for citizens to bypass legislatures which, due to gerrymandering or other democratic shortcomings, fail to reflect the policy preferences of the public. With respect to abortion amendments, Michigan, Ohio, Arizona, and Missouri all had abortion bans or strict restrictions on the books at the time voters established a constitutional right to abortion.[77]

But just as state constitutions can reflect stories of progressive social change, so too can they reflect movements to retrench rights. Several southern constitutions, for example, were rewritten at the end of Reconstruction

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[70] Kevin Frazier, *State Constitutional Conventions, Explained*, State Ct. Rep., https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-conventions-explained [https://perma.cc/5DCE-9WAN] (last updated Aug. 6, 2024).

[71] The Council of State Governments, The Book of the States tbl.1.3 (2023), https://bookofthestates.org/tables/2023-1-3/ [https://perma.cc/8VZG-4GUA].

[72] David A. Carrillo & Danny Y. Chou, *California's Constitution is for the People*, State Ct. Rep. (Sept. 25, 2024), https://statecourtreport.org/our-work/analysis-opinion/californias-constitution-people [https://perma.cc/8J7P-KNAQ].

[73] Constance Van Kley, *A Constitution Unique to Montana and Uniquely Montanan*, State Ct. Rep. (Jan. 2, 2025), https://statecourtreport.org/our-work/analysis-opinion/constitution-unique-montana-and-uniquely-montanan [https://perma.cc/U4F5-LZND].

[74] *Id.*

[75] *State-Level Equal Rights Amendments*, *supra* note 52.

[76] Bannon, *supra* note 24.

[77] *Id.*; *In Michigan, a Historic Victory for Abortion Rights*, Am. C.L. Union (Apr. 6, 2023), https://www.aclu.org/news/reproductive-freedom/in-michigan-a-historic-victory-for-abortion-rights [https://perma.cc/XME3-E6D7].

with explicit white supremacist goals.[78] South Carolina's 1895 constitutional convention included warnings about the threat of the "black substratum," the endorsement of racial segregation, and a call by the convention's president for "Anglo-Saxon supremacy" to be preserved.[79] South Carolina's 1895 constitution is still in effect today and even now does not contain a provision banning slavery.[80]

Constitutional amendments have also often been vehicles for limiting rights. For example, between 2004 and 2008, twenty-nine states passed amendments banning marriage by same-sex couples,[81] part of a political backlash first prompted by a Massachusetts Supreme Judicial Court ruling establishing a state constitutional right to marriage equality.[82] Most of these amendments still remain part of state constitutions, though inoperative as long as the Supreme Court's ruling in *Obergefell* remains good law.[83] Other amendments establish rights that can limit the rights of others, such as the right to fetal personhood.[84] It is an important reminder that a strong floor of federal rights continues to remain important: not all state constitutional provisions are progressive, and state constitutions' very orientation toward popular democracy can simultaneously pose challenges in ensuring protections against majoritarian abuses of power.

In sum, even a brief overview of state constitutions reveals richly complex, regularly evolving, and frequently confounding documents—with many provisions that have rarely been litigated or even studied. Profoundly different from the federal Constitution in content, history, and structure, state constitutions offer tremendous promise—with notable limits—in establishing a stable of independent state-level individual rights.

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[78] *See* Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wis. L. Rev. 1063, 1070-73; Marcus Gadson, *Confederate Monuments and State Constitutions*, State Ct. Rep. (July 18, 2024), https://statecourtreport.org/our-work/analysis-opinion/confederate-monuments-and-state-constitutions [https://perma.cc/KN2J-JE2Y].

[79] Brady, *supra* note 78, at 1072.

[80] Gadson, *supra* note 78. Appellate Court of Maryland Judge Dan Friedman has written about the interpretive challenges posed by the fact that "[s]lavery, racism, and white supremacy were important, if not central features of every Maryland constitutional convention and every version of the Maryland Constitution produced." Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?*, 82 Md. L. Rev. 55, 82 (2022).

[81] Kathrina Szymborski Wolfkot & Morgan Munroe, *Voters in California, Colorado, and Hawaii Signal Support for Marriage Equality*, State Ct. Rep., https://statecourtreport.org/our-work/analysis-opinion/marriage-equality-back-ballot [https://perma.cc/LVQ7-KX9T] (last updated Nov. 13, 2024).

[82] Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

[83] Four states have repealed anti-marriage equality amendments, three in 2024. *See* Wolfkot & Munroe, *supra* note 81; *see also* Brady, *supra* note 78, at 1065 (discussing the prevalence of "zombie" provisions, "clearly or arguably unenforceable clauses and amendments that stick with us," in state constitutions).

[84] Bannon, *supra* note 36.

II. Taking State Courts Seriously

Just as state constitutions are not simply miniature versions of the federal Constitution, so too do the state courts tasked with interpreting state constitutions have strikingly different structures and identities than federal courts. Here as well, these differences have important ramifications for the development of state constitutional law.

For one thing, state courts have important differences when it comes to how cases are litigated—and who can enter the courthouse door—in ways that can have a substantial practical impact on the development of state constitutional law. For example, most state constitutions do not have an analogue to Article III's "case or controversy" requirement and frequently have less rigid requirements for establishing standing, such as providing for taxpayer standing[85] and advisory opinions.[86] State courts can therefore provide openings to cases and litigants that might be foreclosed in the federal context.

The procedural realities of litigating in state court are also different. Many states provide for substantial original jurisdiction for state supreme courts, for example, including the power to issue mandamus orders.[87] As Zachary Clopton has argued, state supreme courts' more extensive original jurisdiction can influence not only the speed of litigation but also fact-finding and percolation in ways that may impact ultimate outcomes.[88] Some states have also adopted procedural rules that discourage litigation against government actors. In Texas, state rules allow for the automatic suspension of preliminary injunctions against the state upon appeal, rendering trial court wins little more than symbolic.[89]

Moreover, just as state constitutions are in many ways closer to the public, so too are state courts. In all but three states, state supreme court justices are eligible to sit for multiple terms—either going before voters or

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[85] Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1266-67 (2012).

[86] Mel A. Topf, A Doubtful and Perilous Experiment: Advisory Opinions, State Constitutions, and Judicial Supremacy, at xii-xvi (2011) (detailing elements of advisory opinion jurisdiction); Alicia Bannon, *Judicial Advisory Opinions Explained*, State Ct. Rep. (Nov. 17, 2023), https://statecourtreport.org/our-work/analysis-opinion/judicial-advisory-opinions-explained [https://perma.cc/5TLY-YQLJ].

[87] Jonathan L. Marshfield, *The Writ of Mandamus in State Courts*, State Ct. Rep. (Jan. 9, 2024), https://statecourtreport.org/our-work/analysis-opinion/writ-mandamus-state-courts [https://perma.cc/8QEA-QTAM].

[88] Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. Chi. L. Rev. 83, 118-24 (2024).

[89] Sarah Kessler, *How Texas Law Lets the State Get Around Injunction*s, State Ct. Rep. (Oct. 5, 2023), https://statecourtreport.org/our-work/analysis-opinion/how-texas-law-lets-state-get-around-injunctions [https://perma.cc/WX78-D45F] (detailing Texas's procedure and noting that Pennsylvania, Florida, New York, and South Dakota also provide for an automatic right to suspend injunctions for government appellants).

through a reappointment process—with the potential (or threat) that judges' rulings can be linked to reselection decisions.[90] Turnover is also far more frequent than in the federal courts: while the average term of a U.S. Supreme Court justice is twenty-six years, state justices on average sit for half as long, with an average of thirteen years on the bench.[91]

Perhaps the most distinctive feature of state courts, however, is the prevalence of judicial elections, used in thirty-eight states as part of their systems for choosing supreme court justices.[92] Contemporary state supreme court elections have all the hallmarks of any other high-stakes political campaign, complete with millions of dollars in spending, attack ads, and extensive dark money.[93] These elections have grown in cost and intensity as state courts have taken on greater prominence post-*Dobbs*, regularly setting new records.[94] An April 2025 Wisconsin Supreme Court election was the most expensive judicial election in history, attracting over $100 million in spending, including more than $10 million by groups associated with Elon Musk and more than $1 million by the ACLU Voter Education Fund—all over a single seat that would determine the ideological composition of the court.[95] The liberal candidate, Susan Crawford, won the race,[96] maintaining a liberal majority on a court that is currently hearing a major abortion case and is likely to decide future election cases in what is a key battleground state.[97] This politicization of judicial elections has troubling implications for the capacity of state courts to maintain fairness and impartiality. A large and growing body of political science research suggests that "fundraising

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[90] Michael Milov-Cordoba, *Life Tenure is a Rarity on State Supreme Courts*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts [https://perma.cc/24VR-FHZS] (last updated Oct. 2, 2024).

[91] *Id.*

[92] *Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection [https://perma.cc/S62T-ALM6] (last updated Apr. 14, 2023). This includes twenty-two states that provide for contested elections, where multiple candidates can vie for a seat. *Id.* In sixteen states, justices are first appointed and then stand for up-or-down retention votes. *Id.*

[93] *See, e.g.*, Douglas Keith, *The Politics of Judicial Elections, 2021-2022*, BRENNAN CTR. FOR JUST. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/6DH4-F9VH].

[94] *Id.*

[95] *Buying Time 2025–Wisconsin*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/buying-time-2025-wisconsin [https://perma.cc/DD6B-BQ6R] (last updated Apr. 4, 2025); Ian Vandewalker & Douglas Keith, *Wisconsin Supreme Court Race Breaks Spending Record, Fueled by Out-of-State Money*, BRENNAN CTR. FOR JUST. (Mar. 24, 2025), https://www.brennancenter.org/our-work/analysis-opinion/wisconsin-supreme-court-race-breaks-spending-record-fueled-out-state [https://perma.cc/YPH2-UMBC].

[96] *Buying Time 2025—Wisconsin*, *supra* note 95.

[97] Alicia Bannon, *What's at Stake in the Wisconsin Supreme Court Election*, STATE CT. REP. (Mar. 27, 2025), https://statecourtreport.org/our-work/analysis-opinion/whats-stake-wisconsin-supreme-court-election [https://perma.cc/WBX6-GFZR].

pressures influence justices' decision-making, whether consciously or unconsciously, creating a form of judicial bias."[98]

Together, these distinctive features of state courts can determine the whole ballgame when it comes to how state constitutional law is created on a practical level. Most state supreme court justices issue rulings knowing that they could impact their future job security—a clear challenge to judicial independence and to the durability of state constitutional rights. In 2010, for example, three Iowa Supreme Court justices lost their seats after joining a ruling the year prior to establish a right to same-sex marriage under the state constitution.[99] At the same time, judicial elections and shorter judicial terms also offer the public greater practical influence on the development of state constitutional law—and may also offer state justices heightened democratic legitimacy when they *do* circumscribe the elected branches of government or issue unpopular rulings. And in the background are different procedures, structures, jurisdictional limits, and more, all of which can impact the how, why, and should of state constitutional development.

III. Building State Constitutionalism

As Chief Judge Jeffrey Sutton has observed, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way."[100] State constitutions have rich histories, varied texts, and a wide range of unique provisions that have been under-utilized by litigants and courts alike. There are hopeful signs, however, that state courts are increasingly open to embracing their unique identities and developing independent state constitutional jurisprudence. Some notable developments and themes are sketched out below.

First, some recent decisions highlight the importance of looking at the process by which courts consider state constitutional questions. For example, given the longstanding practice in many states to reflexively lockstep state constitutional interpretation with the federal Constitution, principles of *stare decisis* can thwart the development of state constitutional principles by perpetuating federal lockstepping. In 2024, the Ohio Supreme Court expressed openness to revisiting such precedents. Critiquing prior rulings in which it had "adopted a lockstep reading of [its] state Constitution without

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[98] Michael S. Kang, *Campaign Cash and Judicial Outcomes*, State Ct. Rep. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/campaign-cash-and-judicial-outcomes [https://perma.cc/PVW9-9M7J]; *see also* Alicia Bannon, Brennan Ctr. for Just., Choosing State Judges: A Plan for Reform 10-11 (2018) (detailing social science research about how election pressures impact judicial decisionmaking).

[99] A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times (Nov. 3, 2010), https://www.nytimes.com/2010/11/04/us/politics/04judges.html.

[100] Sutton, *supra* note 1, at 174.

any independent analysis of the constitutional provision,"[101] the court stated that when a litigant "has raised and preserved an argument under a provision of the Ohio Constitution that this court has previously, and without analysis, interpreted in lockstep with the United States Constitution, it is appropriate to revisit unreasoned prior precedent."[102] Similarly, Robert Williams has argued that state court rulings purporting to "prospectively lockstep" state constitutional provisions with U.S. Supreme Court doctrine should be seen as nonbinding, because a prospective ruling effectively incorporates the U.S. Constitution, including all future interpretations by the Supreme Court, into the state constitution.[103]

Some state courts have also expressed openness to revisiting how they approach cases involving both state and federal constitutional claims. Currently, most state courts have adopted a set of interpretive rules in which they resolve federal claims first and then only turn to state claims if they conclude the U.S. Constitution does not protect the right being asserted.[104] Many states also have "departure" rules that lay out specific circumstances in which state courts may deviate from federal precedents when considering analogous state constitutional claims, meaning that state claims are interpreted in lockstep with the federal Constitution as the default.[105] These approaches can deter state constitutional development. As Chief Judge Sutton has argued, litigants and courts "will be less likely to duck independent assessments of the state claim if they consider it first."[106] And as Robert Williams has pointed out, using the U.S. Constitution as the point of "departure" for any state constitutional analysis "seems to give the U.S. Supreme Court's approach a presumption of correctness that is misplaced."[107] As a matter of federalism—and particularly given that states were seen as the primary source of protection of individual rights at the time the U.S. Constitution was adopted[108]—there is no reason for state courts to privilege the Supreme Court's analysis beyond its value as persuasive authority.[109]

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[101] State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 89 (Ohio 2024).

[102] *Id.* at 90; *see also* Bolick, *supra* note 6, at 783 ("Precedential effect [of lockstepping opinions] is deserving only where the court gave fulsome analysis of why the provisions are coextensive . . . .").

[103] Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1521 (2005).

[104] Alicia Bannon, *New Mexico Supreme Court Hints at a Big Constitutional Change*, STATE CT. REP. (Oct. 12, 2023), https://statecourtreport.org/our-work/analysis-opinion/new-mexico-supreme-court-hints-big-constitutional-change [https://perma.cc/6CG3-G5DG].

[105] David Schultz, *When Do State Courts Depart from Federal Precedents?*, STATE CT. REP. (June 30, 2023), https://statecourtreport.org/our-work/analysis-opinion/when-do-state-courts-depart-federal-precedents [https://perma.cc/P9QA-7TWH].

[106] SUTTON, *supra* note 1, at 179.

[107] Williams, *State Constitutional Law After* Dobbs *and* Bruen, *supra* note 11.

[108] Kaye, *supra* note 3, at 400-01.

[109] *See* SUTTON, *supra* note 1, at 174.

There are signs that state courts are increasingly open to such arguments. In 2024, the Hawai'i Supreme Court held that when it is asked to interpret analogous state and federal constitutional provisions, the "proper sequence . . . is to interpret the Hawai'i Constitution before its federal counterpart."[110] The court emphasized "the states as the cradle of rights," and made clear that "we reason independently, untethered from the Supreme Court's analysis of the United States Constitution."[111] In 2023, the New Mexico Supreme Court likewise expressed openness to revisiting its approach to state constitutional interpretation, which currently follows the typical approach of reaching the state constitutional claim only if a right is not protected under the federal Constitution, and permitting "departure" from federal precedent only in specified scenarios.[112] In a footnote, the court asked whether its existing approach "is the proper method to ensure the people of New Mexico the protections promised by their constitution."[113]

A second area in which state courts are signaling greater embrace of state differences is in their openness to departing from federal law, not just in the substantive articulation of rights but in the doctrines and methods used to interpret state constitutions and apply those rights in particular cases. Bulman-Pozen and Seifter have observed that historically, "state courts [have] liberally import[ed] practices, doctrinal frameworks, and rhetoric from the pages of the *U.S. Reports* when deciding state constitutional rights claims."[114] But there are signs state courts are increasingly open to state-specific articulations.

In 2024, for example, the Montana Supreme Court struck down a series of voting restrictions under its state constitution.[115] Specifically, the court declined to apply the federal *Anderson-Burdick* test, often wielded in challenges to voting restrictions, after criticizing it as "amorphous" and giving "undue deference to state legislatures."[116] Recognizing that "the Montana Constitution affords greater protection of the right to vote than the United States Constitution,"[117] the court held that "Montana best serves the independence of its explicit constitutional guarantee of the right to vote by retaining a state-constitution-driven analytical framework for evaluating challenges to voting regulations so as to maintain that strong protection of every person's

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[110] State v. Wilson, 543 P.3d 440, 445 (Haw. 2024).

[111] *Id.* at 446.

[112] Grisham v. Van Soelen, 539 P.3d 272, 279 (N.M. 2023). Departure from federal precedent is permitted when there is "a flawed [or undeveloped] federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* (quoting State v. Gomez, 932 P.2d 1, 7 (N.M. 1997)) (alteration in original).

[113] *Id.* at 281 n.7.

[114] Bulman-Pozen & Seifter, *supra* note 44, at 1881.

[115] Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

[116] *Id.* at 1084, 1089.

[117] *Id.* at 1085.

right to vote."[118] The court adopted an analysis that provides for strict scrutiny when "a law impermissibly interferes with the right to vote," and a "middle-tier" analysis when a law "minimally burdens the right to vote."[119] Likewise, in the same ruling in which the Hawai'i Supreme Court announced that it would first consider state constitutional claims before turning to federal ones, it also articulated an interpretive approach rooted deeply in the local, explaining how the "Aloha Spirit inspires constitutional interpretation."[120] Concluding that there is no individual right to keep and bear arms under the state constitution, the court pointed to state history that "does not include a society where armed people move about the community to possibly combat the deadly aims of others" and reflects a commitment to "peace and tranquility."[121] The ruling was a stark rejection of both federal Second Amendment doctrine and the originalist interpretation methods embraced by the U.S. Supreme Court.

Together, these developments offer glimpses of what a jurisprudence truly oriented around the unique character of state constitutions could look like.

IV. Symposium Essays

The three essays in the *Harvard Civil Rights-Civil Liberties Law Review*'s symposium each offer a compelling and thought-provoking contribution to the growing conversation around how to take state differences seriously.

In **Defederalizing State Constitutional Law**, Professor Jorge Farinacci-Fernós offers both an in-depth treatment of the wide variety of rights that state constitutions provide and a robust call to action directing courts to embrace an "independent state constitutionalism."[122] Such an approach would no longer use federal doctrines relating to justiciability, state action, and the scope of judicial enforcement of rights as starting points, all of which tend to limit the ability of courts to intervene to enforce constitutional protections.[123] The existing "federalized" approach to interpreting state constitutions, he argues, has undermined their full potential.[124]

One of Farinacci-Fernós's key insights relates to a foundational difference between federal and state power: the federal government is fundamentally one of limited, enumerated powers, while states enjoy general

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[118] *Id.* at 1090.

[119] *Id.* at 1090-91.

[120] State v. Wilson, 543 P.3d 440, 459 (Haw. 2024).

[121] *Id.*

[122] Jorge M. Farinacci-Fernós, *Deferderalizing State Constitutional Law*, 60 Harv. C.R.-C.L. L. Rev. 823, 863 (2025).

[123] *Id.* at 849-62.

[124] *Id.* at 837.

police powers and courts with general jurisdiction.[125] These differences, which he argues are of "kind and not of degree," open up a role for state constitutions—and courts—in a wide set of arenas outside the ambit of U.S. constitutional power.[126]

Farinacci-Fernós also points out that as a practical and historical matter, state constitutions have often been used by the public to "fix the dysfunctions and insufficiencies of ordinary legislatives processes," by constitutionalizing a wide array of substantive issues.[127] This includes the establishment of positive rights and horizontal rights without a state action requirement, such as rights relating to labor, education, and social welfare.[128]

Together, these points suggest a very different role for courts in how they approach state constitutional interpretation. For example, Farinacci-Fernós asks why state courts should embrace the "political question doctrine" if many state constitutional provisions are best understood as popular governance measures intended to bypass politically unresponsive legislatures and constitutionalize key policy values.[129] At the very least, why should state courts think federal doctrine is the necessary starting point to do a political question analysis? Embracing these federalized doctrines, he suggests, both "stunt[s]" state constitutional developments and "deprive[s] millions of people of the democratic victories they achieved through their state constitutions."[130]

In **The Statewide Injunction: State Judicial Power and Meaningful Remedies**, Professor Constance Van Kley also critiques the tendency of state courts to lockstep with their federal counterparts. She homes in specifically on growing calls in the federal courts to limit or eliminate the availability of universal injunctions—injunctions that bar enforcement of a law against non-parties as well as named plaintiffs—including, most prominently, the use of nationwide injunctions against a federal law or policy. Reading the tea leaves that universal injunctions may increasingly become unavailable in federal court, Van Kley argues that there are strong structural reasons for states to "swim against the federal tide" when considering the appropriateness of universal injunctions in state courts.[131]

A recent Ohio Supreme Court ruling, *State ex rel. Yost v. Holbrook*, reflects this danger: while the court did not reach the merits of whether a state trial court could issue a statewide injunction blocking a state law, Van Kley points out that the justices debated the issue in a series of concurrences

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[125] *Id.* at 827.

[126] *Id.*

[127] *Id.* at 828.

[128] *Id.* at 831-40.

[129] *Id.* at 854.

[130] *Id.* at 862-63.

[131] Constance Van Kley, *The Statewide Injunction: State Judicial Power and Meaningful Remedies*, 60 Harv. C.R.-C.L. L. Rev. 865, 868 (2025).

that primarily relied on federal cases and law.[132] This reflects a failure, Van Kley argues, to consider state courts as institutions distinct from the federal courts. "Litigants must think deeply about how to counter the inertia of federally developed limits on federal judicial power, and judges must demonstrate courage and creativity to resist the temptation of lock-stepping."[133]

Van Kley makes a compelling case for state difference. She catalogues a wide number of factors unique to states that should inform a state court's analysis about the appropriateness of universal injunctions, from the existence of "open courts" provisions in many state constitutions, to the historical fact that many state constitutions were ratified during a period when universal injunctions were the federal norm, to structural differences (such as the existence of statewide intermediate appellate courts or direct appeals from trial courts to state supreme courts) that could warrant different considerations about the benefits of percolation or the risks of forum shopping when it comes to universal injunctions.[134] She also looks to the widespread use of judicial elections and the relative ease with which state constitutional amendments can be put before the public as state-level constraints on judicial overreach that make universal injunctions less dangerous and potentially more legitimate.[135]

Together, these unique state-level considerations all counsel, she argues, in favor of starting "at zero"—not from a federal baseline—when considering state authority to issue universal injunctions.[136]

And finally, in **Barriers to Vindicating State Constitutional Rights in Civil Litigation**, Julie A. Murray, the co-director of the American Civil Liberties Union's State Supreme Court Initiative, and Bridget Lavender, a Skadden Fellow with the Initiative, offer a litigator's perspective on why there has been an underenforcement of state constitutional rights. Often overlooked in the conversation, they argue, are the procedural and doctrinal barriers to bringing such claims.[137]

Murray and Lavender point out the difficult calculus confronting litigators when deciding whether to bring or forego state constitutional claims. For example, they note that sovereign immunity bars litigants from bringing state constitutional claims against states and state officials in federal court.[138] This not only forecloses filing claims in federal court, but some circuits have held that states do not waive such immunity even if cases with

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[132] *See* State *ex rel.* Yost v. Holbrook, 234 N.E.3d 481, 481-89 (Ohio 2024).

[133] Van Kley, *supra* note 131, at 884.

[134] *Id.* at 878-84.

[135] *Id.* at 882, 884.

[136] *Id.* at 885.

[137] Murray & Lavender, *supra* note 48, at 889-90.

[138] In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the U.S. Supreme Court held that *Ex parte Young*, 209 U.S. 123 (1908), which creates a vehicle to sue state officers who violate the U.S. Constitution, does not apply to lawsuits brought under state law.

mixed state and federal claims are filed in state court and then removed to federal court.[139] Federal courts have also embraced a variety of abstention and other doctrinal barriers to vindicating state constitutional rights in those venues.[140]

Furthering the complexity on the state side, Murray and Lavender highlight additional dimensions of state difference. They point out that only twenty-four states provide for causes of action to vindicate state constitutional rights, either through adopting analogues to the federal Section 1983 or by recognizing implied causes of action for at least some state constitutional provisions.[141] Many states create further hurdles by importing federal qualified immunity doctrine to state law claims, or imposing barriers to the recovery of damages for state constitutional violations absent statutory authorization.[142] Litigators may also be disincentivized from bringing state claims due to the dearth of caselaw, lack of fee-shifting provisions, and other constraints such as inaccessible case dockets.[143]

These kinds of practical barriers to state constitutional development are all too often overlooked in academic discussions, and Murray and Lavender offer an invaluable focus on the challenges to bringing and winning cases. And they call on courts, policymakers, and advocates alike to work toward meaningful access to justice for litigants by "deconstruct[ing] the barriers litigants face to the effective vindication of their state rights."[144]

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One of the great insights of the American constitutional Founders was to create a system with overlapping sources of rights and government obligations. At a time when the floor provided by federal rights is being lowered in many arenas—and when the risk of abuses of power from the federal government is particularly acute—states and state constitutions can provide not only a vital backstop for protecting fundamental rights, but also a site on which to build and realize a more promising future. But none of that happens as a matter of course. It is a project for scholars, advocates and courts—but also ordinary citizens—to give state constitutions their meaning.

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[139] Murray & Lavender, *supra* note 48, at 902-03.

[140] *Id.* at 904-06.

[141] *Id.* at 909-10.

[142] *Id.* at 911.

[143] *Id.* at 912-16.

[144] *Id.* at 918.