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# FOREWORD

## ROBERT F. WILLIAMS STATE CONSTITUTIONAL LAW LECTURE:

## THE STATE OF STATE CONSTITUTIONAL LAW, THE NEW JUDICIAL FEDERALISM AND BEYOND

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I dedicate this lecture to my colleagues and friends Ann Friedman and Rand Rosenblatt for reasons they understand, to my long-time colleague and friend Alan Tarr, and to the past, present and future *Rutgers University Law Review* (formerly *Rutgers Law Journal*) students who have worked diligently for decades to cover matters of state constitutionalism.

*State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.*

*Justice William J. Brennan, Jr. (1977)*[1]

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*Jeffrey Sutton, a well-respected judge who sits on the United States Court of Appeals for the Sixth Circuit, endorses Brennan's thesis and provides four examples in which state constitutional protections were or are more robust than federal ones. These examples demonstrate that the law may be best served if proponents of a new or expanded right give priority to a claim based on their state constitution, and that state judiciaries can set an example for the federal judiciary.*

*Justice John Paul Stevens (Ret.)(2018)*[2]

## I. INTRODUCTION

This is the thirty-first of our Annual Lectures on State Constitutional Law, but it is the first of the now-endowed Robert F. Williams State Constitutional Law Lectures. I am pleased and humbled to be giving the lecture myself and want to express my gratitude to the many donors who made this endowment possible so that the lecture series may live on into the future. You will be pleased to know I am not taking the annual honorarium you created!

There are, of course, many people to thank for this development. First, the Rutgers Law Faculty indulged me back in 1980 when I suggested offering a course on State Constitutional Law, for which I would develop original materials.[3] Next, back in 1988, my colleague, Earl

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. John Paul Stevens, *The Other Constitutions*, N. Y. REV. BOOKS (Dec. 6, 2018), https://www.nybooks.com/articles/2018/12/06/other-constitutions/.

3. I had some significant experience with state constitutional law prior to entering the law teaching profession. *See* Robert F. Williams, *The Long Road to Florida's Modern Constitution*, 71 RUTGERS U. L. REV. 1247, 1247–48 (2019).

Maltz, proposed an annual lecture series on state constitutional law together with an issue of *Rutgers Law Journal*.[4] My political science colleague, Dr. Alan Tarr, was the one who suggested the fundraising effort to endow the lecture in my name.[5] Our then-Dean Ray Solomon seemed to think this was a good idea and authorized the beginning of the fundraising campaign. Over the next several years Robin Todd, and later Josh Karp, worked effectively to establish an endowed lectureship. So, here I am to launch the new lectureship as a continuation of our three-decade-long commitment to state constitutional law scholarship.

Supreme Court Justice William J. Brennan, Jr. and Retired Justice John Paul Stevens both touted the importance of state constitutional law in individual rights cases, over forty years apart.[6] What took place in these several generations? Why? To what effect? This is a good point to reflect on these questions, assess the current state of state constitutional law, and speculate a bit about the future.

The signature development in state constitutional law over the past several generations has been the "New Judicial Federalism" ("NJF").[7] This phenomenon, beginning in the 1970s, saw state supreme courts relying on their own constitutions to recognize rights that were *more protective* than those recognized by the United States Supreme Court under the Federal Constitution.[8] Of course, as Ron Collins observed as early as 1985, the New Judicial Federalism is not "new" anymore.[9]

For the past forty years, through my position at Rutgers Law School since 1980 and my role as Faculty Editor of our Annual Issue on State Constitutional Law for the past thirty-one years, I have had a first-hand view of state constitutional law's evolution in real time. The Law Review students supplied me with every high-court state constitutional case in the country and I skimmed them for my own teaching and scholarship, also recommending a selection on which the students could write case comments. Therefore, I was able to follow the trends leading to the evaluation of not only the NJF, but also state constitutional law generally.

4. Robert F. Williams & G. Alan Tarr, *Rutgers Law Journal: Twenty-Five Years of State Constitutionalism*, 44 RUTGERS L.J. 547, 547 (2014).

5. Robert F. Williams, *Dedication to Dr. George Alan Tarr,* 68 RUTGERS U. L. REV. 1473, 1474–75 (2016).

6. Brennan, *supra* note 1 at 491; Stevens, *supra* note 2.

7. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 113–14 (2009).

8. *Id.*

9. Ronald K. L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, vi (1985).

State constitutions are constitutions *within* our dominant and more familiar Federal Constitution.[10] They are low-visibility and, despite sharing the name "constitutions," they perform different legal and political functions from the Federal document. For example, they primarily *limit* state government powers, by contrast to the Federal Constitution's *enumerations* of powers.[11] They are longer, more detailed, and easier to revise and amend.[12] They contain more rights protections.[13] This leads to an interesting paradox in American constitutionalism. The Federal Constitution is much more familiar in our country, but it is in fact remote and out of reach for any significant lawyer or public involvement. State constitutions, on the other hand, are much closer to the people and are realistically accessible to lawyers and popular involvement through a number of avenues. However, as noted, state constitutions are still not well understood by the public, or even by enough legal or political professionals.[14]

## II. THE NEW JUDICIAL FEDERALISM

### *A. Causes*

Although there were earlier examples of the NJF,[15] Justice Brennan's famous 1977 *Harvard Law Review* Article is often regarded as

10. WILLIAMS, *supra* note 7, at 17.
11. *Id.* at 3, 249–50.
12. *Id.* at 3–4.
13. *Id.* at 3.
14. *Id.* at 3–5.
15. *See* Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125, 129 (1969); A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874–75 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 287 (1973); John M. Steel, *The Role of a Bill of Rights in a Modern State Constitution: Introduction*, 45 WASH. L. REV. 453, 453 (1970); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–98 (1997); Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873–75 (1975); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729, 729–30 (1976); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425 (1974); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U.L. REV. vii, x (1996). Some state courts were early adherents to independent state constitutionalism. *See, e.g.*, Baker v. City of Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970) ("While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized

the beginning of the phenomenon where state courts began to interpret their state constitutions to provide more rights than recognized by the United States Supreme Court under the Federal Constitution.[16] Justice Brennan made similar points in some dissenting opinions,[17] and, just short of ten years after his 1977 Article he stated, "rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our times."[18] Justice Brennan was criticized by some as being a sore loser and advocating result-oriented constitutional interpretation,[19] but his perspective came from being knowledgeable about and involved with state constitutions for most of his legal career.[20]

Justice Brennan's advocacy of reliance on state constitutions suggested an *offensive* strategy to win individual rights cases in the states and avoid negative rulings by an increasingly conservative United States Supreme Court. During the decade after Justice Brennan's Article, the number of state cases recognizing rights beyond the federal minimum standard increased exponentially![21]

Before the 1970s, we used to think of United States Supreme Court decisions as the last word on constitutional questions. But this was only true for cases *recognizing* federal constitutional rights as the supreme

life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land."). *See also* Serrano v. Priest, 557 P.2d 929, 950–952 (Cal. 1976); People v. Brisendine, 531 P.2d 1099, 1113–14 (Cal. 1975).

16. WILLIAMS, *supra* note 7, at 121.

17. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting). Supreme Court dissents do not only speak to future Supreme Court justices but can also influence state court decisions on similar state constitutional rights in very immediate ways. *See infra* notes 108–09 and accompanying text.

18. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998) (quoting Nat'l L.J., Sept. 29, 1986, at S1); *accord* William J. Brennan, Jr., *Foreword: Remarks of William J. Brennan, Jr.*, 13 VT. L. REV. 11, 11 (1988) (calling state courts' increased reliance on state rather than federal individual rights guarantees "the most significant development in American constitutional jurisprudence today.").

19. *See*, *e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) ("I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court."); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 429–433, 449 (1988).

20. Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 771–83 (1998).

21. James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 357, 362–63 (2016).

law of the land.[22] Supreme Court decisions *rejecting* asserted federal constitutional rights claims were only the last word on *federal* constitutional questions.[23] I referred to these decisions as representing the "middle" of the American constitutional rights litigation process, leading to a ripple of "second looks" at the questions, most often by state courts, under their state constitutions.[24] It became recognized that Supreme Court decisions on federal constitutional rights constituted a "floor" or "least common denominator" of constitutional rights in our system of constitutional federalism.[25]

Dr. John Kincaid pointed out that President Richard Nixon's 1969 appointment of Chief Justice Warren E. Burger reflected the president's successful campaign promise to turn the United States Supreme Court in a more conservative direction.[26] This, in turn, as agreed upon by most analysts, was one of the other moving forces behind the NJF.[27] Searching for alternative avenues to protect rights, lawyers and then judges began to take notice of the "parallel universe" of *state* constitutional rights that were there all along.[28]

It is unclear whether the NJF would have taken place at all, let alone taken hold the way it has in the states, a generation or two before the 1970s and 80s. However, as Dr. Alan Tarr observed, by the time that

22. Even these decisions are not as "binding" as they may seem. *See* Mark Denniston & Christoffer Binning, *The Role of State Constitutionalism in Determining Juvenile Life Sentences*, 17 GEO J.L. & PUB. POL'Y 599, 599–601, 620 (2019); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228–29 (2008). Of course there is very little chance that the United States Supreme Court will review a state court's application of one of its federal constitutional formulations, particularly for the purpose of simply correcting errors in application. *See* Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U.L. REV. 979, 980, 997–98 (2010).

23. WILLIAMS, *supra* note 7, at 115.

24. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 360–61 (1984) ("This Article's thesis is that Supreme Court federal constitutional interpretations represent the *middle* of an evolving process of constitutional decisionmaking in our federal system.").

25. Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 115 (Wash. 1981) (en banc) ("The court must . . . establish a rule which accounts for all the variations from state to state and region to region. The rule must operate acceptably in all areas of the nation and hence it *invariably* represents the *lowest common denominator*." (citing *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C. R.-C. L. L. REV. 271, 290 (1973) (emphasis added))).

26. John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 915 (1995); *see also* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020); Howard, *supra* note 15, at 874; David Schultz, *Voting Rights and the 2020 Election: A New Judicial Federalism for the Right to Vote*, 104 MINN. L. REV. 41, 45–46 (2020).

27. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63, 72–73 (1994); *see also* TARR, *supra* note 18, at 161–65 (1998).

28. WILLIAMS, *supra* note 7, at 119–20.

United States Supreme Court retrenchment began, at least some state courts had begun to see themselves as protectors of civil liberties.[29] He stated:

> Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decades had laid the foundation for the development of state civil liberties law.
>
> This, in turn, suggests that, paradoxically, the activism of the Warren Court, which was often portrayed as detrimental to federalism, was a necessary condition for the emergence of a vigorous state involvement in protecting civil liberties.[30]

If it was concern about a conservative trend on the highest court in the land, interestingly that Court has actually encouraged recourse to state constitutions.[31] The following 1982 statement by Justice Stevens for a Supreme Court majority is important:

> As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.[32]

29. *See* Tarr, *supra* note 27, at 72–73.

30. *Id*. at 73.

31. For an early pre-NJF statement by the Court of the truism that state courts may interpret their state constitutions to be more protective than the Federal Constitution, see Chase Securities Corp. v. Donaldson, 325 U.S. 304, 312–13 (1945) ("Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.").

32. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)). Thirty-four years later, Justice Scalia, in a death penalty sentencing case, noted: "The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions." Kansas v. Carr, 136 S. Ct. 633, 641 (2016).

Justice Stevens went on to write a number of opinions like Justice Brennan, encouraging state courts to develop independent state constitutional interpretation in rights cases.[33]

In 1982, the *Harvard Law Review* published an exhaustive consideration of state constitutional rights litigation as its "Developments" contribution.[34] This early recognition by an elite law review, which still stands up well today, provided an early form of academic imprimatur for the NJF. Further, it pointed out the unique possibilities under state constitutions for "majoritarian" judicial review:

> Both courts and commentators have largely ignored the possibility that judicial review might play a radically different role—that of safeguarding the interests of *majorities*. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than anti-majoritarian, review. In fact, there is reason to believe that state courts already have undertaken something very much like this change of direction in one area: the review of economic regulation.[35]

Another major step supporting the NJF occurred in 1980 when the United States Supreme Court decided *PruneYard Shopping Center v. Robins*.[36] In an opinion by Justice Rehnquist, the Court upheld the California Supreme Court's decision permitting political speech and leafletting on the property of a *privately owned* shopping center.[37] This state constitutional decision was in direct conflict with the Supreme Court's interpretation of the First Amendment,[38] but the Court's

For more examples, see Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 910–11 (2018).

33. *See e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 570–72 (1987) (Stevens, J., dissenting); Delaware v. Van Arsdall, 475 U.S. 673, 689–708 (1986) (Stevens, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1065–72 (1983) (Stevens, J., dissenting). *See generally* Ronald K.L. Collins, *Justice Stevens Becomes Advocate of States' Role in the High Court*, 6 NAT'L. L.J. 1 (1984).

34. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328–31 (1982).

35. *Id.* at 1498–99. *See*, *e.g.*, Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1114–15 (2017); Williams, *supra* note 32, at 933–34.

36. 447 U.S. 74 (1980).

37. *Id.* at 76–77, 88.

38. Hudgens v. NLRB, 424 U.S. 507, 520–521 (1976) (finding no state action when private mall owners bar free expression); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (reaching the same conclusion); *see infra* notes 116–17 and accompanying text.

unanimous decision legitimating such an outcome[39] gave a major national boost to the NJF.

Then, in 1983, the Court decided *Michigan v. Long*.[40] There, Justice Sandra Day O'Connor announced that if cases came to the Court with state constitutional law "interwoven with the federal law," and the state court decision was not grounded on an obvious "adequate and independent" state law ground, the Court could, in its discretion, exercise jurisdiction.[41] She continued: "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the Court has reached."[42] Justice Stevens dissented on the grounds that this was an improper interference with state constitutional independence, attempting to *defend* state constitutional law decisions that had already been decided from Supreme Court review:[43]

> The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected" the citizen.
>
> . . . .I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard . . . .
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> . . . .
>
> Until recently we had virtually no interest in cases of this type . . . . Some time during the past decade . . . our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future Court will recognize the

39. *See PruneYard*, 447 U.S. at 88.
40. 463 U.S. 1032 (1983).
41. *Id.* at 1040–41.
42. *Id.* (emphasis added); WILLIAMS, *supra* note 7, at 123.
43. WILLIAMS, *supra* note 7, at 123.

> error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction.[44]

In *Arizona v. Evans*,[45] thirteen years later, Justice Ginsburg joined Justice Stevens's criticism of the *Michigan v. Long* approach:

> The *Long* presumption, as I see it, impedes the States' ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona's Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion.
>
> . . . .State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints, it has been observed, may limit the ability of this Court to enforce the federal constitutional guarantees. Prime among the institutional constraints, this Court is reluctant to intrude too deeply into areas traditionally regulated by the States. This aspect of federalism does not touch or concern state courts interpreting state law.[46]

This acknowledgement by Justice Ginsberg of Federalism concerns or dilution, either explicit or implicit, when the Supreme Court decides federal rights claims in favor of states and against their citizens illustrates the difficulty that the Court may have in announcing *federal* rights for all fifty states.[47] Professor Larry Sager, cited by Justice Ginsburg, makes the point.[48] Those decisions, then, are not convincing precedents for state courts deciding cases under their *state* constitutions even with identical language, in a state with which they are familiar, and only deciding for that one state.[49]

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44. *Long*, 463 U.S. at 1067–70 (Stevens, J., dissenting).

45. 514 U.S. 1 (1995).

46. *Id*. at 24, 30–31 (Ginsburg, J., dissenting) (quoting Lawrence Gene Sager, *Far Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–1218 (1978)).

47. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959–61 (1985).

48. *See id.*; WILLIAMS, *supra* note 7, at 173–74.

49. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1329–30 (2017) [hereinafter *State Constitutions*]; Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1325–1330 (2019) [hereinafter *State Courts*].

Finally, the United States Supreme Court's 2005 decision in *Kelo v. City of New London*,[50] ruling that the taking of property through eminent domain for economic development did not violate the Federal Constitution, spurred a wave of consideration of the issue by state legislatures, and by courts under their analogous state constitutional provisions.[51] These and other major top-down spotlights on state constitutional law, from the Supreme Court itself, emphasized the emerging importance of independent state constitutional rights adjudication, and provided a specific technique for keeping those cases out of the Court. What we have seen over the years, however, is that many state courts still do not utilize this clear advice.[52] It will be interesting to see if this pattern continues, or whether more state court justices rely on this advice to insulate their decisions from United States Supreme Court review where federal constitutional provisions seem to have been interwoven with state constitutional provisions.

At the 1982 annual meeting of the Association of American Law Schools ("AALS") there was a workshop (I organized it) on state constitutional law that was "standing room only."[53] This was an early indication that there was at least some pent-up interest in the subject among law professors and it contributed to the rising interest.[54] There were panel discussions on state constitutional law at the next several AALS annual meetings.

In the initial days of the NJF, the movement to *state* constitutional litigation of rights matters was almost exclusively brought by criminal defense lawyers and other counsel seeking progressive outcomes.[55] This concentration of criminal procedure cases has continued.

Further influence of the United States Supreme Court on the development of the NJF came from its hands-off approach to federal

50. 545 U.S. 469 (2005).

51. Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery, 136 P.3d 639, 651 (Okla. 2006); David Schultz, *Economic Development and Eminent Domain After Kelo*: *Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41, 63–70 (2006); Gabriel I. Chacón, Comment, *Eminent Domain—Generalized Economic Benefit Is Insufficient Public Use to Justify Eminent Domain under the Michigan Constitution—* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), 36 RUTGERS L.J. 1363, 1368–71 (2005); Marshall T. Kizner, Comment, *State Constitutional Law—Economic Benefit Alone Does Not Constitute A Public Use for Eminent Domain Takings.* City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006), 38 RUTGERS L.J. 1379, 1382–88 (2007).

52. WILLIAMS, *supra* note 7, at 123–24.

53. Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 964 n.46 (1982).

54. I published a paper following that workshop. *See generally* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

55. WILLIAMS, *supra* note 7, at 120, 124–25.

constitutional litigation concerning equal and adequate funding for public schools.[56] This left, literally, *no federal* constitutional avenue for this type of litigation and resulted in a near-immediate round of landmark *state* constitutional law decisions on education funding.[57] Professor A.E. Dick Howard noted that this sort of hands-off decision by the United States Supreme Court was also a stimulus for continuation of the extensive doctrines of substantive due process and equal protection in challenges to economic regulation, which had been alive and well in the states even before the NJF.[58]

For similar reasons, when the "tort reform wars" began, the United States Supreme Court's decision to stay out of challenges to economic regulation resulted in a very extensive line of state constitutional cases in the states, with a major degree of success.[59] This litigation, like the school finance cases, introduced new groups of lawyers, judges, and scholars to the importance of state constitutional law. It also brought new scrutiny to the activities of state supreme courts, and then to the importance of the heretofore low-visibility elections for these important judicial positions.

The Conference of Chief Justices and the National Center for State Courts collaborated in 1984 to sponsor a conference on state

56. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (indicating hesitance to make a uniform requirement for all 50 states); Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and its Aftermath,* 94 VA. L. REV. 1963, 1971–77 (2008). Professor Scott Bauries has suggested that constitutional separation of powers concerns and textual analysis are less helpful in understanding education finance litigation in state courts than the varying conceptions of the nature of education rights. *See generally* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 701–02 (2010); *see also* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 718–25, (2012). For a different view, compare William E. Thro & R. Craig Wood, *The Constitutional Text Matters: Reflections on Recent School Finance Cases,* 251 EDUC. L. REP. 510, 529–32 (2010). For an examination of the ways which the state and federal conceptions of education rights under constitutions have converged in school finance cases, see Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 351–65 (2011).

57. *See* Serrano v. Priest, 557 P.2d 929, 951–52 (Cal. 1976); Robinson v. Cahill, 303 A.2d 273, 281–82 (N.J. 1973).

58. WILLIAMS, *supra* note 7, at 190–91; Howard, *supra* note 15, at 881–83.

59. *See* Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, at 866, 874–75 (2002); Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 904 (2001); Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 907–908 (2018); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1162–65 (2005).

constitutional law in Williamsburg, Virginia.[60] Scholars who were beginning to write about state constitutions came together with some of the state supreme court justices who had decided early important cases to discuss this emerging state constitutional law phenomenon. A book, albeit not widely circulated, emerged from this conference, and the word continued to spread.[61]

In some of the decisions early in the NJF, state supreme court justices went beyond simply authoring decisions, deciding the controversies to include "teaching opinions" and alerting the judiciary and the Bar to the new possibilities of state constitutional law and the importance of state constitutions.[62]

Many state supreme court justices and law professors participated in early judicial and lawyer training programs within their states, calling attention to the importance of state constitutional law and introducing some of the techniques of research and advocacy in this newly-emerging field.

In what was both a cause and effect of the NJF, there was an explosion of law review literature on a variety of topics in state constitutional law by students, judges, and academic authors. This academic literature built upon itself and led to a number of entire symposia in law reviews across the country. These publications analyzed the emerging judicial embrace of state constitutional law and, in turn, were cited by lawyers and the state courts in future decisions. In addition, the literature began to cross state lines ("trans-state"), analyzing certain common provisions in state constitutional law more broadly.[63] This helped facilitate the use of "horizontal federalism" by state courts looking at decisions from other jurisdictions concerning provisions identical or similar to the state constitutional clause under review.[64] Our *Law Review*, in our thirty-first year covering state constitutional law, has made great contributions to this literature.[65]

60. *See generally* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (Bradley D. McGraw, ed., 1985).

61. *Id.*

62. WILLIAMS, *supra* note 7, at 144–46, 158. For an extensive review of the materials of the New Judicial Federalism by a state supreme court justice (teaching opinions), see Justice Brent Appel's opinions in *State v. Baldon*, 829 N.W.2d 785, 833–34 (Iowa 2013) and *State v. Ochoa*, 792 N.W.2d 260, 264–66 (Iowa 2010).

63. Daniel B. Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271, 301–02 (1998).

64. WILLIAMS, *supra* note 7, at 352.

65. Williams & Tarr, *supra* note 4, at 547–51.

Another contribution was the development of a fifty-state series, with a volume on each state's constitution, begun in 1990.[66] These books serve as reference sources on each state constitution.

In 1992, however, Professor James A. Gardner asserted that "state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements"[67] and that "state constitutional discourse is impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish."[68] Gardner's central focus was on state constitutional rights cases.[69] After concluding that state constitutional discourse was impoverished, Professor Gardner asserted that the cause was the failure of state constitutionalism generally.[70] Ultimately, Professor Gardner contended that "the communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own."[71]

These strong and provocative criticisms stimulated a useful new discussion of what state constitutional law is all about.[72] Looking back, I view this challenge as a productive stimulus for self-reflection.

66. *See generally Oxford Commentaries on the State Constitutions of the US*, OXFORD U. PRESS, https://global.oup.com/academic/content/series/o/oxford-commentaries-on-the-state-constitutions-of-the-us-cotus/?lang=en&cc=us (last visited July 21, 2020). Professor Lawrence Friedman is now the editor of the series, created by Alan Tarr and now published by Oxford University Press: THE OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES. These volumes all have the same title, *The ____ State Constitution*. Each volume contains a brief constitutional history of the state, followed by the text and section-by-section analysis (including citations to leading cases) of the state constitution, together with a bibliographical essay. Forty-eight of these volumes have now been completed. All of them will be updated.

67. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

68. *Id.* at 766.

69. *See id.* at 805–10.

70. *Id.* at 812 (asserting that the cause was "the failure of state constitutionalism itself to provide a workable model for the contemporary practice of constitutional law and discourse on the state level.").

71. *Id.* at 837; *see also* James A. Gardner, *Reply: What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1026–29 (1993) (arguing that states' constitutions are not an expression of fundamental values of a cognizable polity).

72. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927, 927 (1993).

In 1998, Alan Tarr and I created the Rutgers Center for State Constitutional Studies, an interdisciplinary institute.[73] Now there are Centers on the Arizona[74] and California[75] state constitutions.

Law schools began to develop courses on state constitutional law, either state-specific or national in focus, that had never been taught before in American law schools.[76] Our Rutgers Law course was probably the first.[77] This development, still ongoing, can also be seen as both a cause and effect of the NJF. Thousands of students have now graduated with a knowledge of state constitutional law, going on to practice law and even entering the judiciary themselves. But there is still a long way to go. Sandy Levinson recently observed:

> One of the dismaying realities of American legal education, particularly at its most elite level, is the abject ignorance displayed about the importance of state constitutions and even of state judiciaries, even though most of the common law cases that students read arise in state courts. Still, too many students may well graduate from three years of legal study with the perception that the only Constitution operating within the United States is the national document and that the only courts one need really focus on are federal courts, particularly, of course, the United States Supreme Court.[78]

73. Williams, *supra* note 5, at 1475.

74. *The Arizona Constitution Project*, ARIZ. ST. U., https://cptl.asu.edu/azconstitution (last visited Apr. 24, 2020).

75. *California Constitution Center*, BERKELEY L. U. C., https://www.law.berkeley.edu/research/california-constitution-center/ (last visited Apr. 24, 2020).

76. Williams, *supra* note 15, at viii.

77. *See supra* note 3 and accompanying text.

78. Sanford V. Levinson, *Foreword* to MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE, at ix (2015); *see also* Jeffrey S. Sutton, Speech, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166–67 (2009).

There are two national law school casebooks that are used in law school courses now.[79] An excellent two-volume national treatise on state constitutional rights and defenses is an invaluable research resource.[80]

The Conference of Chief Justices adopted a resolution at its 2010 Midyear Meeting encouraging all law schools to offer courses on state constitutional law.[81] The influence of this resolution is unclear.

### *B. Effects*

Now is a good time, approaching the fifty-year mark of the NJF, to attempt an assessment of its effects on American constitutional law jurisprudence. First, thousands of people and their lawyers in the states have won cases over these years that would have failed under the Federal Constitution. Major systemic reforms in state public education, the workings of the branches of state government, the operation of state and local criminal justice systems, tort systems, and the new, broader understanding of the importance of state constitutional change have resulted from the NJF.

At least several major decisions by the United States Supreme Court were preceded by persuasive lines of state constitutional law decisions on the same topic. Marriage equality and the decision that sodomy laws are unconstitutional come to mind.[82] The marriage equality decision in the Supreme Court was the culmination of state-constitutional-law-first strategy.[83]

79. *See generally* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (5th ed. 2015); RANDY J. HOLLAND, STEPHEN R. MCALLISTOR, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE (2d ed. 2016). Professors Katie Eyer and Robert Williams have published a free, online supplement for Constitutional Law professors (and others) who want a short, readily-available introduction to state constitutional law. *See generally* ROBERT F. WILLIAMS & KATIE R. EYER, STATE CONSTITUTIONAL LAW TEACHING MATERIALS FOR 1L CONSTITUTIONAL LAW CLASSES (SUPPLEMENT) (July 19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstractid=3418938.

80. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (4th ed. 2006).

81. WILLIAMS & FRIEDMAN, *supra* note 79, at xix.

82. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); Lawrence v. Texas, 539 U.S. 558, 576 (2003); *see also* Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1380 (2010); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 377 (2011); Joseph Blocher, *What State Constitutional Law Can Tell Us About The Federal Constitution*, 115 PENN ST. L. REV. 1035, 1041–42 (2011); *State Constitutions*, *supra* note 49, at 1323.

83. Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1530–32 (2016).

A significant change in the substantive dockets of state supreme courts took place as the NJF unfolded. These former low-visibility courts, with their rare high-profile murder cases have become the locus of many of the last several generations' hot-button legal topics such as abortion, the death penalty, marriage equality, criminal procedure, free speech, eminent domain, gun rights and other important matters of constitutional law under both the Federal Constitution and state constitutions.[84] State supreme court justices were met with new calculations about the responses to their decisions on these hot-button cases (such as the possibility of state constitutional amendments overturning their decisions or electoral defeat), both within their states and in others as well.[85] All fifty state judiciaries are now aware of, and some are quite knowledgeable about, their state constitutions and more generally, about state constitutional law.

As noted earlier, the United States Supreme Court became comfortable, or even in a sense encouraging, in its acknowledgement that state courts are free, under their own state constitutions or even statutes, court rules, and common law, to render decisions that are more protective than the Supreme Court's interpretations of federal constitutional rights, which establish a national minimum standard under the United States Constitution's Supremacy Clause.[86] Therefore, it is not only in the Court's *dissenting opinions* that state courts are encouraged to diverge from the national minimum standard of rights,[87] but also in the opinions of the majority members of the Court.[88]

Undoubtedly as a result of the NJF's endorsement by the United States Supreme Court, its increasing visibility, and the advent of controversial state constitutional amendments, scholars of *federal* constitutional law such as Sandy Levinson, Seth Kreimer, Larry Sager, and Neal Devins began to, albeit partially, shift their gaze to *state* constitutional law.[89] This added important academic consideration to that of the early group of state constitutional scholars.

84. *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism,* 62 STAN. L. REV. 1629, 1636, 1652 (2010); Justin R. Long, *Guns, Gays, and Ganja*, 69 ARK. L. REV. 453, 456–61 (2016).

85. *See* Devins, *supra* note 84, at 1686.

86. *See* U.S. CONST. art. VI, cl. 2; *supra* note 32 and accompanying text.

87. *See*, *e.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); *see also infra* notes 108–09 and accompanying text.

88. *See*, *e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

89. *See generally* Devins, *supra* note 84; Seth Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12 (2002); Sanford V. Levinson, *Freedom*

The phenomenon of the NJF, and the rising importance of state constitutional law generally in the United States stimulated interest in state, or subnational, constitutions in other federal countries.[90] A number of such countries utilize constitutions for their component units and a lively study of comparative subnational constitutional law has developed.[91]

Many competing national progressive and conservative groups, because of the rise of the NJF, discovered the state constitutional amendment process as an avenue for pushing *national* subjects. As analyzed by Dr. John Dinan:

> [T]he early twenty-first century has seen a flurry of state constitutional amendments intended to advance state interests in the federal system, whether by enacting policies blocked at the federal level or aiding in the reversal or modification of congressional statutes or court rulings. As will be shown, such amendments have been formally proposed in recent years and, in many cases, have been enacted on a wide range of issues, including eminent domain, affirmative action, minimum-wage policy, stem cell research, abortion, medicinal marijuana, health care, and union organizing.[92]

Another development, probably attributable to the NJF, is the increased interest of political scientists in the area of state

*of Speech and the Right of Access to Private Property Under State Constitutional Law*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 51 (Bradley D. McGraw ed., 1985); Sager, *supra* note 47.

90. G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 PENN ST. L. REV. 1133, 1145–46 (2011).

91. *See id.*; G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 771 (2009). *See generally* James A. Gardner & Antoni Abad i Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain,* 59 AM. J. COMP. L. 491 (2011); Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625, 641–42 (1999); Robert F. Williams, *Teaching and Researching Comparative Subnational Constitutional Law*, 115 PENN ST. L. REV. 1109, 1116–22 (2011).

92. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1010 (2011); *see also* Sean Beienburg, *Contesting the U.S. Constitution Through State Amendments: The 2011 and 2012 Elections*, 129 POL. SCI. Q. 55, 55–56 (2014); Justin R. Long, *Guns, Gays, and Ganja*, 69 ARK L. REV. 453, 453–54 (2016) ("[T]hree law-reform movements . . . have treated state constitutional changes as a tool for advancing their national policy aims.").

constitutionalism. After Alan Tarr[93] and John Dinan[94] "reopened the study of state constitutionalism,"[95] they were followed by Emily Zackin,[96] Amy Bridges,[97] Paul Herron,[98] John Dinan again,[99] Robinson Woodward Burns,[100] Adam Brown,[101] Keith Whittington,[102] and Sean Beienburg,[103] among others.

The spotlight that shone on state constitutions by the NJF illuminated the presence of "positive" or "third-generation"[104] rights to affirmative governmental assistance that are unheard of in our Federal Constitution. The revelation of such rights, long sought unsuccessfully in the Federal Constitution, demonstrated that we were looking for them in the "wrong places."[105] Burt Neuborne, in our initial 1989 Annual Lecture

93. TARR, *supra* note 27, at 72–73.

94. *See generally* JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006).

95. Robinson Woodward-Burns, Review Essay, *The State Constitutions' Influence on American Political Development*, 81 J. POL. e85, e85 (2019), http://dx.doi.org/10.1086/705276. I would add John Kincaid to this list. *See generally* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995).

96. *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2012); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1641–45 (2014); Mila Versteeg & Emily Zackin, *Constitutions Un-entrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016).

97. *See generally* AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES (2015); Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, 22 STUD. AM. POL. DEV. 32 (2008).

98. *See generally* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SUCCESSION, RECONSTRUCTION, AND REDEMPTION 1860-1902 (2017); Paul E. Herron, *Upon the Shores of an Unknown Sea*, 69 RUTGERS U. L. REV. 1433 (2017) (reviewing AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES (2015)).

99. *See generally* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018).

100. *See generally* Woodward-Burns, *supra* note 95; ROBINSON WOODWARD-BURNS, THE UNITING STATES: HOW THE STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS (forthcoming 2021).

101. Adam R. Brown & Jeremy C. Pope, *Measuring and Manipulating Constitutional Evaluations in the States: Legitimacy Versus Veneration*, 47 AM. POL. RES. 1135, 1135 (2019); Adam R. Brown, *The Role of Constitutional Features in Judicial Review*, 18 ST. POL. & POL'Y Q. 351, 351 (2018).

102. Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 RUTGERS U. L. REV. 1141, 1141 (2015); Keith Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law,* 75 MD. L. REV. 383, 383 (2015).

103. Sean Beienburg, *Contesting the U.S. Constitution Through State Amendments: The 2011 and 2012 Elections*, 129 POL. SCI. Q. 55, 55–56 (2014).

104. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1–3, 46–47 (2013).

105. *Id*. at 1–3.

on State Constitutional Law, contended that state courts were in a better institutional position to enforce these kinds of rights than federal courts.[106] Helen Hershkoff then argued persuasively that state courts should refrain from reflexively applying federal "rational basis" review of states' compliance with such positive state constitutional mandates, and rather apply a much more rigorous standard.[107]

We began to see early in the NJF that dissenting opinions in United States Supreme Court decisions rejecting federal constitutional rights claims, which had been thought only to influence academics and future Court majorities, could have a much more immediate influence. I observed:

> Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis.[108]

Justice Brennan made a similar point, not surprisingly, about the possible influence of Supreme Court dissents in developing state constitutional law.[109] Lawyers advocating more progressive state constitutional rights decisions regularly rely on the persuasive arguments found in Supreme Court dissents, and such arguments have proved persuasive in many state courts.

One of the key distinctions between federal constitutional decisions recognizing federal constitutional rights and state supreme court decisions recognizing state constitutional rights is that the latter are subject to the realistic possibility of being "overturned" prospectively by amendments to the state constitution. This became clear as early as 1972 when the California Supreme Court's decision declaring the death penalty unconstitutional under the state constitution was nullified very quickly by an amendment.[110] This has turned out to be a very real

106. Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 891–93 (1989).

107. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137, 1183–84 (1999); *see also* WILLIAMS, *supra* note 7, at 116–17.

108. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 375–76 (1984).

109. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

110. WILLIAMS, *supra* note 7, at 119–20, 120 n.38 (describing how People v. Anderson, 493 P.2d 880, 899 (Cal. 1972) was effectively overruled by a state constitutional amendment

possibility, as those who oppose the new hot-button state decisions move from legal to political arguments.[111] Such amendments can take the form of nullifying the specific decision, precluding such decisions in the future, and even amending the state constitution to require "forced linkage" to United States Supreme Court interpretations of the analogous federal constitutional provision.[112] As the NJF progressed, this possibility became more realistic and, arguably, occupied a space in the back of the minds of state supreme court justices (together with public opinion) considering recognition of state constitutional rights beyond the national minimum.[113]

This early California development formed the seeds of a "backlash" of criticism and actions in reaction to the NJF, following its initial "thrill of discovery."[114] State courts, in reaction to the backlash, began to engage in the state constitutional "methodology wars," in which they considered whether they should evaluate state constitutional claims before or after analogous federal claims, whether they should interpret state constitutional rights in "lockstep" with federal rights, and whether "criteria" should be developed to justify state interpretations beyond the national minimum. [115] These matters are still in debate today.

The evolution of the NJF demonstrated that state courts interpreting their state constitutions need not necessarily follow accepted federal constitutional doctrines such as the state action doctrine.[116] For example, a number of state supreme courts recognized the right to free speech and assembly under their state constitutions, even on *privately-owned* property that was open to the public.[117]

In addition to the increasing recognition during the NJF that state constitutions contain affirmative or positive rights provisions, a further unique characteristic of state constitutions came into much clearer focus: they contain a wide variety of *policy-oriented* provisions that, on their surface, could more properly be dealt with by ordinary statutory law.[118] There are many motivations for using this mechanism to entrench policy matters in the state constitution.[119] This is not a new phenomenon but

nullifying the court's interpretation of "cruel *or* unusual punishment"). *Anderson* was overruled by article I, section 27 of the California Constitution.

111. *Id.* at 128–29.

112. *Id.*

113. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 471 (2010).

114. WILLIAMS, *supra* note 7, at 119–30.

115. Gardner, *supra* note 21, at 366–70.

116. *See* WILLIAMS, *supra* note 7, at 188–90.

117. *Id.* at 188–90; *see also supra* notes 36–39 and accompanying text.

118. *See* WILLIAMS, *supra* note 7, at 23–24.

119. *Id.* at 29.

began in the middle of the nineteenth century.[120] As Alan Tarr noted, "[s]tate constitutions, in contrast [to the U.S. Constitution], deal directly with matters of public policy, sometimes in considerable detail."[121]

Political scientist Christopher Hammons evaluated the difference between "framework-oriented" and "policy-oriented" state constitutional provisions.[122] He concluded that on the average, nationally, state constitutions contain about forty percent policy-oriented clauses.[123] This tendency, which is seemingly increasing, has major consequences for state judicial implementation of such constitutionalized policies.

We also came to realize as the NJF unfolded that states could recognize or even establish rights for their citizens beyond the Federal Constitution's national minimum standards, not only by interpreting or amending their state constitutions, but also by statute or even common law. For example, the Georgia Supreme Court rejected the United States Supreme Court's "good faith exception" to the exclusionary rule because there was a state *statute* requiring suppression of evidence seized without a warrant.[124] Even a state's common law doctrines may provide rights beyond the national constitutional minimum standards.[125]

120. *Id.* at 26.

121. TARR, *supra* note 27, at 20; *see also* WILLIAMS, *supra* note 7, at 21 ("Over the course of the century, state constitutions increasingly became instruments of government rather than merely frameworks for government.") (quoting G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 132 (1998)); Christian Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 964–65 (1994) ("The key to explaining the growing length of nineteenth-century constitutions lies in the delegates' understanding of the purpose of constitutions. There was common agreement that the nature and object of constitutions extended beyond fundamental principles to what delegates called constitutional legislation. Delegates willingly assumed an institutional role that occasionally supplanted the ordinary legislature."); Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969, 972–73 (1995) (reviewing DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890 (1992)).

122. Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1338 (2001).

123. *Id.* at 1333. *See also* Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837, 840 (1999).

124. Gary v. State, 422 S.E.2d 426, 429 (Ga. 1992); *see also* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379, 390 (1980) (emphasizing the importance of states' own laws in addition to their constitutions).

125. Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1314–15 (Or. 1989); Curtis J. Berger, Pruneyard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 663–666, 670 (1991); Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 750–51 (1992); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15–17 (1995).

It further became clear during the spread of the NJF that, in fact, state constitutions could be interpreted to provide *fewer* rights than the national constitutional minimum standard.[126] However, states must enforce the federal minimum standard of rights.

### *C. Assessment of the NJF: Human Rights Federalism?*

As much as the NJF has evolved and matured over the past several generations, there is still a long way to go. Even in the last several years, in case after case around the country, state courts are faced with arguments by lawyers that either do not raise state constitutional claims at all or make them improperly under the guidelines annunciated by such courts. For example, in 2016 the New Mexico Supreme Court made the following statement:

> Because Defendant makes no claim that his rights under the New Mexico Constitution should be interpreted more broadly than those guaranteed by the Fourteenth Amendment of the United States Constitution, "we base our discussion of this issue on the constitutional requirements established under federal law."[127]

In 2017, Justice Goodwin Liu of the California Supreme Court reflected on Justice Brennan's 1977 *Harvard Law Review* Article and its effects. Among an overall positive and supportive evaluation, he emphasized the importance of federal/state "redundancy" in American constitutional rights protections.[128]

United States Court of Appeals for the Sixth Circuit Judge Jeffrey Sutton's 2018 book, 51 *Imperfect Solutions: States and the Making of American Constitutional Law*,[129] has had a very important effect on awareness of state constitutional law.[130] The book has been very well received, and Judge Sutton, who delivered our Annual State Constitutional Law Lecture several years ago, has spoken widely about the book.[131]

126. Gardner, *supra* note 21, at 380–83.

127. State v. Thomas, 376 P.3d 184, 189 (N.M. 2016).

128. *State Constitutions*, *supra* note 49, at 1312–13.

129. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

130. *See* Stevens, *supra* note 2, at 33 (statement of Justice John Paul Stevens reviewing this book); *see also State Courts*, *supra* note 49, at 1310, 1313–14; Jeffrey S. Sutton, *A Response to Justice Goodwin Liu*, 128 YALE L.J. 936, 937, 941 (2019).

131. Jeffrey S. Sutton, *Foreword: The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 791 (2018).

In 2010, however, Dean Erwin Chemerinsky published an Article entitled *Two Cheers for State Constitutional Law*, in which he concluded "that state constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution." [132] He is correct, of course, in pointing out that by contrast to a national victory for civil liberties under the U.S. Constitution, such victories within the states under state constitutions are significantly less permanent and far-reaching.

First, of necessity, any state constitutional ruling on civil liberties, or any other issue for that matter, must be limited to that particular state. Second, decisions of state supreme courts interpreting their state constitutions are vulnerable to being overturned, at least prospectively, by an amendment to the state constitution. As Dr. John Dinan has pointed out, although such amendments are extremely rare at the federal level, they have taken place with some regularity in the states.[133] Dinan describes "amendments to *reverse* state court decisions," as well as "amendments to *preempt* rights-expansive state court decisions."[134] Dinan goes on to provide numerous examples of both kinds of state constitutional amendments that can affect state courts' individual-liberties rulings.[135] This is far from an everyday occurrence, but its possibility is ever-present, and may even affect state supreme court justices' willingness to render individual rights decisions beyond the federal minimum standards.[136] Federal judges, including Justices of the United States Supreme Court, have very little to worry about in this regard.

Third, a very large majority of state supreme court justices face the electorate in a variety of ways. In the words of the late California Supreme Court Justice Otto Kraus, deciding controversial cases as an elected justice is "like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[137] In one of the most extreme examples of this feature of most state judiciaries, unlike in the federal judiciary, three justices of the Iowa

132. Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010).

133. JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 111 (2018).

134. *Id.*

135. *Id.*

136. Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 122 (2018).

137. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

Supreme Court were voted out of office, after that court ruled in favor of marriage equality, through a negative campaign financed largely with out-of-state funding.[138]

Dean Chemerinsky further noted that United States Supreme Court decisions themselves can "impose constitutional limits on government actions," including interpretation or amendment of state constitutions.[139] Finally, he restated these descriptions of the inherent limits of state constitutional law in a 2018 keynote address.[140]

Professor Neal Devins, expanding on Dean Chemerinsky's sobering assessment, has also pointed out some realistic limitations on the likelihood of many state supreme courts interpreting their constitutions expansively, beyond the national minimum standard set by the United States Supreme Court based on a number of factors, such as: elected as opposed to appointed state supreme courts, state supreme courts' lack of discretion over cases they take, ease of state constitutional amendment, party alignment within the state, etc.[141]

Professor Jim Gardner's view is that although Justice Brennan's 1977 stimulus "did much to excite the appetite of rights liberals, it had little long-term impact on the practices of state courts."[142] He states his important alternative view:

> [O]f subnational constitutional independence, grounding it in a Madisonian understanding of federalism as implementing a two-government system of dual agency, a system that is designed to produce permanent contestation between national and subnational governments. In that context, the deployment of independently interpreted constitutional rights can be better understood as merely one tool available to subnational governments in an ongoing practice of intergovernmental struggle over policy. That, in turn, explains why state courts are a priori no more likely to be inclined to prefer rights-expanding interpretations of state constitutional provisions than to prefer rights-contracting ones. When and if state courts choose to issue rights-expanding decisions thus depends largely on how well they

138. David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90, 90–94 (2011); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

139. Chemerinsky, *supra* note 140, at 1698. As an example, Dean Chemerinsky pointed to Citizens United v. FEC, 558 U.S. 310 (2010).

140. Erwin Chemerinsky, *Keynote Address: The Alaska Constitution and the Future of Individual Rights*, 35 ALASKA L. REV. 117, 127–28 (2018).

141. Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1134–41 (2019).

142. Gardner, *supra* note 21, at 358.

> believe the federal government is doing its job, a judgment that in today's world is as much about power and partisanship as it is about constitutional jurisprudence.[143]

Gardner points out that still the majority of state-court rights decisions do not diverge from federal standards, and that "Justice Brennan's call to arms was thus built around a significantly incomplete view of state constitutional law: he saw the independence, but overlooked the interdependence; he saw human rights protections, but missed the phenomenon of human rights federalism."[144] Whether one agrees with these conclusions, they bear careful consideration going forward. Having acknowledged the limitations pointed out by Dean Chemerinsky and Professors Devins and Gardner, as one must, there can be several aspects of state constitutional law protection of civil liberties above the federal minimum standards outside the state. For example, expansive state individual liberties decisions may serve as persuasive precedent in other states considering the same matter.[145] Further, in some situations a progression of state constitutional rulings can lead, ultimately, to a change of position by the United States Supreme Court itself, as in its marriage equality decision.[146]

Particularly from the standpoint of individual lawyers and their clients, the possibility of a victory in their case just for their state, unreviewable by the United States Supreme Court, is still extremely attractive. Of course, "second best" opportunities to expand civil liberties are better than no chances at all.[147] So, maybe the NJF is entitled to two and one-quarter or even two and one-half cheers.

## III. BEYOND THE NEW JUDICIAL FEDERALISM: STATE CONSTITUTIONAL LAW IS HERE TO STAY

In a 1988 poll, over half of the respondents did not even know their state had a constitution.[148] It is very doubtful that would be the case

143. *Id.* at 359.
144. *Id.* at 374, 380.
145. Devins, *supra* note 141, at 1175–76.
146. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); Bonauto, *supra* note 83, at 1530–31; *see also* Lawrence v. Texas, 539 U.S. 558, 576–78 (2003). In his Article, Dean Chemerinsky clearly acknowledges this possibility. *See* Chemerinsky, *supra* note 140, at 1703.
147. Chemerinsky, *supra* note 140, at 1700.
148. *See generally* John Kincaid, *The New Judicial Federalism*, 61 J. ST. GOV'T 163 (1988).

today. State constitutions are no longer the "dark side of the moon."[149] Similarly, or possibly even more drastically, President Trump's campaign pledge to nominate only federal judges who were recommended by the Federalist Society all these years later will likely result in another 1970s-like rush to the state courts and state constitutions. The United States Supreme Court's recent "hands off" ruling on partisan gerrymandering may provide another similar stimulus.[150] Again the Court referred those dissatisfied with its decision to state law remedies: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[151] This time, however, we have available to us all of the experiences gained from the several generations of the NJF.

The attention the NJF increasingly brought to state constitutions, initially with respect to arguments for *rights protections* beyond the federal constitutional minimum standards, has now led to an emerging recognition of the additional elements of state constitutional law that are fundamentally important to our governance and to the protection of our citizens. Now that the role of state constitutional rights in American constitutionalism is more clearly understood (we still have a ways to go), separation of powers, the role of state constitutional revision and amendment, and local government under state constitutions are also emerging from the "gravitational pull"[152] or "shadow"[153] of federal

149. John Kincaid, *Early State History and Constitutions*, *in* THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT 239, 239–40 (Donald P. Haider-Markel ed., 2014).

150. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019); *see, e.g.*, League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018) (striking down partisan gerrymandering under state constitution); *see also supra* notes 56–58 and accompanying text; Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 211–13 (2019). *See generally* James A. Gardner, *A Post*-Vieth *Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643 (2004); Schultz, *supra* note 26.

151. *Rucho*, 139 S. Ct. at 2507.

152. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705 (2016) (explaining that federal constitutional interpretations in rights protection and beyond often exert a kind of "gravitational pull" on interpretations of identical or similar state constitutional provisions). However, according to Professor Scott Dodson:

> Constitutional law often involves sensitive and important policy matters, on which local preferences tend to be stronger, more unified, and more extreme than national preferences. Further, state constitutions have a different history and erect a different governmental structure than the federal Constitution. Finally, constitutional governance is the most prominent feature of popular sovereignty, a cherished American ideal. These factors suggest that states should exercise independence in state constitutionalism, relying on the preferences of their particular populaces, with sensitivity to the nuances of their state governmental structures.

*Id.* at 724–25.

153. Williams, *supra* note 24 at 359–61.

constitutional law. These additional elements of state constitutional law will be with us from now on. I want to give a brief introduction to each of these important areas of state constitutional law.

### *A. Separation of Powers*

As Justin Long has demonstrated, state government structure and separation of powers arguments can be utilized to protect what we think of as "rights."[154] State constitutional distribution of powers and checks and balances arrangements have evolved differently from those of the more familiar Federal Constitution.[155] Paul Verkuil posed the question in the federal context: "The question for the judiciary is how closely should it umpire the activities of the policymaking branches."[156] This question applies equally to the state courts.

As important as the "protection" of one branch from another is, the underlying goal of judicial enforcement of separation of powers principles is the *liberty of the citizens*. The judicial role in separation of powers cases, particularly those involving encroachment, "ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government."[157] The New Jersey Supreme Court stated that encroachment problems require much greater judicial scrutiny than do abdication problems.[158]

Importantly, unlike federal constitutional rights, which through the Supremacy Clause and the Fourteenth Amendment provide a minimum standard of rights in the states, federal separation of powers standards and doctrines do not apply to, or limit, states' separation of powers. As Dean Robert Schapiro noted, federal separation of powers doctrines have never been incorporated to apply to state governments.[159] He advised:

> The unincorporated status of federal separation of powers law also means that judicial restraint does not counsel lockstep

154. Justin R. Long, *State Court Protection of Individual Constitutional Rights: State Constitutional Structures Affect Access to Civil Justice*, 71 RUTGERS U. L. REV. 937, 939 (2018).

155. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 821–26 (1991). *See generally* WILLIAMS, *supra* note 7, at 303–12.

156. Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 302 (1989).

157. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1565 (1991); *see* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse,* 4 ROGER WILLIAMS U. L. REV. 79, 81 (1998).

158. *See* Communications Workers v. Florio, 617 A.2d 223, 232 (N.J. 1992) ("Although both the giving and taking power can be constitutional if not excessive, the taking of power is more prone to abuse and therefore warrants an especially careful scrutiny.").

159. Schapiro, *supra* note 157, at 94.

> interpretation. Diverging from federal doctrine will not impose additional restraints on state officers; nor will following federal doctrine minimize judicial regulation of other branches of state government. To put it slightly differently, in the separation of powers area state courts have nowhere to hide. Federal law provides no constitutional floor. Responsibility for the restrictions the court imposes cannot be laid at the feet of the United States Supreme Court. . . . [F]ollowing the federal lead would mean that state courts might well impose significant restrictions on the actions of other state governmental actors. Deviating from federal doctrine and adopting a more flexible approach might better advance the goal of judicial restraint.[160]

Despite these truisms by Dean Schapiro, many state courts continue in lockstep with federal law.[161] This is true even though state courts will be much more involved with separation of powers disputes than federal courts, even intra-branch disputes.[162]

In a deeply researched and analytical study, Professor Miriam Seifter concluded that many modern state governors "possess new and extensive powers to set state agendas."[163] Through their formal powers to reorganize state government, appoint officials, veto budgetary items, and control state administrative agencies, as well as their informal powers, such as helping to shape national policy and "supporting or resisting federal actions on immigration, environmental law, healthcare, and

160. *Id.*

161. *See* James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 109 (1998); *see, e.g.*, Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54 (1998); Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031, 1031 (2003). For a very important state-specific separation of powers analysis, of the type advocated by Professor Schapiro above, see Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1083–84 (2004). In this Article, Professor Zasloff discusses the issues in litigation that were later decided by the California Supreme Court. *See generally id.* (citing Marine Forests Soc'y v. Cal. Coastal Comm'n, 113 P.3d 1062 (Cal. 2005)). *See also*, *e.g.*, S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 744 S.E. 2d 521, 525–26 (S.C. 2013) (examining a claim under state constitutional separation of powers doctrine). A major effort was mounted in Rhode Island, and the state constitution was amended in 2004 to provide a clearer statement of separation of powers and to prohibit legislative appointments to executive agencies and boards. *See* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 78 (2004).

162. Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence*, 46 WM. & MARY L. REV. 1273, 1274–75 (2005); WILLIAMS, *supra* note 7, at 300–01.

163. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485–86 (2017).

more,"[164] she concludes that "in the past century, and especially in recent decades, most governors have gained a spate of powers that eclipse not only their Founding-era authority, but also the domestic powers of modern Presidents."[165]

Most governors are even subject to less interest group and media scrutiny than the President.[166] Further, state executive branch structures, such as plural executives, can differ substantially from the federal model and from state to state.[167]

In recent years, we have seen two examples of state legislatures controlled by one political party, in lame-duck sessions, enacting laws to drastically limit the power of the incoming governors of the opposite party.[168] The outgoing governor, of the same party, willingly signs such legislation.[169] Professor Miriam Seifter has referred to such legislative actions in North Carolina and Wisconsin as "power plays."[170] In both states, separation of powers challenges were filed with mixed results.[171] This may be a development that calls for some form of constitutional amendment limiting legislative power in lame-duck sessions.

### *B. State Constitutional Amendments*

Complete revision and replacement of state constitutions by constitutional conventions, relatively common in prior years, has become quite unusual in the last half-century.[172] Now, and possibly for the foreseeable future, state constitutions are likely to be updated only through "piecemeal" amendment.[173]

Political scientist John Dinan's 2018 book, *State Constitutional Politics: Governing by Amendment in the American States*, collects and expands on much of his long-time and deep research into this field. [174] The title reflects the tendency of the states to modify their constitutions'

164. *Id.* at 486.
165. *Id.* at 487.
166. *Id.* at 523–25.
167. WILLIAMS, *supra* note 7, at 303.
168. Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1224 (2019).
169. *See*, *e.g.*, *id.* at 1225–26.
170. *Id.* at 1224.
171. *Id.* at 1224–28.
172. WILLIAMS, *supra* note 7, at 382 n.140, 399 n.234; Sanford Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 227–32 (2016).
173. Thad Kousser, *The Blessings and Curses of Piecemeal Reform*, 44 LOY. L.A. L. REV. 569, 573 (2011); WILLIAMS, *supra* note 7, at 361.
174. *See generally* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018).

rights, government structure, and policy provisions at a very significant rate.[175] It will be the standard in this field for some time to come. He concludes:

> Amendments can alter institutions in two main ways: by changing the structure of institutions and means of selecting officials or by shifting authority among institutions and officials. Amendments can alter understandings of rights in either of two ways, whether defining rights in advance of court decisions or overturning understandings of rights expressed in court decisions. Policy amendments also take different forms, whether preventing passage of policies, initiating policies, or authorizing policies in the face of constraints preventing their adoption.[176]

Of course, almost none of these take place in the federal government.

Law professor Jonathan Marshfield has completed a number of pieces on his long-range research into state constitutional change and its effects. He extended the study of "informal change" in state constitutions[177] by examining one element of informal change: state supreme courts overruling their earlier interpretations of their state constitutions.[178] He compared the numbers of formal amendments to state constitutions with the informal "amendments" deriving from decisions overruling precedent, concluding: "In short, although formal amendments vastly outnumber informal amendments by courts in the aggregate, informal amendment regarding individual rights was more prevalent than formal amendment. This generally holds true across states and time; suggesting that there is something special about the relationship between courts, informal amendment, and rights."[179] Marshfield noted that "[v]arious states with high formal amendment rates also have some of the highest rates of informal amendment by courts."[180]

175. *Id.* at 3 (discussing a "distinctive form of constitutional politics in the states.").

176. *Id.* at 280.

177. Such prior study included, for example, Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387, 388–89 (2015) ("An informal constitutional change occurs where the enforceable meaning of the constitution changes without altering the constitutional text.").

178. Jonathan L. Marshfield, *Courts and Informal Constitutional Change in The States*, 51 NEW ENG. L. REV. 453, 459 (2017).

179. *Id.* at 488.

180. *Id.* at 489. See generally Robert F. Williams, *New Light on State Constitutional Change*, 51 NEW ENG. L. REV. 547, 547–58 (2018), for my thoughts on Marshfield's findings.

Marshfield also noted the effect of possible override by amendment of expansive state civil liberties rulings on state judges' considerations,[181] together with a number of other important considerations of state constitutional amendments.[182]

Again, by contrast to federal constitutional law, state courts are much more deeply involved in the process of state constitutional amendment and revision.[183]

### *C. State Constitutional Law of Local Government*

Both progressives and conservatives have discovered the law-making power of *local governments* which in many states takes place under the state's constitutional home-rule provisions.[184] Battles over local regulation of single-use plastic bags, Styrofoam, right to work, minimum wage and living wage, guns, smoking, as well as many other topics now take place in the nation's localities.[185] These are usually fueled by national interests. Many state constitutions empower state legislatures (often more conservative) to "preempt" such local lawmaking (often more progressive).[186] Such preemptions serve to curtail the purpose of state constitutional home rule in what Richard Briffault called *The Challenge of the New Preemption*.[187]A 2017 report of the National League of Cities warned:

> State legislatures have gotten more aggressive in their use of preemption in recent years. Explanations for this increase include lobbying efforts by special interests, spatial sorting of political preferences between urban and rural areas, and single party dominance in most state governments. This last point is particularly important. As preemption efforts often concern a

181. *See supra* notes 141–44 and accompanying text.

182. *See*, *e.g.*, Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 262–63 (2016) (considering the effect of state constitutional relative ease of amendment on judicial interpretation); Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. UNIV. L. REV. 65, 65 (2019) (submitting an argument that significant constitutional change may only be presented to voters by constitutional conventions); Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 502 (2016) (exploring the improvement of the amendment approval process through required county debate and approval).

183. TARR, *supra* note 27, at 26; WILLIAMS, *supra* note 7, at 113–14.

184. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018).

185. *Id.* at 2000–01.

186. *Id.* at 1997–98.

187. *See generally id.*

politically divisive issue, they rely on single party dominance to pass through state legislatures.[188]

In another important state constitutional change, a number of states have amended their constitutions to include legally enforceable restrictions on state "unfunded mandates" imposed on local governments.[189] These constitute *legal* restrictions on what used to be *political* controversies and have added new matters to the state courts' constitutional dockets.[190]

## IV. CONCLUSION

Since state constitutions' importance burst out of relative obscurity onto the legal and political scene in the 1970s, our understanding of their unique and democratic qualities, particularly in contrast with the more familiar Federal Constitution, has grown steadily.[191] We have learned and experienced an immense amount. It is clear now that this evolution will continue into the future. A new generation of lawyers, judges, and scholars is poised to carry all of these activities forward. I believe our *Rutgers University Law Review* will continue to play an important role in these developments.

188. NATIONAL LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2017).

189. WILLIAMS & FRIEDMAN, *supra* note 79, at 892–94.

190. *Id.*

191. Williams, *supra* note 7, at 31 ("In a number of important ways, the state constitutions can be considered more 'democratic' than the federal Constitution."). For a major new assessment of state constitutions, see generally Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutional Law*, 119 Mich. L. Rev. (forthcoming 2021).