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DOES THE NEW JUDICIAL FEDERALISM HAVE A FUTURE?

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I. INTRODUCTION

In the 2019 annual Robert F. Williams State Constitutional Law Lecture, which was also his valedictory address, Professor Robert Williams reviewed the progress of the New Judicial Federalism. This reliance by state judges on their state constitutions to provide greater protections for rights than were available under current interpretations of the Federal Constitution by the U.S. Supreme Court was, he observed, "[t]he signature development in state constitutional law over the past

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several generations."[1] While acknowledging that the New Judicial Federalism is no longer new, he denied that it is of merely historical interest.[2] Rather, "[s]tate [c]onstitutional [l]aw [i]s [h]ere [t]o [s]tay,"[3] even if the focus of litigation may shift over time, and even if other actors—governors, state legislatures, and the state populace itself through constitutional amendments—may now play an increasing role in shaping state constitutional law.

Recent commentators have offered widely divergent assessments as to the continuing significance of the New Judicial Federalism and of state constitutional law more generally.[4] Erwin Chemerinsky has emphasized the limited reach of state constitutional rulings, terming state constitutional law "a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution."[5] Neal Devins has suggested that the polarization of American politics has circumscribed the opportunities for judges to intervene in support of rights claims and indeed has affected their willingness to do so, while simultaneously limiting the durability of the constitutional rulings they announce.[6] On the other hand, Judge Jeffrey Sutton has celebrated the continuing importance of state constitutional law in the American federal system,[7] and Robinson Woodward-Burns has argued that state constitutions continue to complement the U.S. Constitution, providing a dynamism lacking in the Federal Constitution.[8] My essay seeks to contribute to this discussion by assessing the prospects for a reinvigorated New Judicial Federalism.

1. Robert F. Williams, *The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 951 (2020). The lecture on which the article was based was the thirty-first Annual Lecture on State Constitutional Law but the first under the title of the Robert F. Williams State Constitutional Law Lecture. *Id.* at 950. The new title for the lecture series is certainly apt.

2. *See id.* at 951.

3. *Id.* at 974.

4. *See infra* notes 5–8 and accompanying text. This is not a new concern. *See, e.g.*, Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 275–79 (1998).

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

6. *See generally* Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129 (2019) [hereinafter *State Constitutionalism*]; Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010). These essays review Devins's arguments in detail below.

7. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022).

8. *See* ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 193 (2021).

II. A THOUGHT EXPERIMENT

Imagine if you will the following scenario: A conservative Republican presidential candidate criticizes the U.S. Supreme Court and pledges during his campaign to appoint very different Justices should he be elected President. Upon election, vacancies quickly develop on the Court, allowing the President to deliver on his promise during his first four years in office. His appointments dramatically change the balance of power on the Court and produce the promised conservative shift in its jurisprudence. The Court refuses to extend principles enunciated in prior decisions, narrows or altogether overrules both some recent decisions and some well-established precedents, and gives every indication that the domination of the Court by conservative jurists will produce a revolution in constitutional law.

One may of course applaud or lament this development, depending upon one's political perspective, but no one is likely to have trouble imagining the scenario—indeed, it seems to be taken directly from yesterday's headlines, drawing on events since 2017. Yet it is not. What I have described occurred a half century earlier with the election of Richard Nixon as President, and the four appointments he made to the Supreme Court during his first term in office.[9] These appointments created a new Court majority that dramatically changed the orientation of that Court, leading commentators to dub it the Nixon Court.[10] The reconstituted Court trimmed back Warren Court rulings on criminal procedure and the rights of defendants, retreated from the Warren Court's aggressive approach to school desegregation, and declined invitations to promote educational equality by invalidating the states'

9. James D. Robenalt, *Richard Nixon Considered Naming the First Woman to the Supreme Court. He was Thwarted.*, WASHINGTON POST (Jan. 31, 2022, 7:00 AM), https://www.washingtonpost.com/history/2022/01/31/richard-nixon-mildred-lillie-supreme-court/. In 1969, President Nixon appointed Warren Burger to succeed Earl Warren as Chief Justice. *Id.* In 1970, he appointed Harry Blackmun to succeed Abe Fortas, and in 1972, he appointed Lewis Powell to replace Hugo Black, and William Rehnquist to replace John Marshall Harlan. *Id.*

10. *See* EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW 3 (2016); *see also* KEVIN K. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 84 (2011). Not all commentators agree that President Nixon's appointees introduced dramatic changes in constitutional law. *See* RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 2–3 (1977); Thomas I. Emerson, *Freedom of the Press Under the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 1, 1–2 (Vincent Blasi ed., 1986). As the title of Professor Blasi's book indicates, over time, commentators have tended to identify the Court based on the name of the Chief Justice rather than the name of the President who appointed them. *Id.*

approach to funding of public education or to promote access to housing by invalidating exclusionary zoning.[11]

Yet the ease with which one can confuse the creation and legacy of the Nixon Court with the current situation may be pertinent to the future of the New Judicial Federalism. After all, it was President Nixon's appointment of Chief Justice Burger and three other Justices to the Supreme Court that provided the impetus for the development of the New Judicial Federalism. The Nixon Court's anticipated—and in some ways actual—retreat from the activism of the Warren Court encouraged civil-liberties litigants to look elsewhere for redress, and this search led them to state constitutions and state courts.[12] Some pioneering state supreme courts responded positively to litigants' novel arguments based on state constitutions, and their leadership in turn encouraged other state courts to look to state bills of rights in deciding cases. Indeed, whereas from 1950 to 1969 state courts in only ten cases "rel[ied] on state guarantees to afford greater protection than was available under the Federal Constitution[,] . . . from 1970 to 1986 they did so in over three hundred cases."[13] These rulings included major initiatives on topics as diverse as school finance, exclusionary zoning, the rights of defendants, and the right to privacy.[14]

Yet the uncanny resemblance between the creation of the Nixon Court and the creation of, what I shall for the sake of symmetry label the Trump Court, raises an obvious question. If the conservative shift in the earlier era produced the New Judicial Federalism, will history repeat itself? Do current circumstances herald the creation of a reinvigorated New Judicial Federalism? While prognostication is always perilous, the thought experiment has identified some parallels between the two situations, and there are others. But there are also differences that may affect the prospects for a renewed state constitutional law.

11. On criminal procedure and the rights of defendants, see MALTZ, *supra* note 10, at 74–75; MCMAHON, *supra* note 10, at 87. On school desegregation, see MALTZ, *supra* note 10, at 77, 83–87; MCMAHON, *supra* note 10, at 87, 102–03. On public-school finance, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973), and on exclusionary zoning, see *Warth v. Seldin*, 422 U.S. 490, 493, 502 (1975).

12. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–65 (1998); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 115 (2009).

13. TARR, *supra* note 12, at 165–66.

14. *Id.* at 166. For a survey of early rulings under the New Judicial Federalism, see *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982). For a later comprehensive overview, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES (4th ed. 2006).

III. THE CHALLENGES THAT WERE OVERCOME IN CREATING THE NEW JUDICIAL FEDERALISM

Prior to the 1970s, state courts contributed little to civil-liberties jurisprudence, despite the availability of state bills of rights and the limited involvement of federal courts until the mid-twentieth century in safeguarding civil liberties.[15] One explanation for this failure was the absence of a model of how state judges might develop such a civil-liberties jurisprudence, as well as the tools—arguments by advocates and legal briefs—necessary for the judges to develop a state constitutional jurisprudence.[16] Only when circumstances brought a combination of state constitutional arguments, plus an example of how courts might develop their protections of constitutional rights, could such a state civil-liberties jurisprudence develop. The activism of the Warren Court supplied state courts with such a model, and the briefs of civil-liberties advocates seeking an alternative to the Nixon Court suggested how they might embrace that model. Moreover, once some state courts pioneered such state constitutional activism, their example encouraged other state courts to follow their lead. Only then did the New Judicial Federalism emerge.[17]

Another concern during the early days of the New Judicial Federalism was the legitimacy of the endeavor. When state courts began to rely on their state bills of rights to afford protections unavailable under the Federal Constitution, critics charged that their rulings were reactive and result-oriented, merely attempts to evade rulings of the Nixon Court with which they disagreed.[18] These criticisms had an effect, spawning an extensive literature addressing the distinctiveness of state constitutions and the circumstances under which independent interpretation of state

15. TARR, *supra* note 12, at 162–64.

16. *State Constitutionalism*, *supra* note 6, at 1142.

17. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV., 1097, 1110–11 (1997).

18. For criticism of the New Judicial Federalism as reactive and result-oriented, see EARL M. MALTZ, *The Political Dynamic of the "New Judicial Federalism"*, *in* 2 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 233, 233 (1989) [hereinafter *The Political Dynamic*]; Steven J. Twist & Len L. Musil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005, 1006 (1989); George Deukmejian & Clifford M. Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 975–76 (1979). Even some proponents of the New Judicial Federalism described it as evasive. *See, e.g.*, Donald E. Wilkes, Jr., *The New Judicial Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425 (1974).

constitutional provisions was appropriate.[19] The persuasiveness of these responses muted the challenges to the New Judicial Federalism, although criticism of particular state constitutional rulings of course continued.

A final concern was how the U.S. Supreme Court would respond to the novelty of state court rulings based on state declarations of rights. Crucial to the emergence of the New Judicial Federalism was the timely encouragement it received from Justices of the Supreme Court. The most significant endorsement came from Justice William Brennan, who in a famous 1977 article in the *Harvard Law Review* noted that "[s]tate constitutions, too, are a font of individual liberties" and cautioned that "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law."[20] The impact of this article is hard to overestimate. As Robert Williams has noted, "[d]uring the decade after Justice Brennan's Article, the number of state cases recognizing rights beyond the federal minimum standard increased exponentially!"[21] Likewise important was *Pruneyard Shopping Center v. Robins*, in which a unanimous Supreme Court endorsed state courts' reliance on their state constitutions to extend rights protections, noting that its rulings under the Federal Constitution did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[22] Similarly, in *Michigan v. Long*, the Court recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."[23] These statements promoted litigation challenging state laws or practices based on state guarantees, and they also encouraged state supreme courts to base their rulings on those guarantees, although the courts' attention to those provisions did not necessarily result in interpretations that diverged from those of the Supreme Court.[24] When the Supreme Court sometimes denied that challenged state rulings were based on independent and adequate state grounds, dissenting Justices often

19. For a survey of this literature and an elaboration of the most persuasive response to the critics, see WILLIAMS, *supra* note 12, at 135–232.

20. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Justice Brennan continued his advocacy in dissenting judicial opinions. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1976).

21. Williams, *supra* note 1, at 953.

22. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

23. Michigan v. Long, 463 U.S. 1032, 1041 (1983) (citing Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940).

24. *See* TARR, *supra* note 12, at 165–68.

reiterated that reliance on state constitutions was a valid and important aspect of American federalism.[25]

IV. THE OBSTACLES TO REINVIGORATING THE NEW JUDICIAL FEDERALISM IN THE TRUMP COURT ERA

None of the challenges associated with the creation of the New Judicial Federalism are likely to prevent a reinvigoration of the New Judicial Federalism today. If state judges until the Warren Court era lacked a model for how to interpret constitutional guarantees of rights, that is emphatically no longer the case. State courts are well aware of state constitutional guarantees and have considerable experience interpreting them, and litigants regularly invoke them in cases before state courts.[26] Indeed, litigants now may even choose to file cases in state court and argue them on state constitutional grounds as a way of educating the Supreme Court on contentious issues. For example, this appears to be the course chosen in same-sex-marriage litigation.[27]

The emergence of the Trump Court has also not renewed challenges to the legitimacy of state constitutional law. Quite the reverse. State court reliance on state bills of rights has become a well-established practice—judges may disagree on the interpretation of those guarantees but not on the legitimacy of consulting them. Indeed, the current emphasis in constitutional law on original meaning and textualism has encouraged a recurrence to state provisions, which often have no federal analogue or are distinctive in their wording.[28] This consensus on the legitimacy of a state constitutional jurisprudence extends to conservative and progressive jurists alike. Indicative of this are the remarks of then-judge Brett Kavanaugh, one of President Trump's nominees to the

25. *See, e.g.*, *Michigan*, 463 U.S. at 1065–72 (Stevens, J., dissenting); Brigham City v. Stuart, 547 U.S. 398, 409 (2006) (Stevens, J., dissenting); Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

26. The "Developments in State Constitutional Law" section of the annual State Constitutional Issue of the *Rutgers Law Review* documents this.

27. *See* Mary L. Bonauto, *Equality and the Impossible: State Constitutions and Marriage*, 68 RUTGERS L. REV. 1481, 1481–82 (2016); *see also* Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1041–42 (2011).

28. There is a vast literature on originalism and textualism. *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 1–8 (2017); JACK M. BALKIN, LIVING ORIGINALISM 3 (2014). On the distinctiveness of rights guaranteed in state constitutions, see TARR, *supra* note 12, at 11–13; Ronald K. L. Collins, Jr., *Bills and Declarations of Rights Digest*, 2485–87, *in* THE AMERICAN BENCH: JUDGES OF THE NATION, (3d ed. 1985-86); *see also* TARR, *supra* note 12, at 194–99 (discussing undertaking an originalist/textualist approach to state constitutional interpretation).

Supreme Court, at the Senate hearings prior to his confirmation. Judge Kavanaugh went out of his way to praise Judge Jeffrey Sutton's recent book on state constitutions, describing it as "a great book about how state constitutions can, and state constitutional law and state statutes can enhance protections of individual liberty, even beyond what the Supreme Court has interpreted the Federal Constitution to be."[29] Other Justices on the Trump Court have also encouraged state judges to rely on their state constitutions.[30]

Nonetheless, there are obstacles to state courts assuming a more active role in protecting rights, even if there are factors promoting such leadership. To understand those opportunities and challenges, one must examine the legal and political context in which state courts now operate.

V. THE AGENDA OF THE NEW JUDICIAL FEDERALISM

Even after the Supreme Court has given its blessing to state courts' reliance on their state bills of rights, state courts cannot act unless cases are brought to them raising claims under those provisions. This can occur in the ordinary course of litigation, or because litigants believe the state courts may be more receptive to their claims, or because the U.S. Supreme Court has indicated an unwillingness to address an issue, obliging litigants to pursue their claims in state courts. Let us compare the early 1970s and the current era in these respects.

A. Normal Business: Criminal Justice

Appeals in criminal cases have historically been an important component of state supreme court caseloads.[31] So it is hardly surprising that when the New Judicial Federalism developed, the majority of claims before state supreme courts under state constitutions were made by defense counsel in the sorts of criminal cases that had always been a part of the courts' caseloads. This was important because criminal procedure and the rights of defendants are topics on which state legislatures seldom

29. *See State Constitutionalism*, *supra* note 6, at 1131 (discussing Judge Kavanaugh's reference to JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)).

30. *See*, *e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2292–94 (2020) (Sotomayor, J., dissenting). *But see* G. Alan Tarr, Espinoza *and the Misuses of State Constitutions*, 73 RUTGERS L. REV. 1109, 1132–33 (2021) (examining Chief Justice John Roberts's opinion for the Court imposing a federal solution that evidenced little appreciation of the distinctiveness of state constitutions).

31. *See* Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 145–46 (1977).

vote and on which rulings are unlikely to overturn the political majority in a state.

The predominance of criminal procedure cases under the New Judicial Federalism reflected more than the realities of court caseloads. Defense attorneys had a strong incentive to explore the potentialities of state protections of the rights of defendants, given their fear of how retrenchment in federal protections under the Nixon Court would affect their clients. When defense counsel invoked state constitutions, often they did so in conjunction with arguments based on federal protections, and state judges either recognized greater protection under the state guarantees or, more frequently, conformed their interpretations of state guarantees to federal precedent.[32] What occurred then was a regularization of consulting state constitutions in the course of the courts' normal business; and as the character of courts' caseloads has not changed, neither has the practice of courts consulting state constitutions in criminal cases. This remains true even after concerns about the Supreme Court's rulings on criminal justice have abated.[33] This well-established aspect of the New Judicial Federalism is likely to continue during the Trump Court era.

B. Supreme Court Abdication

Both the Nixon Court and the Trump Court have seemed to invite state constitutional litigation by declining to address contentious issues affecting all fifty states.[34] This federal reluctance has encouraged litigants to seek state forums and may encourage state judges to take the lead, because they are not similarly constrained by questions of federalism or the difficulty of crafting a solution for all fifty states.[35]

32. *See* TARR, *supra* note 12, at 166–68 (discussing research showing that "decisions based on state constitutions remain a rather small proportion of state criminal-justice and civil-liberties rulings").

33. Williams, *supra* note 1, at 958–59. Recent examples of state supreme courts recognizing that the rights of defendants are broader under state constitutions than under the U.S. Constitution include: *State v. Tsujimura*, 400 P.3d 500, 510–11 (Haw. 2017); *Young v. State*, 374 P.3d 395, 412–13 (Ala. 2016); *State v. Medina*, 2014 VT 69, ¶ 2, 197 Vt. 63, 66–67, 102 A.3d 661, 663–64; and *State v. Short*, 851 N.W.2d 474, 481–83 (Iowa 2014).

34. Neal Devins points out that state supreme courts can avoid controversy by "lockstepping," i.e., following Supreme Court interpretation of the Federal Constitution. *See State Constitutionalism*, *supra* note 6, at 1140–42. But he recognizes that this does not work when the Court has not ruled or when there are no equivalent federal provisions. *Id.*

35. As Justice Ruth Bader Ginsburg observed in her dissent in *Arizona v. Evans*:

> State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints . . . may limit the ability of this Court to enforce the federal constitutional guarantees. Prime among

During the Nixon Court era, this issue was public school finance.[36] In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment did not require equal per-pupil expenditures in a state's school districts, and so Texas's reliance on the property tax to finance public education was constitutional, even if it resulted in substantial funding disparities between school districts.[37] Speaking for a five-member majority that included all of President Nixon's appointees, Justice Lewis Powell—himself a Nixon appointee—emphasized the Court's reluctance to intrude in intrastate fiscal matters, "an area in which it has traditionally deferred to state legislatures."[38] In doing so he stressed "that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues,"[39] and that judicial intervention would "abrogate [the] systems of financing public education presently in existence in virtually every [s]tate."[40] Powell emphasized that these prudential considerations were not to be construed as an endorsement of Texas's system or of those in other states.[41] As Justice Potter Stewart acknowledged in his concurring opinion, "[t]he method of financing public schools in Texas, as in almost

> 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.

Arizona v. Evans, 514 U.S. 1, 30–31 (1995) (Ginsburg, J., dissenting) (citations omitted).

36. Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC, (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/. Robert Williams has noted that the Supreme Court also refused to get involved in the "tort reform wars," likewise provoking extensive state constitutional litigation. Williams, *supra* note 1, at 960.

37. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

38. *Id.* at 40.

39. *Id.* at 41.

40. *Id.* at 44. Federalism concerns were paramount in Justice Powell's opinion:

> While '(t)he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

Id. (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530–32 (1959) (Brennan, J., concurring) (citations omitted). Likewise crucial were considerations of judicial restraint: "We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in [fifty] States . . . ." *Id.* at 55.

41. *Id.* at 58–59.

every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust."[42] But the remedy was to be found at the state level, not in the Supreme Court.[43]

And so it was: thirteen days after the U.S. Supreme Court announced its decision in *Rodriguez*, the New Jersey Supreme Court in *Robinson v. Cahill* unanimously ruled the state's system of public-school finance unconstitutional.[44] Because New Jersey's system of school finance closely resembled Texas's, the New Jersey justices could not base their ruling on the federal Equal Protection Clause, which had been the basis for the claim in *Rodriguez*.[45] The justices instead held that New Jersey's system violated the New Jersey Constitution's requirement that the state provide all children with "a thorough and efficient system of free public school[] [education]."[46] The decision in *Robinson*, following closely upon the U.S. Supreme Court's reluctance in *Rodriguez* to impose a national solution, underscored the potentialities of state constitutional law, and litigants quickly learned the lesson.[47] In the sixteen years following *Robinson*, supreme courts in twenty-one other states heard challenges to their states' system of school finance,[48] with the challenges succeeding in almost half those cases.[49] Litigation on the issue continues to the present day.[50]

The era of the Trump Court offers an interesting parallel. In *Rucho v. Common Cause*, the Supreme Court held that claims of partisan

42. *Id.* at 59 (Stewart, J., concurring). For discussion of the consequences of *Rodriguez*, see Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1971–77 (2008); DOUGLAS REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 7–8 (2001).

43. *San Antonio*, 411 U.S. at 59.

44. Robinson v. Cahill, 303 A.2d 273, 295–98 (N.J. 1973).

45. *C.f. id.* at 283.

46. *Id.* at 285 (quoting N.J. CONST. art. 8, § 4, ¶ 1).

47. Wesley W. Horton, *Memoirs of a Connecticut School Finance Lawyer*, CONN. L. REV. 703, 705–06 (1992). As the victorious attorney in the challenge to Connecticut's system of school finance put it, "[*Robinson* and *Rodriguez*] fired [his] imagination." *Id.*

48. *See* Education Finance Statistics Center, *School Finance Litigation, by Year, Case, and Status, by State: 1970-2009*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/edfin/litigation.asp (last visited Aug. 9, 2022).

49. Successful challenges to state systems of public-school finance included: *DuPree v. Alma School District No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929, 957–58 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Rose v. Council for Better Education*, 790 S.W.2d 186, 215–16 (Ky. 1989); *Helena Elementary School District No. 1 v. State*, 769 P.2d 684, 690–91 (Mont. 1989); *Seattle School District No. 1 v. State*, 585 P.2d 71, 104 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); and *Washakie County School District No. 1 v. Herschler*, 606 P.2d 310, 334–37 (Wyo. 1980).

50. *See, e.g.*, Gannon v. State, 390 P.3d 461, 467 (Kan. 2017) (per curiam); Abbeville Cnty. Sch. Dist. v. State, 767 S.E.2d 157, 159 (S.C. 2014).

gerrymandering were not justiciable under the U.S. Constitution.[51] Speaking for a five-member majority that included the two Justices that had at that point been appointed by then-President Trump, Chief Justice John G. Roberts, Jr. acknowledged that excessive partisan districting was "incompatible with democratic principles."[52] But he insisted that the states were the proper venue to remedy the situation, noting some states' creation of independent districting commissions and state courts' enforcement of state constitutional provisions prohibiting partisanship in redistricting.[53] Perhaps unsurprisingly, the Chief Justice failed to mention that he had recently dissented in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which upheld a constitutional initiative vesting the redistricting power in an independent commission.[54] Some state courts had already begun enforcing those constitutional criteria prior to *Rucho*, and that ruling prompted litigants to shift their efforts to state courts enforcing state constitutions, where they enjoyed some immediate success.[55] It also

51. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

52. *Id.* at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

53. *Id.* at 2507–08. The Chief Justice noted:

> Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

Id.

54. 576 U.S. 787, 824–26 (2015) (Roberts, C.J., dissenting).

55. For a pre-*Rucho* ruling striking down partisan gerrymandering under a state constitution, see *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018). For post-*Rucho* rulings invaliding partisan gerrymanders under state constitutions, see *Harper v. Hall*, 868 S.E.2d 499, 528 (N.C. 2022); *League of Women Voters v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 1665325, at *1 (Ohio Jan. 12, 2022); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Sept. 3, 2019). As of June 2022, seven states have been ordered to redraw legislative or congressional districts by their state courts. *See Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST. (July 1, 2022), www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0.

encouraged the development of a legal literature exploring the role that state constitutions could play in combating gerrymandering and partisan manipulation of elections more generally, supplying legal ammunition for advocates throughout the nation.[56] Put differently, *Rucho* may serve the same function that *Rodriguez* did in encouraging a revival of the New Judicial Federalism.

Or it may not. State constitutions may well be crucial to combatting gerrymandering and other interferences with fair elections, but state courts may not.[57] As Jessica Bulman-Pozen and Miriam Seifter have observed, the focus on courts "may have obscured a simpler point about state constitutions, one that has particular significance today: precisely because they are committed to popular majority rule, state constitutions can help counter antidemocratic behavior."[58] This is particularly true in states where constitutional amendments, oftentimes recently adopted via constitutional initiative, have established independent non-partisan districting commissions that may well prove a more effective means of combating gerrymandering than litigation does.[59]

56. *See* Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 UNIV. PA. J. CONST. L. 203, 208–10 (2019); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 907–16 (2021). The last article examines more broadly the role that state constitutions can play in ensuring popular sovereignty in the states, noting that:

> [A]ll state constitutions expressly confer the right to vote, most require "free and equal" elections or a variation thereon, and some more specifically indicate that voters have an equal right to elect government. State constitutions also seek to foreclose government favoritism. They are explicit about both ensuring opportunities for equal participation and foreclosing special treatment; provisions governing equality, bans on special laws, and general-purpose requirements aspire to prevent "the granting of special privileges for a select few."

Id. at 912–13.

57. *See* Bulman-Pozen & Seifter, *supra* note 56, at 909.

58. *Id.* at 861.

59. *See id.* at 914 n.326 (citing ALASKA CONST. art. VI, § 8; ARIZ. CONST. art. IV, pt. 2, § 1(3); ARK. CONST. art. 8, § 1; CAL. CONST. art. XXI, § 2; COLO. CONST. art. V, §§ 44–44.6, 46–48.4; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; ILL. CONST. art. IV, § 3; IND. CODE § 3-3-2-2 (2019); MICH. CONST. art. IV, § 6; MISS. CONST. art. 13, § 254; MO. CONST. art. III, §§ 3, 7; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; [N.J. CONST.] art. IV, § 3; OHIO CONST. art. XI, § 1; [OHIO CONST.] art. XIX, § 1; OKLA. CONST. art. 5, § 11a; PA. CONST. art. II, § 17; TEX. CONST. art. III, § 28; and WASH. CONST. art. II, § 43 as examples of redistricting commissions that may address state legislative districts, congressional districts, or both).

C. State Supreme Court Initiatives Under State Constitutions

Many cases under the New Judicial Federalism do not fit into either of the preceding categories. They did not arise in the course of the ordinary work of state courts in deciding criminal cases, nor were they the result of abstention or encouragement by the Supreme Court. Rather, they resulted from policy-oriented litigation, in which those advocating policy change or an expansion of rights, oftentimes advocacy groups or individuals supported by such groups, chose to frame their claims in state constitutional terms.[60] The litigants did so because state constitutions seemed to offer the legal ammunition for vindicating those claims, even when the Federal Constitution did not.[61] State constitutions may have contained provisions with no analogue in the Federal Constitution,[62] or they may have employed distinctive language in framing their rights guarantees that justified a different interpretation,[63] or they may have contained long-standing language that could readily be applied to new situations, or they may have included recent amendments addressing issues of current moment.[64] Moreover, the litigants believed that the judges in some states, unlike those on the Nixon Court, might be more receptive to the claims they were advancing, an expectation vindicated in numerous cases.[65] A comprehensive listing of all these New Judicial Federalism initiatives is beyond the scope of this essay, but some examples may indicate the scope and character of these initiatives.

Abortion: After the U.S. Supreme Court in *Harris v. McRae*[66] upheld the Hyde Amendment, under which states participating in the Medicaid program were not obliged to pay for medically necessary abortions for which federal reimbursement was unavailable, the New Jersey Supreme Court ruled that under the New Jersey Constitution the State may not restrict funds to those abortions to preserve a woman's life, but not her

60. *See* Gay L. Students Ass'n v. Pac. Tel. & Tel., 24 Cal.3d 458, 463–65 (1979); Lawrence Friedman, *Reckoning with Dissonance: Thoughts on State Constitutional Law and Constitutional Discourse*, 40 NEW ENG. L. REV. 437, 440 (2005) ("Indeed, the possibility that state constitutions may embrace different understandings of individual rights protections than those accepted by the U.S. Supreme Court lies at the core of the 'new judicial federalism'. . . .").

61. *Gay L. Students Ass'n*, 24 Cal.3d at 466.

62. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95–105 (2014).

63. *Privacy Protection in State Constitutions*, NCLS, (Jan. 3, 2022), https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

64. *Id.*

65. Friedman, *supra* note 60, at 440.

66. 448 U.S. 297 (1980).

health.[67] The supreme courts in a few other states announced similar rulings.[68] Relying on its state constitution's guarantee of a right to privacy, which was adopted in 1970, the Florida Supreme Court invalidated a requirement of parental consent for abortion[69] and a mandatory waiting period prior to abortion.[70]

Capital Punishment: The California Supreme Court struck down capital punishment in the state, contrasting the state constitution's ban on "cruel or unusual" punishments with the ban on "cruel and unusual" punishments found in the Eighth Amendment;[71] the Michigan Supreme Court relied on similar language in the Michigan Constitution to strike down a sentence of mandatory life imprisonment as grossly disproportionate.[72] In 1980 the Massachusetts Supreme Judicial Court struck down the death penalty,[73] and in 1988 the New Jersey Supreme Court curtailed its imposition based on the state constitution.[74] More recently the Washington Supreme Court too has struck down the death penalty under the state's constitution.[75]

Environmental Rights: All state constitutions written since 1959 contain provisions either directing the legislature to protect the environment or guaranteeing public rights to a clean and healthy environment.[76] Although some state supreme courts have been reluctant

67. *Id.* at 311; Rt. to Choose v. Byrne, 450 A.2d 925, 927–28 (N.J. 1982).

68. *See* N.M. Rt. to Choose v. Johnson, 975 P.2d 841, 844 (N.M. 1998); Women of Minn. v. Gomez, 542 N.W. 2d 17, 19 (Minn. 1995); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390–91 (Mass. 1981).

69. *In re* T. W., 551 So.2d 1186, 1194–96 (Fla. 1989).

70. Gainesville Woman Care, LLC v. State, 210 So.3d 1243, 1245, 1265 (Fla. 2017).

71. People v. Anderson, 493 P.2d 880, 888 (Cal. 1972). The California Supreme Court's ruling was overturned by a constitutional amendment, CAL. CONST. art. I, § 27, and three anti-death-penalty justices were voted out of office in retention elections in 1986. *See* John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987) [hereinafter *The Defeat of the California Justices*].

72. People v. Bullock, 485 N.W.2d 866, 875 (Mich. 1992).

73. Dist. Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1286 (Mass. 1980). The Massachusetts Constitution was amended to authorize laws imposing the death penalty, MASS. CONST. art. 116, but a subsequent law reintroducing capital punishment was likewise invalidated on state constitutional grounds in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124–29 (Mass. 1984). Massachusetts currently does not have capital punishment. TRACY L. SNELL, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2020–STATISTICAL TABLES 1 (2020), https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf.

74. State v. Gerald, 549 A.2d 792, 818 (N.J. 1988). This ruling was overturned by a constitutional amendment, N.J. CONST. art. I, §12, but more recently the New Jersey legislature has altogether eliminated the death penalty. N.J. STAT. ANN. § 2C:11-3b (West 2007).

75. State v. Gregory, 427 P.3d 621, 642 (Wash. 2018).

76. For an overview of these provisions, see Barton H. Thompson, Jr., *The Environment and Natural Resources*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE

to invalidate state policies on the basis of these provisions, others have not. Recent examples include the Pennsylvania Supreme Court relying on the state's Environmental Rights Amendment to strike down an oil and gas law designed to facilitate the development of natural gas from the Marcellus Shale,[77] and the Montana Supreme Court invalidating a provision of the Montana Environmental Act that stripped Montanans of the right to challenge mining and other industrial projects.[78]

Exclusionary Zoning: After the Supreme Court ruled that litigants did not have standing to sue to challenge restrictive zoning regulations,[79] the New Jersey Supreme Court ruled that the zoning power, which was delegated to local governments, must be exercised in a manner consistent with the public interest and in particular must not be used by communities to exclude the poor.[80] When localities rejected this mandate and the state failed to act, the New Jersey Supreme Court imposed its own requirements and threatened affirmative judicial decrees against communities that failed to meet their obligations.[81]

Freedom of Speech: State supreme courts relied on the distinctive wording of state guarantees to afford broader protection than that available under the Federal Constitution. The New Jersey Constitution, for example, includes an affirmative right to free speech—"Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right"[82]—and the New Jersey Supreme Court has relied on this language to recognize a right to free speech, including leafletting, in privately-owned shopping malls.[83] The New York Court of Appeals relied on similar language in the New York Constitution to uphold an adult bookstore's right of free expression, despite the

AGENDA OF STATE CONSTITUTIONAL REFORM 307, 307–08 (G. Alan Tarr & Robert F. Williams eds., 2006). Thompson notes that these provisions, which appear in roughly one-third of state constitutions, differ dramatically in their content. *Id.*

77. Robinson Twp. v. Commonwealth, 83 A.3d 901, 975 (Pa. 2013).

78. Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 2020 MT 303, ¶¶ 52–90, 402 Mont. 168, 190–205, 477 P.3d 288, 303–11.

79. Warth v. Seldin, 422 U.S. 490, 493 (1975).

80. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 727–28 (N.J. 1975).

81. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 453–54 (N.J. 1983).

82. N.J. CONST. art. I, § 6.

83. *See* N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994). Not all state supreme courts drew similar conclusions from similar constitutional language. *See* G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 21, 36–37 (Stanley Friedelbaum ed., 1988).

Supreme Court's holding that the First Amendment did not provide this protection.[84]

Separation of Church and State: Some state supreme courts relied on state constitutional bans on aid to religious institutions to invalidate voucher plans or the provisions of services to students attending church-related schools.[85] But other state supreme courts concluded that these provisions did not prohibit programs in which funding went to parents, who could then choose whether to send their children to church-related schools.[86]

Sexual Relations and Same-Sex Marriage: State courts may rely on state constitutional guarantees to reject positions taken by the U.S. Supreme Court. This occurred after the Supreme Court upheld a Georgia sodomy law in *Bowers v. Hardwick*,[87] with several state courts striking down the sodomy laws in their states in the wake of *Bowers*.[88] State courts may also stake out positions on a controversial issue before the U.S. Supreme Court addresses the issue. This occurred in litigation involving same-sex relationships. Even before the U.S. Supreme Court addressed the issue, several supreme courts relied on state guarantees of equal protection to hold that their states could not restrict marriage or the benefits associated with marriage to opposite-sex couples.[89]

84. *Compare* People *ex rel.* Arcara v. Cloud Books, Inc., 503 N.E.2d 492, 494–95 (N.Y. 1986), *with* Arcara v. Cloud Books, 478 U.S. 697, 697 (1986).

85. *See, e.g.*, Cal. Teachers Ass'n v. Riles, 632 P.2d 953, 963–64 (Cal. 1981); Matthews v. Quinton, 362 P.2d 932, 942 (Ala.1961). *See generally* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 95–100 (1989).

86. According to Chief Justice John Roberts, speaking for the Court in *Espinoza v. Montana Department of Revenue*, "[twenty] of [thirty-seven] States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs." Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020).

87. 478 U.S. 186, 186 (1986).

88. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 502 (Ky. 1992); Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. 1996); Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997); Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998); Doe v. Ventura, No. MC01-489, 2001 WL 543734, at *1 (Minn. 2001). The U.S. Supreme Court reversed its position in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

89. *See, e.g.*, Baker v. State, 744 A.2d 864, 867 (Vt. 1999); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

VI. THE POLITICAL OBSTACLES TO A REINVIGORATED NEW JUDICIAL FEDERALISM

State supreme courts played a key role in criminal procedure cases prior to the advent of the New Judicial Federalism, continued to do so while expanding their focus to consider state constitutional claims under the New Judicial Federalism, and are likely to continue to do so in the era of the Trump Court and beyond. State supreme courts have also at times filled gaps created by the U.S. Supreme Court's refusal to get involved in cases involving partisan gerrymandering and other election issues, although political forces within a state may contest the courts' involvement and rulings.[90] Nonetheless, the key issue in determining the future of the New Judicial Federalism is how state supreme courts will respond to policy-oriented litigation rooted in state constitutions in the era of the Trump Court and beyond.

In the 2019 State Constitutional Lecture, Professor Neal Devins addressed this very issue, concluding "I am skeptical that there will be a renaissance of state constitutionalism in the age of party polarization[,]" and, more specifically, that "state supreme courts will rarely use their state constitutions to buck U.S. Supreme Court decision-making."[91] The party polarization that Devins documents in his article is a relatively recent phenomenon.[92] When the New Judicial Federalism emerged in the early 1970s, one could still find liberal Republicans and conservative Democrats, but that is no longer the case. The Republican and Democratic parties have become ideologically defined, with Republicans becoming more conservative and Democrats more progressive.[93] The parties have also become more national—neither party exhibits strong interstate ideological variation, and national interest groups associated with each party play a major role in funding even state races, thereby enforcing ideological conformity.[94] Voters increasingly exhibit strong party loyalties, voting for candidates of the same party for office after

90. Nina Totenberg, *Supreme Court Stays Out of Key State Rulings on Partisan Gerrymandering, For Now*, NPR (Mar. 7, 2022, 6:15 PM), https://www.npr.org/2022/03/07/1084681375/supreme-court-stays-out-of-election-law-for-now.

91. *State Constitutionalism*, *supra* note 6, at 1132–33.

92. For studies on the growth of polarization, see *The Shift in the American Public's Political Values: Political Polarization, 1994–2017*, PEW RSCH. CTR. (Oct. 20, 2017), https://www.pewresearch.org/politics/interactives/political-polarization-1994-2017; Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011).

93. *See State Constitutionalism*, *supra* note 6, at 1148–49.

94. *See* Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/.

office and in election after election, so that most states are identifiably red or blue states, dominated politically by a single party.[95] In 2022, for example, a single party controlled the governorship and both houses of the state legislature in thirty-seven states, while only thirteen states had divided government.[96]

Devins contends that this "party polarization both exacerbates backlash risks and otherwise makes it less likely that state courts will disagree with the legal policy judgments embedded in state laws."[97] If the executive and legislative branches in a state are controlled by a single political party, it is likely that the judicial branch, including the state supreme court, will be as well. Governors will appoint members of their own party to the supreme court, even if the selection system is nominally a merit-selection system.[98] If judges are elected, voters will choose candidates from their own party whether the elections are partisan or nominally non-partisan.[99] These "red and blue state supreme court justices are likely to agree with red and blue state lawmakers and governors. In other words, there are fewer states now than before where the legal policy preferences of state supreme courts vary from those of elected officials."[100] Even if they do, justices will be loath to announce decisions that will leave them open to political retaliation and electoral challenge, particularly when their rulings may be readily reversed via constitutional amendment.[101] Indeed, they may be precluded from announcing such decisions, as states may amend their constitutions to prevent their state supreme courts from following the lead of activist judges in other states, as occurred with same-sex marriage.[102] Thus,

95. *Id.*

96. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Aug. 9, 2022).

97. *State Constitutionalism*, *supra* note 6, at 1141.

98. Aman McLeod, *The Party on the Bench: Partisanship, Judicial Selection Commissions, and State High-Court Appointments*, 33 JUST. SYS. J. 262 (2012); G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 146–47 (2012) [hereinafter WITHOUT FEAR OR FAVOR].

99. *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2–3 (2009). Approximately eighty-nine percent of state judges stand for election at some point in their career. WITHOUT FEAR OR FAVOR, *supra* note 98, at 122. Thirty-five states held state supreme court elections in 2020, with seventy-eight of the nation's 344 state supreme court seats up for election. *See State Judicial Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/State_judicial_elections,_2020 (last visited Aug. 9, 2022).

100. *State Constitutionalism*, *supra* note 6, at 1152.

101. *Id.* at 1159. Devins notes that the "nationalizing of state judicial politics often cuts against expansive state court interpretations of state constitutions. State supreme court justices are particularly wary of running afoul of national interest groups on national issues." *Id.*

102. *See* ALA. CONST. art. I, § 25; HAW. CONST. art. I, § 23; OHIO CONST. art. XV, § 11.

according to Devins, judicial innovation based on state constitutions, if it occurs at all, is likely to be confined to the shrinking number of purple states.

VII. RECONSIDERING THE POLITICAL OBSTACLES TO A REINVIGORATED NEW JUDICIAL FEDERALISM

Professor Devins builds an impressive argument, and I find myself largely convinced by it. Nonetheless, the prospects for a reinvigorated New Judicial Federalism may be less dire than he suggests. First, the political polarization he documents is unlikely to affect the majority of cases in which state courts apply state bills of rights, namely, those involving the rights of defendants, because those rulings are unlikely to threaten the policies of the state's political majority. Admittedly, there are occasions in which state supreme court rulings on criminal procedure have generated a response, usually via constitutional initiatives. For example, the voters in a state may seek through such initiatives to constrain their state supreme court from expanding the rights of defendants by requiring that the justices interpret state guarantees in line with Supreme Court precedent, as occurred in Florida and was attempted in California.[103] A few state supreme court justices have also been targeted, some successfully, because of their rulings on the rights of defendants.[104] Other justices have been the target of campaigns that sought to unseat them by highlighting controversial votes protecting the rights of defendants, even when the real impetus for the challenges was their rulings on other matters, such as tort law.[105] Even so, these episodes have not deterred state judges from consulting state guarantees of defendants' rights, and there is no reason to expect that this practice will change during the era of the Trump Court.

Second, the threats that Devins attributes to political polarization are not dramatically different from those faced by state supreme courts in the heyday of the New Judicial Federalism. This is important because

103. *See* FLA. CONST. art. 1, § 12 (search and seizure); FLA. CONST. art. 1, § 17 (cruel and unusual punishment). A California initiative amendment that would have linked virtually all of the state constitution's criminal procedure rights to federal constitutional interpretation was struck down in *Raven v. Deukmejian*, 801 P.2d 1077, 1185–90 (Cal. 1990).

104. In 1996, Justice Penny White in Tennessee and Chief Justice David Lanphier in Nebraska were defeated in retention elections after well-funded campaigns that highlighted their votes in controversial criminal cases. *See* WITHOUT FEAR OR FAVOR, *supra* note 98, at 83–84. However, not all efforts to unseat justices based on their votes in criminal cases have succeeded. *Id.*

105. *Id.* at 75.

during that period state supreme courts continued to interpret state declarations of rights expansively even in the face of those threats. One of the threats, albeit one that it is easy to overestimate, is the vulnerability of state supreme court justices to electoral challenge. Prior to political polarization, as Devins notes, "there was little risk of electoral defeat in retention elections. From 1990 to 2000, 1.7% of state justices were defeated in retention elections; from 1994 to 2006, judges lost retention elections around 1% of the time."[106] Yet, with the noteworthy exception of the defeat in 2010 of three justices in Iowa seeking retention in the wake of a ruling striking down a ban on same-sex marriage, party polarization has not dramatically changed things.[107] From 2016 to 2019, retention elections took place for fifty-nine judicial seats on courts of last resort.[108] All fifty-nine of those judges were retained.[109] During that same period, there were ninety-two non-retention elections held, and incumbent judges won reelection 86.6% of the time.[110] It is possible, of course, that state supreme court justices may be overly fearful of running afoul of national interest groups and so may alter their behavior to court prospective voters or to avoid electoral challenges.[111] Nonetheless, Devins notes that currently there are efforts in several states to change the mode of judicial selection, which suggests that political parties and the groups associated with them are not altogether satisfied with their ability to influence the votes of the justices.[112]

Another threat is that given the ease of constitutional amendment in many states, particularly in those states that have the constitutional initiative, opponents of New Judicial Federalism rulings may overturn those rulings via constitutional amendment.[113] Certainly many New

106. *State Constitutionalism*, *supra* note 6, at 1136 (footnote omitted).

107. The defeat of the justices in the wake of *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), was dramatic but likely idiosyncratic, produced by the fortuitous combination of a polarizing issue, an inability to overturn the ruling by constitutional amendment, and the chance opportunity afforded by impending judicial elections. *See* TARR, *supra* note 12, at 178–79.

108. *State Judicial Elections, 2020*, *supra* note 99.

109. *Id.*

110. *See id.*

111. *State Constitutionalism*, *supra* note 6, at 1159–60.

112. *Id.* at 1172–74.

113. *See id.* at 1137. Thus, Devins notes:

> The risk of electoral defeat—while most important—is not the only reason that state supreme courts calibrate their decision-making by taking into account backlash risks. Unlike federal constitutional rulings (which are next to impossible to nullify through legislation or constitutional amendment), state constitutional rulings are far easier to negate.

Judicial Federalism rulings have not been controversial, and some have instead prompted legislative action to further the objectives of the courts' rulings or have encouraged a dialogue between state legislature and state supreme court.[114] Nonetheless, this sort of backlash is a real threat. But the threat is not peculiar to the era of political polarization and perhaps not more severe now than in the past.[115] Even in the heyday of the New Judicial Federalism, constitutional amendments were used to overturn unpopular rulings.[116] In the 1970s and 1980s judicial rulings on the death penalty in California, Massachusetts, and New Jersey prompted constitutional amendments overturning those rulings; and when some California justices continued to vote against the death penalty, they were defeated at the polls when they ran for another term on the court.[117] Voters in Hawai'i and California overturned their supreme courts' rulings on same-sex marriage in 1993 and 2008 respectively, long before the era of the Trump Court.[118] Although voters in twenty-nine states amended their state constitutions to ban same-sex marriage from 1998 to 2008, perhaps in part to preclude the courts in their states from legalizing it, this points to the polarizing effect of a single issue rather than an increasing propensity to overturn state court rulings.[119] Certainly the supreme courts of California, Massachusetts, and New Jersey have not been intimidated by the risk of amendments overturning their rulings, and it is unlikely that they will be in the future.

VIII. DOES THE NEW JUDICIAL FEDERALISM HAVE A FUTURE?

Yet the ease with which state constitutions can be amended is important in thinking about the future of the New Judicial Federalism. For the ease of state constitutional amendment and the frequency with

Id.

114. *Legislative Assaults on State Courts—2020*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2020 (last visited Aug. 9, 2022).

115. *The Political Dynamic*, *supra* note 18, at 233–34.

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

117. The California Supreme Court's ruling was overturned by a constitutional amendment and three anti-death-penalty justices were voted out of office in retention elections in 1986. CAL. CONST. art. I, § 27; *see also* John H. Culver & John T. Wold*, Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 83, 86 (1987); *The Defeat of the California Justices*, *supra* note 71, at 349.

118. Richard Wolf, *Timeline: Same-Sex Marriage Through the Years*, USA TODAY, (June 26, 2015, 12:53 PM), https://www.usatoday.com/story/news/politics/2015/06/24/same-sex-marriage-timeline/29173703/.

119. *Id.*

which it occurs may actually encourage the development of state constitutional law. As John Dinan has noted, in recent years amendments "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."[120] Other amendments have addressed issues such as the right to life and the right to bear arms, contesting the U.S. Supreme Court's interpretation of those rights.[121] These amendments enshrine new rights and new policies in state constitutions, typically in provisions that have no analogue in the Federal Constitution, and almost inevitably require interpretation by state supreme courts. Giving effect to these provisions may lead to a reinvigorated New Judicial Federalism that is not, like its predecessor, consistently progressive in its direction.[122]

This in turn highlights a certain lack of clarity in discussions of the New Judicial Federalism. Disagreements about the prospects of the New Judicial Federalism often reflect a subtle disagreement about what is meant by the New Judicial Federalism. Professor Devins emphasizes the factors that discourage state supreme courts from announcing rulings that protect rights beyond those protected under the U.S. Constitution and concludes that the prospects for a reinvigorated New Judicial Federalism are poor.[123] In contrast, Professor Williams focuses on the willingness of state supreme courts to treat state constitutions as distinctive bodies of law that they should consider in reaching their conclusions, whether or not those conclusions lead them to afford greater protection for rights than are available under the U.S. Constitution.[124] Taking state constitutions seriously need not in all cases—or perhaps in most cases—lead to interpretations that diverge from those of the U.S. Supreme Court interpreting analogous provisions. Professor Williams is certainly correct that "state constitutional law is here to stay,"[125] but Professor Devins may also be correct that "state supreme courts will rarely use their state constitutions to buck U.S. Supreme Court decision-making."[126] Thus, how one assesses the prospects of the New Judicial Federalism may well depend upon how one defines the New Judicial Federalism.

120. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1010 (2011) (footnotes omitted).

121. *See, e.g.*, Sean Beienburg, *Contesting the U.S. Constitution Through State Amendments: The 2011 and 2012 Election*s, 129 POL. SCI. Q. 55, 68–69 (2014).

122. *See The Political Dynamic*, *supra* note 18, at 235–36.

123. *State Constitutionalism*, *supra* note 6, at 1175–76.

124. *See* WILLIAMS, *supra* note 12, at 24.

125. Williams, *supra* note 1, at 974.

126. Devins, *supra* note 6, at 1133.