

## INTRODUCTION

*Robert F. Williams\**

This is the thirty-fifth Annual State Constitutional Law Issue of our Law Review. This year, in addition to the annual Robert F. Williams State Constitutional Law Lecture, we held a day-long in-person and remote conference entitled “State Constitutions and the Limits of Criminal Punishments.”<sup>1</sup> The conference was underwritten by the State Law Research Initiative, and I thank its Executive Director Kyle Barry<sup>2</sup> and the Law Review members. It was a big success.

This issue engages with a growing legal movement to challenge excessive criminal punishments—including both prison terms and conditions of confinement—using the various anti-punishment clauses in state constitutions. For decades, most practitioners and jurists largely ignored their own state bans on cruel and/or unusual punishment, giving the last word to federal courts applying the Federal Eighth Amendment.<sup>3</sup> But why? The vast majority of incarcerated people in America are confined under *state* law, and federal rights are necessarily constrained by our federalist system—indeed, the U.S. Supreme Court has been explicit about its reluctance to impose sweeping rules that apply to over fifty different legal systems, while inviting states to expand individual rights on their own.<sup>4</sup> State constitutions provide one path to do so, and recently several state high courts across the country—from Washington to Iowa to Michigan to Massachusetts—have shown how state constitutional analysis can reign in the excesses of our carceral state.<sup>5</sup> With the U.S. still a world leader in incarceration, this issue grapples

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1. Symposium, *State Constitutions and the Limits of Criminal Punishments*, 77 RUTGERS U. L. REV. 927 (2025), <https://state-law-research.org/symposium>.

2. Kyle Barry is the editor of BEHIND THE BENCH (State L. Rsch. Initiative), <https://slri.substack.com>.

3. See generally Rob Smith et al., *State Constitutionalism & the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023).

4. See *Jones v. Mississippi*, 593 U.S. 98 (2021).

5. Kyle C. Barry, *Wyoming Supreme Court Signals Openness to Limiting Excessive Punishments*, STATE CT. REP. (May 14, 2025), <https://statecourtreport.org/our-work/analysis-opinion/wyoming-supreme-court-signals-openness-limiting-excessive-punishments>.

with the power and obligation of state courts to address one of the most urgent civil rights issues of our day.

As the symposium reflects, interest in this area of law has grown enormously since I first engaged with it 40 years ago. In 1986, after I had been teaching state constitutional law for six years, I and my late colleague Marc Feldman prepared an amicus brief supporting a constitutional challenge to New Jersey's death penalty statute. We relied on our state's "cruel and unusual punishment" clause, but also included a unique state constitutional argument linking that clause with our constitution's human rights provision and arguing that they enhanced each other.<sup>6</sup> We were granted oral argument, but the New Jersey Supreme Court rejected all the arguments.<sup>7</sup> This early experience, albeit unsuccessful, with the potential of state constitutional anti-punishment clauses makes it even more gratifying to see these clauses beginning to be recognized by scholars, lawyers and state high courts. It has been my honor to participate in this important symposium.

We were honored to have for the endowed Lecture David Shapiro, then Executive Director of the Chicago Lawyers' Committee for Civil Rights and now Executive Director of the Roderick & Solange MacArthur Justice Center, and an experienced United States Supreme Court and state high court practitioner.<sup>8</sup> He brings direct experience in litigating similar issues in federal court under the Federal Constitution and in state high courts under state constitutions. His Foreword to this Issue delves into the early history of state *judicial* involvement in concerns about prison conditions, the declining *federal* constitutional concern for prison conditions, and links such early judicial involvement to current state constitutional law arguments.<sup>9</sup>

Professor Emily Hughes and Jon Mills presented their article, published here as "The Inner Worth of Dignity," which analyzes in depth the Montana Constitution's clause protecting human dignity and how it informs and enhances the state's prohibition on "cruel and unusual"

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

7. *State v. Ramseur*, 524 A.2d 188, 213 n.12 (N.J. 1987).

8. See, e.g., David M. Shapiro & Monet Gomerman, *To the States: Reflections on Jones v. Mississippi*, 135 HARV. L. REV. F. 67 (2021); David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542 (2019).

9. David M. Shapiro, *Foreword: Perpetual Guardians of the Penitentiary Houses*, 77 RUTGERS U. L. REV. 933 (2025).

punishments.<sup>10</sup> Their analysis, which covers several other states, will prove to be very important in state constitutional law nationally.<sup>11</sup>

Meredith Esser and Kathrina (Kasia) S. Wolfkot spoke about their article “Conditions of Confinement and State Constitutions.”<sup>12</sup> They reviewed the United States Supreme Court’s declining enforcement of Eighth Amendment protections inside American prisons, particularly through procedural limitations and its “deliberate indifference” standard, which often tolerates brutal living conditions and even abuse. Then, they reviewed the variety of state constitutional anti-punishment clauses (not just cruel and/or unusual clauses, but also those unique to state constitutions, such as bars on treating incarcerated people with “unnecessary rigor”) and explained how, if practitioners take these provisions seriously, they can provide a path toward more meaningful rights protections.

Dr. William Berry III of the University of Mississippi School of Law, an expert on cruel and unusual punishment under both federal and state constitutional law,<sup>13</sup> presented his article arguing that state courts should not “lockstep” with the doctrinal frameworks of Federal Eighth Amendment case law. Often, he points out, even state courts that claim independence to reach their own outcomes still depend on legal standards from U.S. Supreme Court cases. He urges state courts to start anew when they consider what their *state’s* use of terms like “cruel” and “unusual” must mean, and starts that process with an array of different possible interpretations.<sup>14</sup>

Our live conference included a terrific panel of state high court justices: Goodwin Liu of the California Supreme Court (remote), Scott Kafker of the Massachusetts Supreme Judicial Court, and Rowan Wilson, Chief Judge of the New York Court of Appeals. They engaged in a thoughtful and candid discussion of state constitutional law litigation in their courts. Justice Kafker and his law clerk Christine Blanchette submitted an article for this year’s Issue discussing the Massachusetts court’s landmark state constitutional decision in *Commonwealth v. Mattis*,<sup>15</sup> which categorically barred all life without parole sentences for

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10. Emily Hughes and Jon Mills, *The Inner Worth of Human Dignity*, 77 RUTGERS U. L. REV. 1013 (2025).

11. See, e.g., Michael L. Smith, *Dignity and Abortion Rights Under State Constitutional Law*, 75 SYRACUSE L. REV. 863 (2025).

12. 77 RUTGERS U. L. REV. 963 (2025).

13. See, e.g., William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021).

14. William W. Berry III, *Unlocking State Punishment Clauses*, 77 RUTGERS U. L. REV. 1033 (2025).

15. 224 N.E.3d 410 (Mass. 2024).

people under twenty-one based on its assessment of the science of brain development.<sup>16</sup> This matter is of signal importance throughout the country. Chief Judge Wilson will be publishing an article in next year's Annual Issue on State Constitutional Law.

Professor Kristen Bell of the University of Oregon School of Law gave an in-depth presentation on the five states with constitutional provisions banning treatment of incarcerated (even pre-trial) persons with "unnecessary rigor," explaining how such rights should also protect people from excessive sentences. She published her article in one of these five states, with the piece now in the Tennessee Journal of Law and Policy.<sup>17</sup>

Dr. Robinson Woodward-Burns, of the Howard University Political Science Department, has contributed his article tracing the Thirteenth Amendment's Punishment Clause,<sup>18</sup> which exempts "punishment for crime" from the constitutional prohibition on slavery, from the Northwest Ordinance through the antebellum state constitutions of the Old Northwest, on to the Thirteenth Amendment and then into later state constitutions.<sup>19</sup> It will be published online in connection with this year's Annual Issue on State Constitutional Law.

My article on techniques to consider when litigating state constitutional claims in the "shadow" of contrary SCOTUS decisions builds on points I have been thinking about for some time.<sup>20</sup> We include it here because of its relevance to the kinds of state constitutional litigation covered in this issue.

The conference was moderated by Adam Sopko, then a staff attorney at the State Democracy Research Institute and now a professor at the University of Colorado School of Law.<sup>21</sup> Adam is already making his mark in state constitutional scholarship and litigation.

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16. Scott L. Kafker and Christine W. Blanchette, *The Supreme Judicial Court Provides Greater Protections Against Cruel or Unusual Punishment for Juveniles and Young Adults: A Convergence of Science and Law*, 77 RUTGERS U. L. REV. 1089 (2025).

17. Kristen Bell, *State Constitutional Prohibitions Against Unnecessary Rigor in Arrest and Confinement*, 17 TENN. J.L. & POL'Y 124 (2024).

18. "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1 (emphasis added).

19. Robinson Woodward-Burns, *For the Punishment of Crime: Slavery, Indenture, and Convict Servitude Under Antebellum Northern State Constitutions*, 77 RUTGERS U. L. REV. COMMENTS. 29 (2025).

20. Robert F. Williams, *Primer on State Constitutional Rights Litigation in a Post-Rucho and -Dobbs World: The Next Wave in the New Judicial Federalism*, 77 RUTGERS U. L. REV. 943 (2025).

21. See, e.g., Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449 (2024); *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144 (2023).

Because of the success of this year's conference, and the interest it has generated in these cutting-edge state constitutional law questions, we decided to extend this topic to next year's Annual Issue on State Constitutional Law. We will not have another in-person conference, but the Annual Williams lecture will be delivered (and streamed) by the Honorable Anita Earls of the North Carolina Supreme Court.<sup>22</sup> The Issue will include articles by Judith Resnik of Yale Law School, Melissa Lee and Jessica Levin of the University of Seattle School of Law, Kyle Barry, and Maya Menlo, who all spoke at this year's conference.<sup>23</sup>

Julie Murray, Co-Director of ACLU's State Supreme Court Initiative, and Bridget Lavender, a Skadden Fellow at the Initiative, will publish their article on litigation barriers in state constitutional civil litigation in the Harvard Civil Rights–Civil Liberties Law Review as part of a symposium on state constitutional law.<sup>24</sup> Syracuse Law Review published a symposium on state constitutional law.<sup>25</sup> Georgia Law Review hosted a conference and will be publishing a symposium on state constitutional law.<sup>26</sup> The University of Kansas Law School has also hosted a conference on state constitutional law<sup>27</sup> and Northwestern University School of Law will host one in November 2025.<sup>28</sup> Jessica Bulman-Posen and Miriam Seifter have published a new casebook on state constitutional law with West Academic Publishers.<sup>29</sup> This is a very important step forward for the field.

We are proud to continue our Law Review's Annual State Constitutional Law Issues well into our fourth decade. Again, we include student-written case comments on some of the most important state constitutional law cases around the country. We believe work on these issues enhances the Law Review students' educational experience, and contributes to the growing understanding of state constitutional law in our country.

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22. See Anita Earls, *Tar Heel Constitutionalism: The New Judicial Federalism in North Carolina*, 133 YALE L.J.F. 855 (2024).

23. Ms. Meno's piece will focus on the Michigan Supreme Court's April 2025 cases extending the state constitutional ban on life without parole to young adults under 21.

24. Julie A. Murray & Bridget Lavender, *Barriers to Vindicating State Constitutional Rights in Civil Litigation*, 60 HARV. C.R.–C.L. L. REV. 887 (2025).

25. Symposium on State Constitutional Rights, 75 SYRACUSE L. REV. 607 (2025).

26. Symposium, *A Nation of States: State Constitutional Rights in the Modern Context*, 59 GA. L. REV. (forthcoming 2025).

27. Symposium, *State Constitutions in Times of Federal Uncertainty*, 74 KAN. L. REV. (forthcoming 2026).

28. Symposium, *The Power of State Constitutional Rights*, NW. U. L. REV. (forthcoming 2026).

29. JESSICA BULMAN-POSEN & MIRIAM SEIFTER, *STATE CONSTITUTIONAL LAW: CASES AND PRINCIPLES* (2025).