PRIMER ON STATE CONSTITUTIONAL RIGHTS LITIGATION IN A POST-*RUCHO* AND -*DOBBS* WORLD: THE NEXT WAVE IN THE NEW JUDICIAL FEDERALISM*

*Robert F. Williams***

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.

Justice William J. Brennan, Jr.[1]

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** Distinguished Professor of Law Emeritus, Rutgers University School of Law.

1. Nat'l L.J. Sept. 29, 1986, at S1, *quoted in* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998).

I. INTRODUCTION

The New Judicial Federalism dawned in the mid-nineteen seventies, in the beginning with criminal procedure cases (both investigative and adjudicative), and then expanding through the next several generations to the whole range of state constitutional rights and liberties.[2] Lawyers saw the advent of the Burger Court as heralding a retrenchment from the Warren Court's progressive rulings through the nineteen fifties and sixties.[3] I have described those developments as unfolding through several different phases,[4] but now we are entering what may be seen as a more pronounced *New*, New Judicial Federalism.[5] The United States Supreme Court of today, with three sitting justices nominated by President Trump, has, at the same time, exhibited both a completely "hands-off" approach to some rights, as well as a very significantly "hands-on" approach to some other individual rights. In the areas of political gerrymandering[6] and abortion,[7] for example, the Court has completely disclaimed authority, for now, over those matters. Further, it is and is likely to continue minimizing other formerly established federal

2. *See generally* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 137–64 (2d ed. 2023).

3. Robert F. Williams, *Foreword: The State of State Constitutional Law: The New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 954–55 (2020).

4. *See* WILLIAMS & FRIEDMAN, *supra* note 2.

5. Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval,* HAST. CONST. LQ. 115 (2022); G. Alan Tarr, *Does the New Judicial Federalism Have a Future?*, 74 RUTGERS U. L. REV. 1405 (2022); Williams, *supra* note 3. For excellent journalistic coverage of the issues discussed in this Article, see Eyal Press, *States of Play: Can Advocates Use State Supreme Courts to Preserve—and Perhaps Expand—Constitutional Rights?*, NEW YORKER, June 10, 2024, at 38.

6. Rucho v. Common Cause, 588 U.S. 689, 716–18 (2019).

7. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022). Professor A.E. Dick Howard made the point that when SCOTUS takes a "hands-off" approach to a certain matter (he was talking about substantive due process claims on state economic regulation), that is an indication that state constitutional claims are most appropriate. *See* A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 881–83 (1976).

constitutional rights.[8] Conversely, it has moved significantly to nationalize rights of firearms ownership and use, as well as individual religion guarantees, thereby occupying those fields to the exclusion of state constitutional law.[9]

These developments in the United States Supreme Court's attitude about federal constitutional rights have made Justice Brennan's perspective on rights even more important today. I have written elsewhere about the new antidemocratic political and legal challenges that increase the importance of structural and separation of powers arguments used in both offensive and defensive contexts.[10] The trend toward illiberal or antidemocratic *national* policies of the Republican Party are flowing down into *state* politics.[11]

Lawyers and judges slowly came to the realization in the 1970s that state courts, as well as federal courts exercising supplementary jurisdiction,[12] could interpret their state constitutions to provide *more* protective rights than those recognized by the United States Supreme Court interpreting the Federal Constitution. This was true whether the

8. *See, e.g.*, Jones v. Mississippi, 593 U.S. 98 (2021); David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 73 (2021); Kathrina Szymborski Wolfkot, *Why Are State Constitutional Challenges to Inhumane Prison Conditions So Rare?*, STATE CT. REP. (Aug. 1, 2024), https://statecourtreport.org/our-work/analysis-opinion/why-are-state-constitutional-challenges-inhumane-prison-conditions-so.

9. *See, e.g.*, N.Y. State Rifle & Pistol Assoc. v. Bruen, 597 U.S. 1, 70–71 (2022) (firearms); Kennedy v. Bremerton Sch. Dist. 597 U.S. 507, 543–44 (2022) (religion); Carson v. Makin, 596 U.S. 767, 788–89 (2022) (religion). *But see* United States v. Rahimi, 602 U.S. 680 (2024) (firearms). These developments show that *state* constitutional law can be influenced by *federal* constitutional law. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 29, 45 (1998).

10. *See* Robert F. Williams, *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*, 2023 WIS. L. REV. 1615. The California Supreme Court's recent decision in *Legislature v. Weber*, 549 P.3d 884, 905 (Cal. 2024) illustrates some of my points. State courts are much more likely than federal courts to become involved in separation of powers, and even intra-branch, disputes. Hans A. Linde, *The State and Federal Courts in Governance: Viva la Difference*, 46 WM. & MARY L. REV. 1273, 1274–75 (2005). Some separation of powers arguments can support *rights* arguments. *See, e.g.*, Justin R. Long, *State Court Protection of Individual Constitutional Rights: State Constitutional Structures Affect Access to Justice,* 70 RUTGERS U. L. REV. 937 (2018); Mothering Justice v. Attorney General, No. 165325, 2024 WL 3610042, at *39–40 (Mich. July 31, 2024); Derek Clinger, *Michigan Supreme Court Strikes Down Legislature's Attempt to Thwart State's Direct Democracy Power*, STATE DEMOCRACY RSCH. INITIATIVE (July 31, 2024), https://statedemocracy.law.wisc.edu/featured/2024/michigan-supreme-court-strikes-down-legislatures-attempt-to-thwart-states-direct-democracy-power/.

11. *See, e.g.*, James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics,* 29 J.L. & POL. 1, 48 (2013).

12. 28 U.S.C. § 1367. *See generally* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS (2021–2022 rev. ed.).

Supreme Court rejected federal arguments entirely or interpreted federal constitutional rights less expansively than argued for by litigants. Based on this phenomenon, lawyers and judges began to refer to the federal constitutional minimum standards of rights as a "federal floor" of rights. This was somewhat of a misnomer, because state courts could actually interpret their state constitutions to provide *less* than the federal national minimum which, nevertheless, had to be enforced by state courts.[13] Further, we came to recognize that the federal floor was in fact a "leaky floor."[14] In other words, when the United States Supreme Court enunciates a multi-part constitutional test, or a balancing test, there are many "leaks" through which state courts could avoid applying the Court's holding.[15] Of course, when the U.S. Supreme Court holds that a certain right exists under the Federal Constitution, that is the supreme law of the land and must be followed by state courts.[16] When, however, the Court holds that a particular right does not exist under the Federal Constitution, or does not extend as far as asserted by the rights claimant, that leaves all of the states' lawmaking tools available for "second looks" at the matter.[17] Still, a negative SCOTUS decision will certainly cast a "shadow"[18] or "glare"[19] over ensuing state constitutional claims. Even today, there is a "gravitational force" that will weigh on state judges to follow ("lockstep") the Supreme Court's decisions even when interpreting their own constitutions.[20] In the words of one commentor:

> Constitutional law often involves sensitive and important policy matters, in 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

13. WILLIAMS & FRIEDMAN, *supra* note 2, at 120–21.

14. Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 232 (2008).

15. *Id.* at 238–39.

16. U.S. CONST. art. VI, C.2.

17. 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, 361 (1984).

18. *Id.* at 366.

19. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1027 (1997).

20. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705, 726 (2016).

> constitutionalism, relying on the preferences of their particular populaces, with sensitivity to the nuances of their state governmental structures.[21]

As we will see, SCOTUS decisions interpreting federal constitutional rights provisions for the whole country are poor precedents for state courts interpreting even identically worded provisions of their state constitutions, reaching decisions that will apply only in their state.[22] As Oregon Justice Hans Linde noted, it is a "non sequitur that the United States Supreme Court's decisions under such a [federal] text not only deserve respect but presumptively fix its correct meaning also in state constitutions."[23]

I. WEAKENING THE POWER OF SCOTUS DECISIONS

Advocates of more protective state constitutional rulings need to develop arguments to counteract this gravitational pull of, and temptation for state courts to lockstep with, negative SCOTUS decisions. The temptation is to avoid discussing such decisions. That is a mistake.

First, before advancing independent arguments under the state constitution, serious attention should be directed to the negative Supreme Court decision advocates are seeking to avoid. Oftentimes, members of the majority opinion itself will make the point that state courts are not obligated to follow the Court's decision. As long ago as 1982 Justice Stevens stated:

> 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.[24]

There are many examples of such statements.[25] Of course, they are truisms, but can be good opening counterweights, where available, to the gravitational force of SCOTUS decisions.

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21. *Id*. at 724–25.
22. WILLIAMS & FRIEDMAN, *supra* note 2, at 165–67.
23. State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983).
24. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).
25. *See* WILLIAMS & FRIEDMAN, *supra* note 2, at 145–46. Even in *Rucho*, the majority opinion advised: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." Rucho v. Common Cause, 588 U.S. 689, 719 (2019).

Even more significantly, however, a negative Supreme Court decision may reflect, either explicitly or implicitly, the majority's view that federalism deference to the states' sovereignty leads it not to adopt a decision that would be binding in all fifty states. This phenomenon of *federalism deference*, or "federalism discount,"[26] can be quite explicit. For example, in *Jones v. Mississippi*[27] the majority held that it would not extend its earlier, protective juvenile sentencing decisions to require a state court sentencing a murderer under eighteen to make a separate factual finding of permanent incorrigibility before imposing a sentence of life without parole. Justice Kavanaugh went so far as to say in the majority opinion:

> Those state practices matter here because, as the Court explained in *Montgomery*, when "a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." … So it is here. Because *Montgomery* directs us to "avoid intruding more than necessary" upon the States, and because a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements.[28]

Justice Kavanaugh continued with an additional expression of the Court's deference to the states:

> Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive

26. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17, 75 (2018).

27. 593 U.S. 98 (2021). *See generally* Khushboo Shah, *What's in an Age: Consider the Neuroscience Dimension of Juvenile Law*, 26 S. CAL. INTERDISC. L.J. 167 (2016).

28. *Jones*, 593 U.S. at 117–18 (citation omitted) (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

> appellate review of life-without-parole sentences. All of those options, and others, remain available to the States. . . . Indeed, many States have recently adopted one or more of those reforms. . . . But the U.S. Constitution, as this Court's precedents have interpreted it, does not demand those particular policy approaches.[29]

Such a statement by a SCOTUS majority is a very important tool for advocates to invoke when their opponent urges a state court to follow the lead of the United States Supreme Court. That Court has, in fact, deferred the matter to your state court to decide independently. For example, when the Court rejected a federal equal protection challenge to deeply unequal state school finance schemes, the majority stated:

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are *always* inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.[30]

Professor Larry Sager has pointed out, as we have just seen, that many of the Federal Constitution's rights guarantees are "underenforced" by the Supreme Court because of this federalism deference to state lawmaking competency.[31] The New Jersey Supreme Court has, as other state courts have, recognized that its state constitutional decisions in cases challenging state and local policies need

29. *Id*. at 120–21.

30. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (emphasis added). The California Supreme Court relied on this statement in partial support of its decision to strike down the state's system of public-school finance. Serrano v. Priest, 557 P.2d 929, 950–52 (Cal. 1976). The dissents in this 5-4 decision have been influential in the ensuing state constitutional litigation over public school finance. *See, e.g.*, *id*. at 951 n. 10.

31. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Sager stated:

> While there is no litmus test for distinguishing these norms, there are indicia of underenforcement. These include disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies . . .

Id. at 1218–19.

not be influenced by SCOTUS' federalism concerns: They apply only in New Jersey![32]

Further to this point that SCOTUS decisions rejecting federal rights claims against state and local governments are not good precedents for similar state constitutional claims, Sager explained that the differing "strategic concerns" in deciding constitutional cases affect SCOTUS differently from state courts.[33] He elaborated:

> State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgements differ . . .[34]

We should also remember that the reasoning of SCOTUS dissents can be quite persuasive in subsequent state constitutional interpretation.[35] In addition to convincing Supreme Court justices in the *future,* SCOTUS dissents can convince current state court judges *now*. I observed many years ago:

> 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.[36]

32. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 281 (N.J. 1973) ("There emerges from the [Supreme Court] majority opinion an evident reluctance to say the Federal Constitution supplies single solutions by which all the States are bound."); State v. Hempele, 576 A.2d 793, 800–01 (N.J. 1990) ("Cognizant of the diversity of laws, customs, and mores within its jurisdiction, the United States Supreme Court is necessarily 'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'" (quoting State v. Hunt, 450 A.2d 952 (N.J. 1982) (Pashman, J., concurring)); *see also* Fletcher v. State, 532 P.3d 286, 308 (Alaska Ct. App. 2023)..

33. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 963–65, 969, 975–76 (1985).

34. *Id.* at 975.

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

36. Williams, *supra* note 17, at 375–76. For early cases relying in part on SCOTUS dissents see Right to Choose v. Byrne, 450 A.2d 925, 932–33 (N.J. 1982); Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 781–82 (Cal. 1981).

Moving back to *Jones v. Mississippi*, Justice Sotomayor's long dissent, joined by Justices Breyer and Kagan, asserted that the majority had ignored or misapplied key precedents, and argued that there was no logic to the majority position given that it said the precedents were not overruled.[37] Her analysis might be quite persuasive when, read together with the majority's expressed federalism concerns, state judges decide whether to follow the *Jones* holding. In these kinds of situations, it can be persuasive to rely on dissents in your argument.

Still another argument, derived from the SCOTUS decision itself, has been described by Professor Louis Bilionis: "Second, the *constitutionally significant facts* may be different at the state and federal levels."[38] He gave examples, where the texts are identical, of search and seizure "reasonable" analysis or cruel and unusual "evolving standards of decency" analysis being different in one state from the analysis for the whole nation.[39] Justice Shirley Abrahamson of Wisconsin dealt with "legislative facts" in a search and seizure case.[40]

Another, related argument that advocates may invoke when they are asking a state court not to follow a SCOTUS decision that is based on a "balancing test" has been proposed by Oregon Justice Hans Linde:

> This court like others has high respect for the opinions of the Supreme Court particularly when they provide insight into the origins of provisions common to the state and federal bills of rights rather than only a contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time and among the several states.[41]

So, as we can see, there are several good reasons for advocates to engage directly with the SCOTUS decision they are asking state courts not to follow. Such decisions may reveal arguments for state courts at least to recognize that they have a duty to examine the state constitutional claims independently, and to resist the gravitational force of the federal decision.

37. Jones v. Mississippi, 593 U.S. 98, 129 (2021) (Sotomayor, J., dissenting).

38. Louis D. Bilonis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1808 (1992).

39. *Id.* He mentioned, in addition, the admonition in many state constitutions requiring "frequent recurrence to fundamental principles." *Id.* at 1810.

40. State v. Rewolinski, 464 N.W.2d 401, 414 n.1 (Wis. 1990) (Abrahamson, J., dissenting). *See generally* Neil Colman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis,* 65 TEMP. L. REV. 1229, 1240–41 (1992).

41. State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983).

Despite the availability of arguments like those described above to blunt the force of SCOTUS decisions in state constitutional litigation, many, and maybe most, state courts still interpret their rights guarantees in "lockstep" with the interpretation of federal constitutional rights guarantees.[42] Based on the gravitational force of Supreme Court decisions, notions that federal and state constitutional law should be "uniform," together with other concerns about disagreeing with SCOTUS, leads many state judges to believe they should follow federal doctrine.

Now is the time for arguments like those above, together with many others,[43] if properly articulated to state courts, to begin to weaken the tendency of these courts to lockstep uncritically with federal rights doctrine and, at least, to keep open minds for arguments such as those below emanating from the state constitutions themselves. At the very least, state courts must recognize that earlier cases where they have said they would follow federal doctrine simply cannot be binding precedents requiring them to do the same in future cases.[44]

Still, however, even after a half century of the New Judicial Federalism, far too many lawyers fail to even raise or argue state constitutional claims independent of their federal arguments. Recently the New Mexico Supreme Court stated, as many other state supreme courts have:

> 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."[45]

How would you like to read that in a case you just lost for a client? What would the client say or do?

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42. WILLIAMS & FRIEDMAN, *supra* note 2, at ch. 7. *See generally* Christopher Green et al., *State-Court Departures from the United States Supreme Court: A Comprehensive Survey*, 92 MISS. L.J. 329 (2023). Justice John Paul Stevens expressed the concern that state courts, through a "misplaced sense of duty," would feel like they *should* follow SCOTUS decisions. *See* Delaware v. Van Arsdall, 475 U. S. 673, 699–700 (1986) (Stevens, J., dissenting).

43. WILLIAMS & FRIEDMAN, *supra* note 2, at 256–63.

44. WILLIAMS & FRIEDMAN, *supra* note 2, at 204 n. 206; *see also* Stolz v. J & B Steel Erectors Inc., 122 N.E.3d 1228, 1236–39 (Ohio 2018) (Fischer, J, concurring); State ex rel. Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 87–88 (Ohio 2024). *See generally* Elizabeth Bentley, *State Court Adherence to Decisions Incorporating Federal Constitutional Law*, 110 IOWA L. REV. 1013 (2025).

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

As long ago as 1983, Justice Robert Jones of Oregon warned that any "lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions of the federal constitution . . . should be guilty of legal malpractice."[46] That was over fifty years ago!

II. ARGUMENTS BASED ON THE STATE CONSTITUTION

After presenting arguments designed to reduce the knee-jerk response that state courts sometimes make to lockstep with federal doctrine, advocates should proceed to arguments that have their basis in the state constitution itself or in the nature of state constitutionalism. Alternatively, the order of these arguments might be reversed based on counsel's determination of what would be most persuasive to the particular state court. As pointed out by Justice Hans Linde, "[to] make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis."[47]

A. Text

There are many different types of state constitutional rights guarantees, ranging from provisions that read identically to their federal analogs all the way to those that have no analog at all in the Federal Constitution.[48] Some do not even appear in the Declarations of Rights. Provisions that are identical to federal guarantees can still be interpreted by state courts to be more protective, not only for the reasons making SCOTUS precedents suspect, but also because state courts are the final arbiters of the meaning of state constitutions.

Former California Supreme Court Justice Joseph Grodin noted: "The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds."[49] Even an "or" instead of an "and" can make a big difference.[50] Other rights, such

46. State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring); *see* WILLIAMS & FRIEDMAN, *supra* note 2, at 169–70.

47. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379, 392 (1980).

48. WILLIAMS & FRIEDMAN, *supra* note 2, at 140–44.

49. Joseph R. Grodin, Commentary, *Some Reflections on State Constitutions,* 15 HAST. CONST. L.Q. 391, 400 (1988); WILLIAMS & FRIEDMAN, *supra* note 2, at 140.

50. *See* Shapiro & Gonnerman, *supra* note 8, at 71; William W. Berry III, *Excavating Mississippi's Punishment Clause*, 94 MISS. L.J. 841, 886–87 (2025).

as free speech[51] and religion,[52] are often expressed in state constitutions very differently, sometimes *affirmatively* rather than *negatively* as they appear in the Federal Constitution.[53] There is no guarantee, however, that a state court will ascribe meanings to such provisions that are different from the federal doctrines enunciated by SCOTUS.

Another point to keep in mind is because state constitutions are so much easier to amend than the Federal Constitution, some of the rights guarantees you may encounter may have been amended over the years–resulting in the current version applicable to your case.[54] In this situation it is important to research the textual changes and the reasons for them.

Sometimes in state constitutional law litigation, although almost never in federal constitutional law, more than one clause might apply to the constitutional violation being asserted. These can be alleged separately and argued individually, with the appropriate trial record being developed. But, in addition, it can be argued that the clauses be interpreted *together,* to enhance each other.

Some state courts have used this approach so that the provisions, applied together, exceed the sum of their parts.[55] For example, the Michigan Supreme Court interprets its search and seizure clause to be enhanced by the textual privacy clause,[56] and enhances its cruel and unusual punishment clause with its more-recent human dignity clause.[57]

Another feature of state constitutional rights protection is that some of these rights do not appear in the state Declarations of Rights, which by contrast to the Federal Bill of Rights, are most often at the beginning of state constitutions. There are some *structural* provisions of state

51. ROBERT F. WILLIAMS & RONALD K. CHEN, THE NEW JERSEY STATE CONSTITUTION 64, 67 (3rd ed. 2023). Our book is part of a fifty-state series of volumes on each state's constitution. *See generally Oxford Commentaries on the State Constitutions of the United States*, OXFORD U. PRESS, https://global.oup.com/academic/content/series/o/oxford-commentaries-on-the-state-constitutions-of-the-us-cotus/ (last visited Sept. 21, 2025).

52. *See generally* Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism,* 7 U. ST. THOMAS J.L. & PUB. POL'Y 192, 198 (2013).

53. WILLIAMS & CHEN, *supra* note 51.

54. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853 (2022).

55. *See* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001; John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733, 757–59 (2022); Martinez-Cuevas v. DeRuyter Bros. Dairy, 475 P.3d 164, 172 (Wash. 2020).

56. State v. Staker, 489 P.3d 489, 494 (Mont. 2021).

57. Quigg v. Slaughter, 154 P.3d 1217, 1222–23 (Mont. 2007).

constitutions that are enforced as *rights* guarantees.[58] The most common examples of this are the education provisions that usually appear in the education articles.[59] Even limitations on laws appearing in the legislative articles, such as the bans on "special laws," are sometimes enforced like rights provisions. Here, equality claims can be supplemented (or repackaged) by separate arguments based on these clauses that also address legislative classifications.[60]

Even though SCOTUS' controversial reliance on "originalism" has been criticized, research into the original meaning of state constitutional rights provisions may be quite persuasive. There is a wave of new scholarship on the origins of "Eighth Amendment analogs" in state constitutions that may be applied by state courts to claims that are no longer viable under the Federal Constitution.[61]

That is, of course, the topic of this Symposium.

B. State Constitutional History

Documentation of the adoption, revision, replacement or mere amendment of state constitutions is much more extensive, available, and often more recent, than that of the Federal Constitution's adoption or amendment.[62] These materials are, however, subject to some difficulties.[63]

Still, these sources are regularly presented and accepted as evidence of constitution drafters' intent at the time provisions were adopted. State constitutional provisions find their way into the constitutions by a variety of avenues: constitutional convention (convention materials such

58. *See, e.g.*, Justin R. Long, *State Court Protections of Individual Constitutional Rights: State Constitutional Structures Affect Access to Civil Justice*, 70 RUTGERS U. L. REV. 937, 939 (2018).

59. *See generally* Jeffery S. Sutton, San Antonio Independent School District v. Rodriguez *and its Aftermath*, 94 VA. L. REV. 1963 (2008).

60. WILLIAMS & FRIEDMAN, *supra* note 2, at 310–12.

61. *See, e.g.*, Mills & Sternstein, *supra* note 55; Kevin Bendesky, "*The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. PA. J. CONST. L. 201 (2023); Maria Hawilo & Laura Nirider, *Past, Prologue, and Constitutional Limits on Criminal Penalties*, 114 J. CRIM. L. & CRIMINOLOGY 51 (2024); Berry, *supra* note 50; *see also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING RIGHTS, CLAIMS AND DEFENSES 10-1 to -32 (3rd ed. 2000); Rob J. Smith, Zoe Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 U. IOWA L. REV. 537 (2023); 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.

62. WILLIAMS & FRIEDMAN, *supra* note 2, at 358–70.

63. *See* Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1170.

as study commission and pre-convention reports, debates, and addresses to the people before voting); the initiative process in those states that permit it for constitutional amendments (newspaper coverage, statements by signature gathers, and official voters' pamphlets); and legislative proposals (study commission reports, legislative debates, ballot descriptions, and newspaper reports). These are all different from each other and must be accessed from different sources.

One of the most surprising elements of state constitutional intent arguments, based on any of these sources, is the concept that, because people vote (except in Delaware) to adopt state constitutions and amendments, they should be interpreted as the "voice of the people."[64] Such a technique of interpretation can, sometimes, be based on newspaper coverage and editorials prior to the referendum vote.[65] This requires journalism research as opposed to traditional legal research.

C. State Constitutional Canons of Construction

Like when interpreting statutes, state constitutional interpretations can be aided by judge-made canons or maxims of interpretation. In fact, many state courts assert that they apply the canons of statutory interpretation to state constitutional interpretation.[66] Accepting this equivalence may be useful to the advocate, but it should be done with some skepticism because the origin of statutes through the legislative process and the origin of state constitutional provisions through a variety of avenues, followed by a vote of the people, result in different kinds of texts.[67]

In addition to canons, there are a variety of other interpretation techniques state courts use in interpreting state constitutional provisions.[68] These are too varied to elaborate here.

D. Out of State Precedent: Horizontal Federalism

Just as in other matters of state law such as torts and contracts, state, but not federal, constitutional interpretation often relies on precedents from other states. This has been called "horizontal

64. WILLIAMS & FRIEDMAN, *supra* note 2, at 355–58. This approach does not apply in Delaware where the people do not vote on constitutional amendments. *Id.* at 45.

65. WILLIAMS & FRIEDMAN, *supra* note 2, at 365–68; Mills & Sternstein, *supra* note 55, at 746.

66. WILLIAMS & FRIEDMAN, *supra* note 2, at 373.

67. *Id.* at 373–74.

68. *See id.* at 353–98.

federalism."[69] Modern legal research techniques facilitate these inquiries, as do publications like the *State Court Report*,[70] *Behind the Bench: State Supreme Court Newsletter*,[71] and the State Democracy Research Initiative's mailing list.[72]

E. Reliance on International and Comparative Legal Norms

Despite some United States Supreme Court Justices' reluctance to rely on international and comparative legal norms when interpreting the Federal Constitution, some state courts have been willing to cite such provisions in interpreting their state constitutions.[73] There are examples from Oregon, West Virginia, Massachusetts and others. Even international treaties can be persuasive.[74]

F. Positive Rights

It is well known that federal constitutional rights are *negative* in nature.[75] By contrast, many state constitutional rights are *positive*. As noted by Mila Versteeg and Emily Zackin, "like most of the world's constitutions, state constitutions contain positive rights, such as the right to free education, labor rights, social welfare rights, and environmental rights."[76] These formulations of rights may be asserted to

69. WILLIAMS & FRIEDMAN, *supra* note 2, at 391.

70. STATE COURT REPORT, https://statecourtreport.org (last visited Sept. 21, 2025).

71. STATE LAW RESEARCH INITIATIVE, https://state-law-research.org/newsletter-blog/ (last visited Sept. 21, 2025).

72. STATE DEMOCRACY RESEARCH INITIATIVE, https://statedemocracy.law.wisc.edu/about (last visited Sept. 21, 2025).

73. WILLIAMS & FRIEDMAN, *supra* note 2, at 395; *see* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 285 n.16 (Mass 2013); *see also* Martha F. Davis, *Getting Comparative Law Right in State Courts*, STATE CT. REP. (Feb. 8, 2023), https://statecourtreport.org/our-work/analysis-opinion/getting-comparative-law-right-state-courts.

74. *See, e.g.*, Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after* Medellin, 115 PENN ST. L. REV. 1051 (2011); Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQ. L. REV. 413 (2015).

75. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

76. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1645 (2014); *see also* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); David Brown, *Montana's Climate Change Lawsuit May See Sequels Across America*, STATE CT. REP. (June 26, 2025), https://statecourtreport.org/our-work/analysis-opinion/montanas-climate-change-lawsuit-may-see-sequels-across-america.

require state or local governments to do something *for* the rights-claimants, rather than to refrain from doing something *to* the rights-claimants.[77]

G. Public Policy Derived from State Constitutions

In a limited set of circumstances, provisions in state constitutions can be incorporated into judicial conceptions of "public policy." For example, even though New Jersey's state constitutional privacy doctrine did not apply to a private employer, that state's supreme court found that the doctrine could form a source of public policy that could be an exception to the common-law "employment at will rule."[78] The constitutional provision is applied *indirectly* through the common law.[79] This way, the state constitutional clause has legal force even in the absence of state action.

H. State Action

Federal constitutional law is known for imposing a strict requirement of "state action" before federal rights can be invoked.[80] Again by contrast, state constitutional rights sometimes do not require state action at all,[81] or are interpreted to require a more relaxed quantum of state action.[82]

I. Adequate and Independent State Grounds

After struggling with the problem of whether it could exercise jurisdiction over state court decisions that mixed up federal and state constitutional doctrines, in 1983 SCOTUS decided there would be a presumption in favor of its jurisdiction in such cases unless the state court included a "plain statement" that "the federal cases are being used only for the purposes of guidance, and do not themselves compel the

77. *See, e.g.*, Lawrence Friedman, *Testing the Limits: Judicial Enforcement of Positive State Constitutional Rights*, 53 DUQ. L. REV. 437 (2015).

78. Hennessy v. Coastal Eagle Point Oil Co., 609 A.2d 11, 17–19 (N.J. 1992).

79. WILLIAMS & FRIEDMAN, *supra* note 2, at 394–95.

80. *Id.* at 218.

81. Hill v. NCAA, 865 P.2d 633, 644 (Cal. 1994).

82. WILLIAMS & FRIEDMAN, *supra* note 2, at 218–21; *see supra* note 80 and accompanying text; *see also* Carlos Chevere-Lugo, *No State Actor, No Problem: State Constitutional Rights and Private Actors*, 76 SYRACUSE L. REV. 607 (2025). *Compare* Flagg Bros. v. Brooks, 436 U.S. 149, 159–63 (1978), *with* Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1172–74 (N.Y. 1978).

result that the court has reached."[83] This is the "adequate and independent state ground doctrine."

When litigating a matter that includes both federal and state constitutional claims, care must be taken to present the arguments separately to avoid mixing up the state and federal arguments. This must be done deliberately. Otherwise even a positive victory in a state high court that mixes up state and federal doctrine can be subjected to a petition for certiorari to SCOTUS, causing a long and expensive delay to your victory even if not granted. If it is granted there will be even more delay and expense, as well as the possibility of having your victory reversed, at least on the federal ground. The state claim will be remanded, where you might still prevail[84]or risk reversal even of the state law claim.[85] Paying attention to the separate presentation of state and federal arguments can help to avoid these eventualities. One way to emphasize the distinction between state and federal arguments is to argue for the court to take the "primacy approach," where it evaluates the state arguments before the federal arguments.[86]

J. Sub-Constitutional State Law Arguments

Even though the focus of this article is state constitutional litigation, lawyers should not overlook state statutory, common law, and administrative law arguments that might be available in addition to their state constitutional claims.[87] Some states have state civil rights statutes that, somewhat like 42 U.S.C. § 1983, provide a cause of action for state constitutional law claims and even attorney's fees.[88] Most state high courts can exercise supervisory powers.[89]

K. Amicus Briefs

We know that major federal constitutional cases can attract dozens of amicus briefs in support of either side. This has been less true at the

83. Michigan v. Long, 463 U.S. 1032, 1040–41, 1044 (1983); WILLIAMS & FRIEDMAN, *supra* note 2, at 149–51.

84. *See., e.g.*, People *ex rel.* Arcara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986).

85. WILLIAMS & FRIEDMAN, *supra* note 2, at 235–36.

86. WILLIAMS & FRIEDMAN, *supra* note 2, at 170–71; *see also* Linde, *supra* note 47.

87. Williams, *supra* note 3, at 970.

88. *See, e.g.*, N.J. STAT. ANN. § 10:6-2 (West 2013). *See generally New Mexico Civil Rights Act Symposium*, 54 N.M. L. REV. 345 (2024).

89. *See* Adam B. Sopko, *The Supervisory Power of State Supreme Courts*, 98 S. CAL. L. REV. (forthcoming 2025). For a discussion of nonconstitutional "prophylactic" rules, see generally Arthur Leavens, *Prophylactic Rules and State Constitutionalism*, 44 SUFFOLK U. L. REV. 415 (2011).

state level. With the recent upsurge in importance and interest in state constitutional law, however, this situation has begun to change. National advocacy groups and others have begun to coordinate the writing of amicus briefs. Those lawyers with significant state constitutional claims would do well to explore the possibility of such briefs, including "Brandeis briefs," in support of their claims.

L. Majoritarian State Constitutional Arguments

We usually think of constitutional rights, both federal and state, as protecting minority, even unpopular, people. There are state constitutional arguments, however, that aim to protect the majority. Back in 1982 the editors of the *Harvard Law Review* stated, "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."[90] Arguments based on bans on special privileges, equality clauses, anti-monopoly clauses, and consumer-oriented, substantive due process can certainly be portrayed in this way. Such arguments might appeal to judges who are not inclined to rule in favor of unpopular minorities.[91]

M. Attorney's Fees

One factor that has inhibited lawyers from bringing affirmative litigation under state constitutions has been the absence of provision of attorney's fees if they prevail.[92] The states that have civil rights acts have solved this problem, so lawyers should check their state laws and include prayers for attorney's fees in their complaints. Even in states without statutory fees provisions, state courts can, in deserving cases, make judge-made fee awards.[93] Under these circumstances, lawyers filing major state constitutional litigation would be wise to include prayers for attorney's fees so that if they prevail to the benefit of large groups of people, it might be worth it to pursue such a judge-made award.

90. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498–99 (1982).

91. WILLIAMS & FRIEDMAN, *supra* note 2, at 222–23; Charles W. "Rocky" Rhodes, *A Silence after* Slaughter-House*: Nineteenth-Century State Constitutional Substantive Rights, Liberties, and Privileges*, 85 LA. L. REV. 439 (2025).

92. Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims,* 63 TEX. L. REV. 1269, 1269–72 (1985).

93. *See, e.g.*, Deras v. Myers, 535 P.2d 541, 550 (Or. 1975); Swett v. Bradbury, 67 P.3d 391, 392–93 (Or. 2003); FRIESEN, *supra* note 61, at ch. 10.

III. AM I OVERLY OPTIMISTIC?

We must, of course, admit that a victory in a state supreme court recognizing an individual right that is more protective than an identical or similar federal constitutional right applies only in a single state and lacks the national reach that a SCOTUS decision carries. As Dean Erwin Chemerinsky noted back in 2010, such a decision is a "second best" alternative to a Supreme Court decision, and therefore deserves only "two cheers."[94] He went on to point out that such state court decisions can be "overturned" by state constitutional amendment, and if the state judges are elected, they can be *targeted* for defeat at the next election, among other limitations.[95] State judges know these things.[96] Professor Neal Devins, in these pages, pointed out a number of reasons why state supreme court justices might not venture to "diverge" from SCOTUS decisions despite their liberty to do so.[97] Jim Gardner has pointed out more reasons for pessimism recently.[98]

Still, most lawyers are not participating in a structured, nationwide litigation plan,[99] but rather representing clients with individual constitutional rights claims that are unlikely to be recognized by SCOTUS or have already been rejected by it. For them, the possibility to prevail on a state constitutional law, or even sub-constitutional state law claim, calls for them to pursue it zealously. It is ordinary, lawyers' hard work. There are no guarantees. As my coauthor Lawrence Friedman and I have stated: "In the end, 'second best' opportunities to expand civil liberties are better than no chances at all."[100] Justice Goodwin Liu of the California Supreme Court pointed out that the redundant possibilities of

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

95. *Id*. at 1698–1703. *See generally* David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90 (2011).

96. *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1656–68 (2010); 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).

97. *See* Neal Devins, *State Constitutionalism in an Age of Party Polarization,* 71 RUTGERS U. L. REV. 1129 (2019).

98. James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703 (2023-2024).

99. *See, e.g.*, Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481 (2016).

100. WILLIAMS & FRIEDMAN, *supra* note 2, at 162.

our federal/state system of constitutional rights litigation were a very positive element of the system.[101]

IV. CONCLUSION

These times call on judges, lawyers, and students who have been primarily interested in, and attentive to, federal constitutional law to expand their horizons to include state constitutional law.

There are now many sources of information on state constitutional law, but still too many people involved in the legal system are underprepared for the next generation of the New Judicial Federalism.

101. *See* Goodwin Liu, *State Constitutions and the Protection of Individual Rights*, 92 N.Y.U. L. REV. 1037 (2017).