JUDICIAL INTERPRETATION AND PRECEDENT

THE VITAL ROLE OF STATE COURTS

2025 FORUM FOR STATE APPELLATE COURT JUDGES

NCJI
NATIONAL CIVIL JUSTICE INSTITUTE

Forum Endowed by Habush Habush & Rottier S.C.

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Foreword

The 33rd Forum for State Appellate Court Judges of the National Civil Justice Institute ("NCJI") was held on July 19, 2025, in San Francisco, California. As with all of our past Forums, both comments and reviews indicated that it was extremely well-received and thought-provoking. This year, judges, practicing attorneys, and legal scholars examined the topic "Judicial Interpretation and Precedent: The Vital Role of State Courts."

The Institute recognizes that state courts play an essential role in the administration of justice in the United States and that state court judges often carry the heaviest judicial workloads. NCJI seeks to support state court judges by hosting annual Forums that bring together judges, academics, and practitioners for a day of meaningful dialogue on pressing issues in civil justice. Through presentations, panel discussions, and small-group conversations, participants exchange perspectives drawn from diverse state court systems. The goal is not necessarily consensus, but deeper understanding—because thoughtful disagreement often yields the most valuable insights.

Since inception, our Forums for State Appellate Court Judges have been devoted to cutting-edge topics, ranging from the court funding crisis, to the decline of jury trials, to separation of powers issues, rulemaking, forced arbitration, judicial transparency, state constitutionalism, aggregate litigation, confidentiality in our public courts, fairness in civil jury trials, and artificial intelligence in our courts. We at NCJI are proud of our Forums and immensely gratified by the growth in interest and attendance we have experienced since inception. A complete listing of prior Forums is provided in an appendix to this report. The reports and research papers—along with most of our other publications—are available for free download on our website: https://ncji.org/

The Institute is indebted to several people who contributed to the success of the 2025 Forum:

- Chief Justice Patricia Guerrero of the California Supreme Court delivered welcome remarks;
- Jonathan Marshfield of the University of Florida Levin College of Law, who wrote and presented the morning paper;
- Our morning panelists Quinn Yeargain, Justice Maria Elena Cruz, R. Jeffrey Lowe, and Lori Rifkin;
- Judge Jacqueline Nguyen of the U.S. Court of Appeals for the Ninth Circuit and Dean Erwin Chemerinsky of the University of California, Berkeley School of Law, who delivered a luncheon keynote;
- Dean Jerry Dickinson of the University of Pittsburgh School of Law, who wrote and presented the afternoon paper; and
- Our afternoon panelists Miriam Seifter, Justice Todd Eddins, Steve Hirsch, and Elizabeth Cabraser.

We are deeply grateful to the individuals who made the 2025 Forum possible: our distinguished speakers, panelists, and the judges who contributed their time and insight. We also recognize the outstanding attorneys who helped moderate the judges' small discussion groups: Jennifer Bennett, David Berger, Gary DiMuzio, Misty Farris, Caragh Fay, Parker Hutchinson, Lucy Inman, Julie Kane, Mike Kelly, Rayna Kessler, Michelle

Kranz, Shelby Leighton, Roger Mandel, Alyson McAllister, Gerson Smoger, Molly Wolfe, Corrie Yackulic, and Genevieve Zimmerman. NCJI also thanks our dedicated staff—Executive Director Mary Collishaw, Academic Program Consultant Professor Marcus Gadson, and Programs Assistant Jennifer Forsythe—whose excellent efforts ensured another successful and thought-provoking event.

Finally, we extend sincere appreciation to our supporters, including individuals, law firms, state justice associations, and the AAJ–Habush Endowment, whose generosity helped make this Forum possible.

We hope you find this report both informative and inspiring as you continue your vital work in the pursuit of civil justice.

Peggy Wedgworth
President, National Civil Justice Institute, 2024–2025

Introduction

On July 19, 2025, 100 judges from 31 states convened in San Francisco, California, for the National Civil Justice Institute's 33rd annual Forum for State Appellate and Trial Court Judges. The topic was "Judicial Interpretation and Precedent: The Vital Role of State Courts."

The day began with welcome remarks from President Peggy Wedgworth of the Institute and Chief Justice Patricia Guerrero of the Supreme Court of California.

The morning panel focused on the paper "Popular Accountability and State Constitutional Law," by Professor Jonathan Marshfield of the University of Florida Levin College of Law. Commentary was provided by Professor Quinn Yeargain of Michigan State University, Justice Maria Elena Cruz of the Arizona Supreme Court, R. Jeffrey Lowe of Lawyers Representing Business, and Lori Rifkin of the Impact Fund.

After a discussion group session, the Luncheon Keynote featured Dean Erwin Chemerinsky of the University of California, Berkeley School of Law and Judge Jacqueline Nguyen of the U.S. Court of Appeals for the Ninth Circuit.

The afternoon panel focused on the paper "The Bottom-Up Constitution: States and the Evolution of American Constitutional Law" by Dean Jerry Dickinson of the University of Pittsburgh School of Law. Commentary was provided by Professor Miriam Seifter of the University of Wisconsin-Madison, Justice Todd Eddins of the Hawai'i Supreme Court, Steve Hirsch of the Complex Appellate Litigation Group, and Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein.

The program concluded with a final discussion group session, followed by a closing plenary. The common ground achieved during the discussion groups, as well as the discussion of any new concepts, appears in the "Points of Convergence" section of this report. At the concluding general session, all Forum faculty members had the opportunity to make final comments and ask questions.

Marcus Gadson
Forum Reporter

Morning Paper, Oral Remarks, and Comments

Welcome Remarks
Chief Justice Patricia Guerrero, California Supreme Court

Good morning, everybody. I want to thank the National Civil Justice Institute, your President, Peggy Wedgworth, and your Executive Director, Mary Collishaw. I was speaking to Mary, and she remembered I had the opportunity to welcome the then-Pound Institute to my home city of San Diego in 2019. Now that I am Chief Justice of the California Supreme Court, I feel like all of California is my home, so I am incredibly pleased to welcome you now to San Francisco. This is, as you may know, where our supreme court is located, so it's an honor to welcome you here today.

I want to welcome my colleagues who are here and friends from our California courts. I see at least one of you here in the audience, and I know there are others who are attending. Welcome to the over 100 judges and justices from the 30 states who are represented here today. Does anyone know who has the most representation? Texas. Welcome to California. And welcome to the very impressive panels, the law professors and attorneys who are serving as your faculty here.

I was especially pleased to see the topic for the Forum for 2025 with the emphasis on the vital role that the state courts play. I had an opportunity in advance to see the very thought-provoking work that has been presented to you by both Dean Dickinson and Professor Marshfield on this topic. I believe you will agree that these are truly excellent resources that will help guide your dialogue here today as you explore how our state courts can have nationwide implications.

I know that I speak for all my counterparts across the country in thanking the authors for recognizing that state courts play a crucial role in the American legal system. While we hear a lot these days about the federal courts, and one in particular, we know that more than 95 percent of all cases are filed in our state courts.

I also wanted to point out the results of a survey from the National Center for State Courts ("NCSC") that many of you may be familiar with as well. This is from December 2024. The reported survey results showed that nearly two-thirds of Americans expressed trust and confidence in America's state courts. I think that's something that we can all be proud of. That did sharply contrast with the results from the confidence surveys for the federal courts or the judiciary as a whole. Reports have shown that public trust in those areas had unfortunately plummeted during that same time period.

We know that much has happened during the first seven months of this year since the NCSC survey was completed. Although there is a risk that there will be some spillover that might imperil the gains that our state courts have made, I am hopeful that that will not be the case. And I am optimistic largely because of all of you here in this room.

I thank you for your ongoing commitment and dedication to protecting individual and civil rights, upholding the rule of law, and treating people who come before you with dignity and with respect in your state courts. Your dedication and your commitment inspire me. That is what the public needs to see to have trust and confidence in our judiciary and faith in our democracy.

Again, thank you for being here. Welcome to San Francisco, California. I hope you enjoy exploring the important topics highlighted in your material, and I thank you for the opportunity to address you and welcome you here today.

Popular Accountability and State Constitutional Law

Jonathan L. Marshfield, University of Florida Levin College of Law

Executive Summary

In this article, Professor Jonathan Marshfield highlights a crucial difference between the U.S. Constitution and state constitutions: how they define "democracy." He explains that while the U.S. Constitution is designed to protect against rash majoritarianism through complex checks and balances, state constitutions are grounded in what he calls "popular accountability constitutionalism." That term refers to the idea that state governments should remain ultimately accountable to the preferences of the state's median voter, not just indirectly through elected representatives but also through direct mechanisms like the initiative, referendum, recall, and constitutional conventions.

Part I explains how the U.S. Constitution limits popular influence through structural design. The Framers feared factionalism and intentionally created a system that diffuses democratic energy through representation, federalism, and entrenched rules.

Part II contrasts this with state constitutions, which emerged from a different set of concerns. State founders worried more about elite corruption than majority overreach and designed constitutions that embraced mechanisms of direct democratic intervention. Professor Marshfield traces how this popular accountability has persisted and evolved through history, from elected governors and judges to constitutional agencies and ballot initiatives. He provides data showing that nearly every state constitution contains numerous provisions explicitly designed to foster accountability to the people. These provisions help explain why state constitutions are often longer, more detailed, and more frequently amended than their federal counterpart.

In Part III, Professor Marshfield argues that courts interpreting state constitutions should take this structural difference seriously. He provides a framework for judicial decision-making rooted in the idea that limitations on popular accountability should be questioned. Courts should also be skeptical of doctrines borrowed from federal law that are premised on institutional arrangements that don't exist in state systems. Professor Marshfield shows that this framework has implications across legal doctrines—from structural questions to rights and remedies. He illustrates how popular accountability can help explain the unique features of state constitutions and supports a more independent and authentic approach to state constitutional interpretation. He concludes that while this approach may not always yield clear answers, it offers a more principled way to understand and develop state constitutional law on its own terms.

Finally, in Part IV, Professor Marshfield argues that popular accountability in state constitutional law has implications for jurists who follow originalist and non-originalist approaches to constitutional adjudication.

American constitutionalism operates against the backdrop of democratic processes, but there are critical differences between how the federal and state constitutions have institutionalized democratic accountability. The federal Constitution is built to fend off rash majoritarianism through internal checks and balances and siphoning democratic accountability into a few highly mediated representative bottlenecks for President and Congress. State

democratic structure is different. State constitutions do not reflect a categorical commitment to representative democracy. Through processes like the citizen initiative, referendum, recall, popular constitutional conventions, judicial elections, and elections for multiple executive and local officials, state constitutional democracy is built around parallel commitments to the purifying virtues of representation and the potency of direct popular interjection in governance I call "popular accountability constitutionalism."

These differences between federal and state democracy should inform how courts decide constitutional cases. Specifically, courts should embrace popular accountability as a legitimate and important state constitutional priority with no clear analog in federal constitutional doctrine. This shift in orientation should empower state courts to depart from federal doctrines that unduly limit or undermine popular democratic involvement in state governance.

This paper explores this idea in detail and provides practical frameworks for state courts. It identifies specific areas where state courts should reconsider federal constitutional precedent and grapples with how state courts might implement a more authentic version of state constitutional structure.

Introduction

American constitutionalism operates against the backdrop of democratic processes, but there are critical differences between how the federal and state constitutions have structured democracy.[1] The federal Constitution is designed to perpetuate a highly mediated, representative, and stable form of democratic governance.[2] Through federalism, the tripartite separation of powers, bicameralism, the electoral college, judicial independence, and the omission of any forms of direct democracy, the federal Constitution places great trust in representation and divided powers to help mitigate the dangers of national populism and rash majoritarianism.[3] As Madison proudly explained in *Federalist 63*, the United States Constitution is defined by "the total exclusion of the people in their collective capacity" from day-to-day governance.[4]

State democratic structure is different.[5] Unlike the federal Constitution, state constitutions do not reflect a categorical commitment to representative democracy.[6] Through processes like the citizen initiative, referendum, recall, popular constitutional conventions, elected judges, and "unbundled" executives, state constitutions reflect a deep skepticism of elected officials and great trust in active popular majorities to correct and control government.[7] This is not to suggest that state constitutions wholly displace representative democracy.[8] They do not. However, as compared to the federal Constitution, state constitutions reflect parallel commitments to the purifying virtues of representation and the potency of direct popular interjections in governance.[9] In the state tradition, both are necessary for good and accountable government.

My core claim in this article is that state constitutionalism is uniquely committed to what I call "popular accountability constitutionalism." I define popular accountability constitutionalism to mean that state government outputs should ultimately align with the preferences of the state's median voter. Popular accountability is not unrestrained majoritarianism, nor does it seek day-to-day direct popular governance.[10] Indeed, popular accountability recognizes that representation can help steer government towards better outcomes and that some misalignment is even desirable, but it also recognizes that representation is susceptible to corruption and malignant misalignment.[11] Thus, popular accountability aspires to overlay representative governance with institutions and processes that empower extant majorities to intervene when they deem it necessary and worthwhile. The driving principle is that government is built to enlist representatives in the yeomen's work of governance but final settling of government outputs ends with extant majorities. Representation is a means, but not the end, of good governance.

The federal Constitution does not embrace popular accountability as I define it here. To be sure, the federal Constitution is built on democratic norms and has become more democratic over time, but it remains "wholly republican."[12] That is, national popular majorities have no direct line of interjection into federal governance. The federal Constitution funnels all pathways of political accountability back into representative offices and mediated institutions. Congress is not popularly accountable because the Senate regulates whatever popular gains accrue in the House of Representatives.[13] Even the Presidency, the office most tightly connected to national popular majorities, is moderated in favor of federalism through the electoral college and various horizontal checks on executive power.[14] Federal courts are, of course, even more entrenched and mediated than either the President or Congress.[15] To top it off, the Constitution does not provide any popular mechanism for changing these structures because Article V's amendment rules run through super-majorities in Congress and the states.[16] As Professor Sanford Levinson has concluded, the federal Constitution is a series of "undemocratic" arrangements locked away from popular majorities by Article V's "iron cage."[17]

State constitutions are built around a wholly different theory.[18] Rather than organize power to moderate popular majorities, state constitutions universally draw on them for legitimacy and preservation.[19] For example, since 1776, the first Article of Virginia's constitution has made clear that all power is vested in the people and that "whenever any government shall be found inadequate…, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal."[20] The story of state constitutionalism since the Founding has been about how to operationalize and stabilize this deep and extreme commitment to popular accountability. The states have taken many twists and turns on this journey: from unrestrained populist legislatures to frequent constitutional conventions, elected judges, recall, referenda, and the initiative. Throughout this history, representative governance was part of the calculus, but popular accountability remained an unwavering state constitutional polestar.[21]

Recognizing popular accountability as deeply embedded in state constitutionalism helps explain why state constitutions look different than the federal Constitution. Unlike the federal Constitution, which is a sparse framework document designed to last for generations, state constitutions are long, detailed, unstable, and include many provisions that look more like statutes or agency rules than higher law.[22] As a result, it's easy to discount state constitutions as frivolous and devoid of any meaningful underlying structure or theory.[23] However, popular accountability helps make sense of these features. State constitutions are not framework documents designed to set up entrenched government beyond the reach of majorities. Instead, they are self-described active instruments of popular control over government. Their principal purpose is to launch government on behalf of the people and formalize realistic tools for ongoing popular accountability. Thus, they reflect fits-and-starts of popular intervention in governance as majorities have, from time to time, realigned state government. Sometimes these adjustments make detailed changes to misaligned substantive policy.[24] Other times, they change political processes and institutions to address structural failures.[25] In any event, a state constitution is fundamentally an account of the push-and-pull between a state's people and their government.

Recognizing popular accountability as uniquely embedded in state constitutionalism should also inform how state courts decide state constitutional cases and assess non-binding federal precedent. I offer two practical implications to help guide state courts. First, when state courts adopt doctrines that impede popular accountability, they, unlike federal courts, should provide an explanation for how those rules cohere with the commitment to popular accountability.[26] It is inherently improper for state courts to assert that limiting popular accountability is a self-justifying objective. To be sure, limitations on popular accountability are appropriate (and prevalent) in state

constitutional law, but such intrusions cannot be legitimated on the basis that they are intrinsic to the nature of American constitutionalism. State constitutions explicitly reject this.

Second, and relatedly, state courts should be deeply suspicious of any federal doctrine that is based on federal institutional analysis.[27] Consistent with its underlying design logic, the federal Constitution has produced a relatively stable set of institutions and processes with archetypal functions designed to entrench the status quo. In contrast, state constitutions have produced a dizzying array of highly contextual and idiosyncratic institutions, processes, and detailed text reflecting fits and spurts of popular reaction to recalcitrant government.[28] State courts should be careful to take these arrangements seriously as a core feature of state constitutionalism and resist doctrines that reduce them down to inapposite Federalist tropes.

To illustrate, consider a recent example from administrative law. In 2022, in *West Virginia v. EPA*,[29] the Supreme Court adopted a broad version of the so-called major-questions doctrine. The doctrine provides that agencies may regulate issues of great "economic and political significance" only when Congress has passed a clear and explicit authorization.[30] A principal justification for the rule is that Congress should have the presumptive authority to make important policy decisions rather than unaccountable agencies and bureaucrats.[31] By funneling important policy decisions back through the full legislative process and away from insulated agencies, the rule is ostensibly a democracy-enhancing measure within the federal government.[32]

Within days of the Supreme Court's ruling in 2022, state courts began to reference the major-questions doctrine in cases involving the authority of state agencies.[33] In many of these cases, courts parroted the Supreme Court's democratic accountability rationale, suggesting that state legislatures must be the presumptive home of policy-making authority for state government to remain democratically accountable.[34] Applying the rule, state courts have invalidated agency rules and executive orders as *ultra vires*, and the doctrine continues to spread across state courts.[35]

But this rapid wholesale adoption by state courts might be more complicated and even counter-productive if we look at the issue through the lens of state popular accountability constitutionalism.[36] From the Supreme Court's perspective, federal agencies are accountable only to Congress and the President.[37] Thus, there is understandable concern that independent agencies might lack public accountability if they can grow their own power through opaque and expansive statutory construction.[38] However, if we approach the question of state agency accountability with sensitivity to how states have pursued popular accountability in their constitutional structures, there is a lot to see that does not exist at the federal level.

Consider, for example, the legislative veto for agency rules.[39] Congress can't do this because the Supreme Court held it unconstitutional in *Chadha v. INS*.[40] However, most states reject *Chadha* and provide a formal process for legislators to review, reject, suspend, or modify agency rules before they are finalized.[41] This means that state agency rules are already reviewed by state legislators as a matter of course in many states. In North Carolina, for example, legislators recently vetoed nearly 100 agency rules per year.[42] Thus, it's unclear why the major-questions doctrine is necessary in these states to prevent agency creep through self-interested statutory, construction because elected state legislators already have a veto process.[43]

Moreover, state agencies are often checked by other unique state forces.[44] They work in an environment where other powerful institutions actively compete.[45] Elected state courts, for example, have explicit rule-making powers and set policy on a broad range of issues that directly affect agencies.[46] Elected executive officials also

have important policy-making powers.[47] The initiative and referendum process also allows voters in many states to affect policy directly, and voters often mobilize in response to state agency failures.[48] In short, state agencies are not nearly as insulated from democratic forces as federal agencies can be. In many respects, state agencies are just one link in the state-policy chain, and they are subject to many unique and potent democratic checks that the states have strung together over time.

Additionally, many states have explicitly incorporated key agencies into their constitutional text and created independent boards to run those agencies.[49] This model grew from public concern about serious legislative failures in areas where legislatures were dominated by special interests (such as railroad regulation, conservation, and, more recently, marijuana legalization).[50] In those instances, voters chose to strip state legislatures of authority and create constitutional agencies protected from legislative influence and more visible to the public.[51] For those constitutional agencies, the major-questions doctrine is a perversion. The whole purpose of the constitutional agency is to enhance democratic accountability by protecting the agency from legislative dysfunction. It makes little sense to adopt a rule in the name of democratic accountability that skews power towards the legislature, the avowed source of the democratic failure.

All of this suggests that the Supreme Court's democratic accountability rationale from *West Virginia v. EPA* may, at best, be an unnecessary interjection into state administrative law. At worst, it could frustrate democratic accountability because it pulls state agency decisions away from the unique processes of accountability already developed in the states and siphons them into courts for adjudication under a federally concocted standard. Looking at this issue through the lens of state popular accountability reveals these possible disconnects. It might also suggest more constructive and authentic state alternatives. For example, it might make sense for state courts to incorporate the legislative veto into their statutory analysis. If a challenged regulation relies on a plausible interpretation of an agency's law, and the regulation was subject to a democratically robust legislative veto, courts could defer to the legislature's acquiescence and uphold the regulation without the same legislative accountability concerns that may exist under the federal Constitution.

Of course, viewing state constitutional disputes through the lens of popular accountability is not a panacea that will always generate clear and predictable outcomes. In fact, it will likely raise new and difficult questions. My modest claim is that popular accountability is a useful and largely underappreciated framework for authentically domesticating constitutional ideas under state constitutions. Understanding how state constitutions approach popular accountability helps decode some of the most cryptic features of state constitutions and provides a useful polestar in resolving state constitutional disputes.

This article proceeds in four major parts. Part I outlines the features of federal democratic accountability. Part II explores how state democratic structure is different and argues that popular accountability is deeply embedded in state constitutional history, text, and structure. Part III proposes a framework for incorporating popular accountability into state constitutional doctrine and explores it in the context of real cases. Some of the cases illustrate how state courts have already invoked modes of reasoning grounded in popular accountability. Other cases illustrate how popular accountability could help state courts better assess constitutional disputes. Finally, Part IV offers a few brief thoughts on how popular accountability is a useful framework for state court judges of all interpretive persuasions.

I. The Structure of Federal Accountability

The federal Constitution is built to retain power in the people but protect against rash majoritarianism. The founders were not shy about this,[52] and I believe it to be a mostly uncontested assessment of the federal Constitution's (un)democratic structure. In this section, I trace what this means for the structure of democratic accountability. I argue that the pathways for democratic accountability are intentionally limited to elections for Congress and the President, and decentralizing power to the states. To be sure, these choices present some complex scenarios, but as compared to the states, they offer a very limited structural matrix, and they exclude any direct popular interjections in federal governance. Charting this environment is important because it helps showcase how the states are different and, as a result, how state constitutional law might diverge from federal law in principled and authentic ways.

A. Republican Government and Accountability

The federal founders were deeply committed to popular sovereignty, but they also "obsessed" over the dangers of rash majoritarianism.[53] The principal challenge in designing the federal Constitution, according to Madison, was to build a "popular government" that could also "provide a proper cure" for the "violence of faction."[54] Madison's concern rested on two ideas. First, because "men were not angels," Madison expected popular majorities to coalesce around self-interested policies at the expense of political minorities and the public good.[55] Second, Madison recognized that if popular majorities were likely to coalesce in self-interest, then democratic government was especially vulnerable to their misuse. He wrote:

> [T]he real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[56]

To solve this problem, the founders built the federal Constitution around several important ideas that can loosely be described as republican government.[57] First, popular sovereignty would be preserved by subjecting certain government officials to regular and frequent elections.[58] As Madison (or Hamilton) explained in Federalist 52, "[f]requent elections are unquestionably the only policy by which" to ensure that government has "an immediate dependence on, and an intimate sympathy with, the people." This strategy was uncontroversial for members of the House, and it ultimately prevailed (in a form moderated by the electoral college) for selection of the president.[59]

Second, the federal Constitution should reject any form of direct popular involvement in governance.[60] That is, representation should displace "pure democracy," which Madison described "as a society consisting of a small number of citizens, who assemble and administer the government in person."[61] According to Madison, representation and democratic scale were essential strategies for curing the ills of majority faction.[62] Electing representatives from large districts was more likely to produce a deliberative body of wise and patriotic rulers who together would "enlarge the public views," avoid "temporary or partial considerations," and "discern the true interest of their country."[63] Thus, Madison believed that "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[64] As Kenneth Miller has explained, the Founder's theory of popular sovereignty was that "the people exercised power, but indirectly, through the mediation of representatives."[65]

Third, the Founders concluded that elections were not enough to protect against the ills of pure democracy and tyranny.[66] The Constitution needed "auxiliary precautions" to ensure that it worked towards the common

good.[67] To do this, they constructed various internal checks on political power and erected various layers of separation between popular majorities and government outputs. One layer was the exclusion of direct democracy. A second layer was bicameralism with a malapportioned senate. A third was the electoral college. A fourth was an independent judiciary. There are more, but after all these highly mediated democratic processes finally populated government with personnel, those officials were to be locked in tension with each other through the careful configuration of internal checks and balances. The hope was that these layers and checks would temper and purify majoritarian impulses by "insulating [officials] from the heat of majoritarian political pressure."[68]

Of course, the federal Constitution has evolved and changed since the Founding. The Seventeenth Amendment, for example, made senators directly elected by state populations.[69] The Fifteenth, Nineteenth, and Twenty-Sixth Amendments expanded the franchise in important ways.[70] However, despite these and other changes, the federal Constitution remains "wholly republican." That is, national popular majorities have no way of interjecting directly into federal governance or holding the federal government accountable other than through presidential or congressional elections.

Indeed, even as the Roberts Court has emphasized "democracy" in many of its recent structural rulings,[71] it continues to affirm that federal accountability flows exclusively through the President and Congress.[72] As Justice Gorsuch recently explained regarding the President, without "presidential responsibility, there can be no democratic accountability for [federal] executive action."[73] The same exclusive republican logic still applies to the Court's understanding of Congress's lawmaking authority.[74] Again, Justice Gorsuch recently explained in *West Virginia v. EPA*: "[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people."[75] Thus, to the extent federal constitutional doctrine turns on democratic accountability, it is about siphoning power to either Congress or the President.

B. Federalism and Accountability

In sketching the structure of democratic accountability under the federal Constitution, it is important to note that federalism functions in at least three different ways, all of which reinforce the indirect structure of federal democratic accountability.

First, federalism is part of the overall strategy to create layers between popular majorities and federal government outputs.[76] For example, the electoral college and equal state representation in the Senate both mean that the preferences of national popular majorities are checked by local state interests.[77] In this way, federalism works in conjunction with the structures of republican government to ensure that majoritarianism is filtered through other public interests (specifically, the discrete interests of smaller, minority states). No matter the congressional election returns, Congress will always be malapportioned because of the Senate. No matter the popular vote, presidential politics will always be mediated by the state-based chunking of electoral college votes. Under the federal Constitution, even the most direct pathways of federal democratic accountability are highly mediated by federalism.

The second way that federalism impacts democratic accountability is through a vertical system of checks and balances. Madison famously theorized that federalism would help protect liberty because it would pit state and federal ambitions against each other.[78] Each level of government would jealously guard its own jurisdiction, thereby holding each in check and preventing a tyrannical accumulation of power at any one level. Scholars have

deeply criticized this scheme on theoretical and empirical grounds.[79] However, for present purposes, it is most important to recognize that this is yet another mediated form of accountability. Even if federalism functions as Madison envisioned, it is not a structure that empowers democratic oversight. Indeed, it works in the opposite direction by creating oppositional forces within government to stymie any rapid corrections.

The third way that federalism impacts democratic accountability is by enforcing decentralized policymaking. Federalism preserves plenary authority to the states and authorizes federal preemption only in enumerated areas.[80] Protecting state authority can indirectly enhance the overall democratic accountability of the federal system under certain conditions. When the federal government leaves an issue to the states, states can enact policies that best align with their statewide communities. Applying a Tieboutian model, we can hypothesize that overall alignment between voter preferences and government policy will increase when a policy is decentralized.[81]

The Supreme Court has frequently adopted this thinking when discussing the proper allocation of power between federal and state governments. In *Dobbs*, for example, the Court buoyed its text-and-history analysis with the structural assertion that overturing *Roe* was more respectful of the Constitution's democratic norms.[82] Writing for the Court, Justice Alito said: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[83] Scholars have criticized this reasoning for making false assumptions about the health of democracy in the states.[84] For present purposes, it is most important to recognize that, once again, the federal constitution pursues democratic accountability through very indirect and mediated processes. Here, it promotes democratic outcomes by defederalizing issues and assuming that the states will implement effective accountability.

C. Entrenched Framework Constitutionalism

The federal Constitution is designed to be general, stable, and outside the reach of ordinary politics and extant majorities. It's "whole purpose," according to Justice Scalia, "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[85] Indeed, Madison argued forcefully that the federal constitution should be deeply entrenched so that it would bind future generations.[86]

This approach to constitutionalism—what Mila Versteeg and Emily Zackin call the "entrenched model of constitutional design"—has several important features.[87] First, it is based on the idea that a constitution should be outside the reach of majorities and very difficult to change.[88] Entrenchment helps to stabilize politics, protect minority rights, and guarantee certain political rights necessary for democratic accountability to operate.[89] Entrenchment is achieved (at least in theory) by including onerous amendment rules that require supermajorities and impose other hurdles to reform.[90]

Second, to accommodate entrenchment, constitutions should be very general and short. As Chief Justice Marshall explained, "only [the constitution's] great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[91] Generality and brevity aid entrenchment because the text of the document is intrinsically more accommodating and does not require technical changes whenever adjustments happen, thereby allowing the document to remain stable.[92]

Entrenched constitutions can help protect government from the ills of rash majoritarianism.[93] By locking politics into certain processes and institutions, ordinary government outputs can be funneled through representatives and

subjected to persistent checks and balances.[94] Specific minority protections can also be placed outside ordinary politics.[95] Entrenched constitutions also help mitigate majoritarianism because they tend to evolve and change informally through highly mediated processes like judicial review and diffused sub-textual norms, rather than popular flares of formal legal reform.[96]

For all these reasons, entrenched constitutions are intrinsically counter-majoritarian to some degree. They are built to ensure that majorities honor the rules of the game, and they are designed to remove certain substantive policies from the political realm altogether. This can create legitimacy concerns.[97] As Thomas Jefferson famously argued, each generation should write its own constitution because "the earth belongs in usufruct to the living."[98]

Most importantly for present purposes, the entrenched nature of the federal Constitution binds together the deeply republican and federal structure of federal democracy. By design, Article V provides no easy pathway for popular involvement in constitutional reform. Amendments must pass through super-majorities in Congress and/or the states, and malapportionment in the Senate cannot be changed without each affected states' agreement.[99] Article V locks in the federal Constitution's overall strategy to protect republican government from majoritarian impulses.

II. The Structure of State Popular Accountability

State constitutions are built differently from the federal Constitution. As a matter of history, text, and structure, state constitutions work to ensure that statewide popular majorities have multiple formal processes for correcting misaligned state policy. The state constitutional commitment to popular majorities is deep and multi-dimensional. In this section, I argue that the theoretical roots of state constitutions, as well as their contemporary texts and structure, all point towards a version of constitutionalism committed to empowering statewide popular majorities as the final arbiters of governance. To be sure, state constitutionalism relies on representative institutions, but it ultimately rests on the idea that state constitutions must enable popular accountability rather than foreclose and diffuse it.

A. State Constitutional Theory in Historical Perspective

State constitutions originated from a different fear than the dread of "majority faction" that dominated federal constitutional design. State constitutions grew out of a fear that corruption sprang mostly from government structures that distanced representatives from the people.[100] That distance fostered opportunities for corruption by personal ambition and special interests.[101] State constitutions were built to close the distance between representatives and the people. They originated as active instruments of popular control over government rather than entrenched constraints on popular majorities. This theoretical frame dominated the first state constitutions and has been ratified through various moments in state constitutional history where state governments failed the public, and the public responded with new adaptations reasserting popular accountability.

1. Revolutionary Origins of Popular Accountability Constitutionalism

The first state constitutions were an exigency of the Revolution and were animated by a deep distrust in ruling elites.[102] By the end of 1775, as British governors retreated from their posts, there was mounting pressure for the colonies to institute new forms of government.[103] Following a series of petitions from the states to the Continental Congress for guidance, Congress issued two famous Resolutions on May 10 and 15, 1776, calling on the states to establish governments "fixed on genuine principles" of popular sovereignty.[104]

But crafting these constitutions was complicated. Revolutionary Americans had a clear commitment to popular sovereignty, but they had no useful precedent for how to operationalize a government where all power was "vested in and derived from the people."[105] It was quickly obvious to them that the people could not govern themselves en masse.[106] However, selecting representatives and appointing leaders raised serious concerns.

By 1776, Americans were deeply suspicious of government officials. In particular, the Whigs believed that King George III had slowly manipulated and circumvented popular representation in Parliament by using various forms of "borough-mongering" and "royal patronage" to manipulate representatives.[107] By the middle of the eighteenth century, Whigs understood the Crown to be "tearing up the [British] constitution by the roots" and "bribing its way into tyranny."[108] For Whigs, this confirmed their general belief that the greatest danger to liberty came from rulers who were "separated from the rest of the community."[109]

The structure of power in the American colonies further reinforced Whig ideas. Americans were especially troubled by the governors' effectiveness in subverting the entire community for their own benefit.[110] Governors were deft at circumventing and capturing legislative assemblies, which ostensibly represented local community interests.[111] They used various tactics, but it was common to manipulate representatives by appointing them (or close family members) to well-paid positions.[112] Governors would also grant lucrative licenses or government contracts in exchange for favorable votes.[113] And, because governors controlled the timing and frequency of legislative elections, they would postpone elections while the assembly suited their interests.[114]

Consequently, early constitutionalists had a growing distrust of even their own elected legislative representatives.[115] This fueled apprehension regarding representative democracy. Although representation was the most practical way for the people to "express their voice in the making of law and the management of government,"[116] representation necessarily separated the people from their rulers, produced a cohort of political elites, and thereby increased the likelihood that "government might escape the control of its creators."[117] Ultimately, early state constitutionalists concluded that representation "was a necessary evil" to be handled with great caution.[118] It had to be carefully structured and monitored. Most importantly, it had to be subject to frequent and direct popular accountability.[119]

It was against this backdrop that early state constitutionalists began to construct the first state constitutions. Not surprisingly, these early documents were wildly populist in their language and structure. They almost universally began by asserting, in their declarations of rights, that all power belonged to the people, who retained an inalienable right to abolish and reform government as they see fit.[120] They bluntly asserted that representatives were mere "servants" of the people, and they captured the Whig belief that officials are inherently prone to recalcitrance because political power separates their personal interests from the common good.[121]

The structure of these constitutions was also deeply majoritarian and reflected great distrust in representation.[122] The overall strategy was to consolidate power in the legislature and tie the legislature to the people as closely as possible.[123] Governors were stripped of almost all power and were appointed by the legislature, as were most judges and local officials.[124] To enhance popular control over legislatures, lower houses were very large, with representatives elected from very small districts, and a few states even adopted unicameral legislatures.[125] State constitutions also required legislative sessions to be public (a stark contrast from the practice of colonial assemblies),[126] mandated annual elections (and even 6-month elections in the case of New Hampshire),[127] and protected the right of constituents to "instruct" their representatives on how to vote.[128] As Professor Randy Barnett has concluded, these arrangements "made the legislature as responsive to majoritarian sentiments as possible."[129]

2. The Persistence of Popular Accountability

It is undisputed that this structure did not work well. State legislatures pursued various disastrous policies because of overt corruption and rash populist influence.[130] Indeed, Madison frequently referred to the failures of these documents when arguing for a more representative and republican federal structure, and it seems that the Philadelphia Convention was deeply influenced by the problems that these constitutions created.[131]

However, the story of state constitutionalism did not end at the Philadelphia Convention as many seem to assume.[132] After federal ratification, the states continued to reform and revise their own constitutions. Indeed, there have been hundreds of state constitutional conventions and 10,000s of state constitutional amendments since 1787.[133] Many of those reforms included greater reliance on republican ideas, but that is only one side of how state constitutions evolved after 1787.[134] Almost without exception, for every republican adaptation that spread through state constitutions, there was a related development that ratified popular accountability as a state constitutional polestar.[135] Consider how this trend is visible in the evolution of state executive, judicial, and legislative powers.

After the disastrous early state constitutions, legislative power was offset by giving governors more power, especially the veto.[136] In this sense, it is tempting to conclude that state constitutions abandoned their majoritarian roots in favor of greater republican checks and balances analogous to the federal constitution. However, expanded gubernatorial power coincided directly with the shift to statewide popular election of governors.[137] Gubernatorial power expanded primarily because governors emerged as especially responsive to popular majorities.[138] As a delegate to New Jersey's 1844 constitutional convention explained: "The Governor is the only true representative of the people. He will be elected by a majority of the whole people of the state. It is peculiarly proper therefore that he should be entrusted with the exercise of the responsible Executive power."[139] Gubernatorial power grew because a popularly elected governor provided a more direct line of accountability to statewide majorities.[140] The gubernatorial veto was not principally a counter-majoritarian restraint on hasty actions by the legislature, it was a method of holding the legislature accountable to the public.[141]

Additionally, as an extension of the idea that power should correspond with direct pathways of popular accountability, states began to proliferate the number of popularly elected executive officials during the Jacksonian Era.[142] At first, this involved only key posts, such as the lieutenant-governor, secretary of state, treasurer, auditor, and attorney general.[143] But it later continued into most aspects of state government, including very specialized positions.[144] The trend eventually abated, but in 2002, there remained more than 10,000 independently elected state and local officials nationwide.[145]

State constitutions have also increasingly codified portions of the administrative state as a way to democratize regulation.[146] They have done this by using the constitution to create agencies, establish processes for staffing and funding those agencies, and set the scope of agency rulemaking and adjudication authority.[147] As noted earlier, states have also used constitutions to single out the regulation of particular industries for more searching popular oversight following legislative failures in those areas.[148] Various constitutional agencies, boards, and commissions are set aside from legislatures and governors so that the public can keep a more watchful eye on state policy in those areas.[149]

Regarding the judiciary, after ratification of the federal Constitution, state constitutions gradually granted courts more independence from state legislatures and executives.[150] This is especially true regarding the selection of judges.[151] However, this coincided with various reforms to ensure that courts were more closely accountable to the people.[152] Through judicial elections, recall, mandatory retirement, and various other reforms, state courts

grew less dependent on the other branches of government but more tightly accountable to popular majorities.[153] Indeed, a key reason that many states transitioned to elected judges was to empower them to oppose legislative and executive recalcitrance on the people's behalf.[154] By giving courts their own popular mandate directly from the electorate, state reformers hoped that courts would be better positioned to contribute to popular accountability.[155]

The same story unfolded regarding reform to state lawmaking.[156] After the dismal performance of early state constitutions, states adopted various reforms that targeted state legislatures.[157] These reforms were accelerated during the financial crisis of 1837, when state legislatures succumbed to the influence of private infrastructure corporations and drove nine states into default.[158] What is often missed is that these reforms focused more on restructuring and enhancing popular accountability than mediating popular influence.[159] For example, several states adopted single-subject and title requirements to promote public transparency and curb legislative logrolling and vote-trading that had fueled corruption and capture.[160] States also adopted prohibitions on special legislation to address the same problems.[161] They also constitutionalized rules of legislative process to encourage transparency and popular oversight and limited legislative sessions and resources as an indirect control on legislative power.[162] Additionally, following the 1837 economic crisis, popularly-run conventions adopted a variety of very specific, statutory-like constitutional restrictions for public finance as a way to rein in recalcitrant legislatures.[163] This set in motion the now commonplace practice of constitutionalizing substantive policy through constitutional amendment to protect popular control of legislation.[164]

But the most dramatic and revealing reforms to legislative power were the adoption of the referendum, initiative, and recall.[165] Beginning in the Progressive Era, and in response to another round of dissatisfaction with legislative performance, more than half of the states adopted some form of initiative or referendum process.[166] These processes were explicit carveouts from the otherwise plenary and exclusive legislative power of state legislatures.[167] They allowed statewide majorities to bypass legislatures and directly adopt or veto laws.[168] As a result, state legislative power is a complex patchwork of representative institutions, detailed regulations in constitutional text, and powerful forms of direct democracy.[169] Elizabeth Garrett has referred to this as "hybrid democracy" because of the various complex interactions that occur between legislatures, direct lawmaking, and popular constitutional amendment.[170]

The recall, which has been adopted in at least nineteen states, allows citizens to petition for a statewide referendum on recalling an official from office.[171] The recall generally applies to elected legislators and executive officials, but a few states also allow recall of judges and appointed officials.[172] The recall is deeply connected to popular accountability because it allows popular majorities to interrupt representative government and remove recalcitrant officials when the people believe it to be necessary.[173]

3. State Constitutional Amendment and Popular Accountability

The evolution of state constitutional amendment practices deserves special mention because it has both preserved and mutated the nature of popular accountability in state constitutional structure.[174] As noted above, the federal Constitution is a deeply entrenched framework text that helps cabin and control majoritarianism through stable representative institutions and rights as trumps on ordinary politics. State constitutions have not followed this path.

During the first wave of state constitution-making in the eighteenth century, the states pioneered a novel American invention—the popular constitutional convention.[175] The convention solved a serious theoretical and

practical problem: If a constitution was to operate as higher law on behalf of the people to constrain government, then what institution was appropriate for drafting and amending it?[176] One cheap solution was to allow legislatures as lawmaking bodies to draft constitutional law, but that created serious concerns because the constitution's principal function was to constrain government, including the legislature, on behalf of the people.[177]

To solve this problem, the states carefully designed the constitutional convention as a unique popular institution. The convention has very particular features. It must be authorized by popular initiative in some form (usually by a referendum). It must be unicameral in structure and populated by delegates selected at a special election from representative districts for the sole purpose of constitution-making. It must generate constitutional law through the deliberation and debate of those delegates, subject to popular affirmation. These features help ensure that popular majorities retain control over constitution-making and that the incumbent government has minimal influence. In other words, the state constitutional convention is emblematic of popular accountability over state government.[178]

The states relied heavily on the convention to rein in state governments during most of the nineteenth century.[179] Indeed, they held sixty-four conventions before the onset of the Civil War and the cessation conventions of 1861.[180] Those conventions addressed important popular concerns of the Jacksonian Era, including malapportionment in state legislatures, improper influence by private corporations, public finance reform, and expanding the suffrage.[181] Then, during the Gilded Age and Progressive Era, the states called another fifty-eight conventions to address another set of popular concerns regarding malapportionment, corporate capture, judicial obstructionism, labor reform, and other popular changes to state government and policy.[182]

Beginning in the twentieth century, states began to rely more heavily on ad hoc amendments via statewide referenda than full-scale conventions.[183] This shift reflected a variety of concerns focused on enhancing popular accountability. First, conventions were costly and inefficient, which limited the public's ability to use them regularly and surgically.[184] Second, during the Progressive Era, courts often struck down popular social and economic legislation under freedom-of-contract theories.[185] To clear these roadblocks to popular reform, the states significantly liberalized their constitutional amendment rules so that legislatures could easily and quickly send proposed amendments directly to statewide majorities at referenda.[186] The main idea was that the state constitution should not function as an immoveable bulwark against popular reform.[187] On the contrary, it should be an instrument for popular accountability when government (including the judiciary) strays too far from its mandate.[188] Streamlining amendment rules around the referendum enabled this. Similarly, the Progressive Era saw the introduction of the citizen initiative for constitutional amendments so that citizens could bypass non-responsive legislatures and obstructionist courts altogether.[189]

These reforms to state amendment rules reflect a wholly different approach to constitutional design than Madison's entrenchment model. Mila Versteeg and Emily Zackin have explained, for example, that state constitutions reflect an "unentrenched" model where the constitution exists principally to constrain government on behalf of the people rather than majorities.[190] Voters use the constitution to hold government accountable by leveraging amendment rules to insert new detailed language that limits government discretion.[191]

This theory fits nicely with the underlying structure of state constitutional design. It is also consistent with how states have used amendment processes (and how frequently). As John Dinan has painstakingly documented, the states use amendment processes regularly to react to whatever issues percolate through state government but ultimately misalign with motivated state majorities.[192] Sometimes those issues manifest through unpopular state court rulings (e.g., economic freedom rulings striking maximum hours laws during the Progressive Era).[193]

Sometimes they result from legislative inaction on popular reforms (e.g., marijuana legalization in the twenty-first century).[194] In any event, state constitutional amendment politics is ultimately about providing statewide majorities with a process for keeping state government accountable. And they use it regularly. The average state constitution has been amended 150 times at a rate of 1.3 amendments per year.[195] As Dinan notes, this rate is "more than ten times the federal amendment and twenty times the post-1791 federal amendment rate."[196]

Predictably, this approach to state constitutions has transformed them into long, detailed, and dynamic texts that contain basic structural arrangements and conventional rights alongside specific policy pronouncements, detailed regulatory interventions, and idiosyncratic institutions and rights. Indeed, Versteeg and Zackin have quantified the length, scope, and detail of state constitutions as of 2016.[197] They found that, because of high amendment rates, the median state constitution was almost four times longer than the U.S. Constitution, covered twice as many topics, and included significantly more detail.[198]

The critical point is that these characteristics of state constitutions are an outworking of their underlying design logic. Just as the text of the federal Constitution has remained relatively short, general, and unchanged because of its "wholly republican" structure, state constitutions bear the features of a document regularly accessed and utilized by active majorities to redirect misaligned government.

B. Popular Accountability in Contemporary State Constitutions

The history that I offer above reflects general trends in the shared development of state constitutions. There are, of course, important differences and nuances between states and across time. Thus, it is worth turning to extant state constitutions to see whether and to what degree they manifest an ongoing commitment to popular accountability constitutionalism. In this section, I first describe state constitutional provisions that affirm a commitment to popular accountability, I then survey state constitutional structures that implement popular accountability. In both areas, I focus on provisions and structures with no clear federal analogs to illustrate the unique state commitment to popular accountability.

1. Contemporary Texts

Contemporary state constitutional texts are replete with provisions reaffirming a commitment to popular accountability constitutionalism. Indeed, several state constitutions include explicit accountability provisions. The Massachusetts Constitution, for example, declares: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, *and are at all times accountable to them*."[199] Several states also have provisions declaring that officials are the people's "servants," and the people have a "right to instruct their representatives."[200] Popular accountability is explicit in state constitutions.

Relatedly, in 2021, Professors Jessica Bulman-Pozen and Miriam Seifter surveyed state constitutional texts for evidence of the "democracy principle," which they define as "popular sovereignty, majority rule, and political equality."[201] They found an astonishing amount of textual support for those commitments across a diverse array of provisions in contemporary state constitutions.[202] For example, they found that every state constitution but New York's still includes an explicit commitment to the people as "the source and end of political power."[203] Those provisions also tend to include a specific reference to the people's right to alter, reform, or abolish government.[204] Pennsylvania's provision is illustrative:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.[205]

Professors Bulman-Pozen and Seifter found myriad other provisions across a diverse range of topics that affirm a commitment to democracy, including provisions ensuring proportional representation in both houses (and sometimes lodging districting authority in independent commissions), provisions regulating legislative procedure in favor of transparence and popular oversight, provisions mandating a public purpose for government policy, provisions providing explicit protection for free and fair elections, and, among other things, provisions declaring lawmaking power to inhere in the people rather than the legislature.[206]

To illustrate the scope and breadth of state constitutional provisions addressing popular accountability, I draw on Professors Bulman-Pozen and Seifter's survey as well as the work of Professor Joshua Douglas (who has surveyed states constitutional voting and election provisions)[207] and my own independent survey of state bills of rights to tabulate provisions across all fifty states.[208] I focus on the following eight provisions listed below because they clearly connect to popular accountability and have no tight federal analogs. However, these provisions are not exhaustive of state constitutional expressions of popular accountability.[209]

1. Accountability—Whether the constitution states that officers are limited agents of the people and at all times accountable to them, can "be reduced to a private station," or are subject to instruction.[210]

2. Popular Sovereignty—Whether the constitution explicitly declares that all power inheres in the people.

3. Right to Abolish/Alter Government—Whether the constitution explicitly declares that the people have an inherent and inalienable right to abolish or alter government as they see fit.

4. Right to Vote—Whether there is an explicit affirmative right to vote.

5. Free Elections—Whether there is an explicit collective guarantee to free and fair elections.

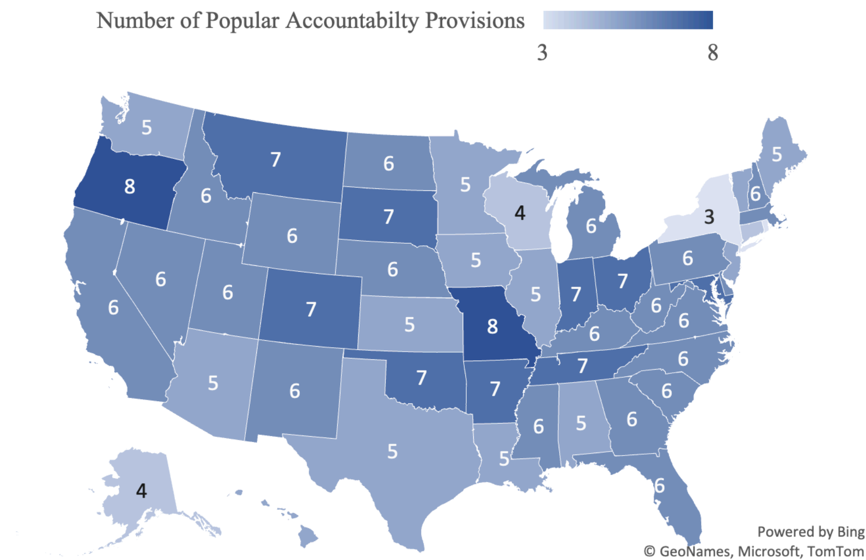
6. Specific Voting Protections—Whether there are specific affirmative protections for voting, such as immunity from arrest on voting day, protection of residency status, protection for secret ballot, etc.

7. Term Limits—Whether there are any constitutional term limits for elected representatives to ensure rotation in office.

8. Single-Subject Rule—Whether legislation must be limited to a single subject or limited to the contents of its title.

The results of this survey show universal expression of popular accountability as a state constitutional commitment. Indeed, all state constitutions include at least three of these provisions. Forty-five states have five or more of these provisions. The median is six out of eight provisions, and two state constitutions (Oregon and Missouri) contain all eight provisions. The full results are illustrated in the figure on the following page.

Prevalence of Popular Accountabilty Provisions



2. Contemporary Structures

The contemporary structure of state government also confirms a deep institutional commitment to popular accountability. To illustrate this, I identify eight structural features indicative of a commitment to popular accountability, and I chart those across all fifty states. These eight features are not exhaustive of the characteristics of popular accountability constitutionalism.[211] However, they are useful for illustrating how broadly the states remain committed to popular accountability. Each of the following eight features has a clear connection to popular accountability and no analog under the federal Constitution:

1. Judicial Elections—Whether justices on the state's highest court are subject to statewide popular elections for selection or retention.[212]

2. Unbundled Executives—Whether more than one executive official is subject to an independent statewide election.

3. Constitutional Agencies—Whether any state regulatory agency has a commissioner or board subject to statewide or district-based election.

4. Recall—Whether any statewide officials are subject to popular recall petitions.

5. Initiative—Whether the state constitution provides for statewide legislation or constitutional amendment by citizen initiative (direct or indirect).

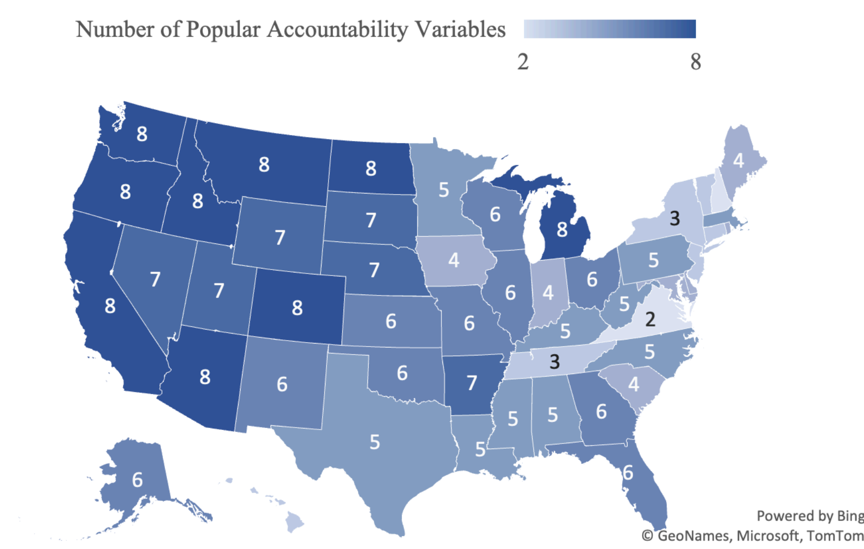
6. Legislative Referendum—Whether the state constitution allows for statewide referenda on legislation.

7. Amendment Referendum—Whether the state constitution requires statewide referenda on constitutional amendments.[213]

8. Convention Referendum—Whether the state constitution requires statewide referenda on calling a constitutional convention.

The results show a universal commitment to popular accountability across at least two of the eight structural variables. Forty-eight states register at least three variables (only Virginia and New Hampshire register two), and forty-two states have at least four. The median is five variables, and nine states register all eight variables. The figure below illustrates the results.

Prevalence of Popular Accountability Structures



III. Toward A State Jurisprudence of Accountability

In this section, I shift to exploring how the state commitment to popular accountability might impact state constitutional doctrine. I first suggest a framework for how to appropriately incorporate popular accountability into doctrine. I then explore real cases addressing rights, structure, and remedies to illustrate how state courts already implement analysis grounded in popular accountability and how they sometimes might benefit from applying my framework.

A. Developing a Framework

If state constitutions are uniquely committed to popular accountability in their text, history, and structure, then this should influence how state courts decide constitutional cases. However, the scope and nature of this influence is nuanced and complicated. Popular accountability sits alongside other commitments and operates in a complex environment. All state constitutions, for example, have always relied on representative institutions as their principal governance mechanisms (often because of their mediating and moderating effects), and basic rule-of-law values lie beneath all state constitutions. Moreover, states are very different from each other. As the above surveys show, some states have broadly adopted many mechanisms and expressions of popular accountability. Others have not. California is not the same as New Hampshire, for example.

These complexities and nuances are important and cannot be ignored. To constructively and authentically incorporate popular accountability into state doctrine, we cannot treat all state constitutions the same, nor can we pretend that popular accountability is the only value that matters. Nevertheless, all state constitutions rely

on statewide popular majorities for their legitimacy and preservation and have incorporated this foundational commitment into their democratic structures to some degree. This categorically distinguishes them from the federal Constitution. Popular accountability should, therefore, be a unique polestar in state constitutional adjudication.

But how should this high-level commitment influence specific legal doctrine? In this section, I begin the process of building a framework for systematically incorporating popular accountability into state constitutional law. I argue that popular accountability invites state courts to rethink constitutional doctrine in at least two ways.

1. Limitations on Popular Accountability are not Axiomatic

When state courts adopt doctrines that impede existing commitments or mechanisms of popular accountability, they, *unlike federal courts*, should provide an explanation for how those rules cohere with the commitment to popular accountability. It is inherently improper for state courts to assert that limiting popular accountability is a self-justifying objective. To be sure, limitations on popular accountability are appropriate (and prevalent) in state constitutional law, but such intrusions cannot be legitimated on the basis that they are intrinsic to the nature of American constitutionalism. State constitutions explicitly reject this.[214]

Justifying an intrusion on popular accountability can take many forms consistent with all the conventional modalities of constitutional construction. For example, a state court might find historical, textual, or structural evidence that a particular state institution exists to protect political minorities from swift popular attacks.[215] From that evidence, a court might conclude that certain mechanisms of popular accountability are properly restricted relative to those minority protections.[216] As this example makes clear, the point is not that state constitutions don't, can't, or shouldn't limit popular accountability. The point is that courts should not presume that limiting popular accountability is an intrinsic objective under state constitutions. That might be true for the federal Constitution, but it is not true for state constitutions.

This approach also helps domesticate and authenticate state constitutional law. It ensures that courts construe state constitutions consistent with their underlying logic and purpose (popular accountability) while honoring a state's specific choices regarding how to operationalize popular accountability. The Illinois Constitution, for example, incorporates the citizen initiative process for constitutional amendments, but only for changes to the legislative article.[217] This choice by Illinois reflects a different approach to popular accountability than Colorado, for example, where the initiative is mostly unrestricted.[218] Nevertheless, Illinois's unique limitation is perfectly proper because it is clear from an ordinary modality of constitutional construction (the text of the Illinois Constitution).

But taking popular accountability seriously can also be tricky. For example, New Hampshire does not have the initiative, referendum, judicial elections, or an unbundled executive. This might suggest that the New Hampshire Constitution is structured to foreclose frequent popular interjections in a manner more analogous to the federal Constitution. But New Hampshire does include the following provision:

> The public has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.[219]

In 2021, a taxpayer sued under this provision, alleging that the state failed to provide child welfare services as required by law because it severely underfunded child welfare programs.[220] The court held that the plaintiff did not have standing because generalized underfunding claims would require the court to intrude on executive and

legislative prerogatives regarding funding priorities.[221] While it is certainly true that judicial review in this context would intrude on the political branches, it's not clear why the taxpayer standing provision does not authorize this type of intrusion when a taxpayer alleges *unlawful* underfunding. Why assume that vague Federalist separation-of-powers theories trump the accountability strategy explicitly embodied in the taxpayer standing provision?[222] All else being equal, why not construe the provision in favor of accountability rather than separation of powers? After all, New Hampshire has held more popular constitutional conventions than any state (seventeen conventions from 1776-1984).

The point is not that popular accountability is a panacea for hard cases. Enforcing funding provisions, for example, only makes cases harder to decide and oversee. Instead, popular accountability can help authenticate state constitutional doctrine and weed out constitutional tropes that are a poor fit for state constitutional law. One tip for unleashing this type of analysis is to question limitations on mechanisms and expressions of popular accountability that claim to be self-justified.

2. Doctrines Grounded in Federal Institutional Analysis are Suspect

Relatedly, popular accountability constitutionalism should make state courts deeply suspicious of federal doctrines that are based on federal institutional analysis because state constitutions are built to achieve different goals through different means. The federal Constitution has produced a relatively stable set of institutions and processes with archetypal functions designed to entrench the status quo. This is consistent with the underlying goal of moderating rash majoritarianism. On the other hand, state constitutions have produced a dizzying array of highly contextual and idiosyncratic institutions, processes, and provisions reflecting fits and spurts of popular reaction to recalcitrant government. If we accept this as a feature of state constitutionalism rather than a bug, state courts should be careful to take these arrangements seriously rather than reduce them down to inapposite federal archetypes that pervert the essence of popular accountability.

For example, consider federal standing doctrine. In general, a plaintiff in federal court must have a concrete, redressable injury to sue.[223] This rule has a textual basis in Article III's "case and controversy" requirement, but it is principally a doctrine grounded in federal institutional analysis.[224] Federal courts should not entertain abstract questions because that would accumulate too much power in the courts and upset the Constitution's checks-and-balances.[225] At first blush, this seems like a sound position with salience in tri-partite constitutional systems. However, the states have long dispensed with the idea that courts should be nothing more than insulated adjudicators of concrete disputes.[226] State courts have broad rulemaking powers.[227] Many have explicit authority to issue advisory opinions.[228] Most importantly, the principal check on state courts is the people themselves through elections.[229] In many states, courts were restructured so that they could engage in active judicial governance on behalf of the people rather than passive dispute resolution.[230] In state constitutional structure, courts are "democratically embedded actors, not countermajoritarian interlopers."[231] Thus, there is good reason to question the applicability of federal standing doctrine in state court because federal institutional analysis is inapposite.[232]

The important point is that popular accountability helps make sense of an otherwise chaotic series of state institutions and structures, which can then empower state courts to critically analyze the relevance of federal institutional analysis. Once it is clear that a state court has been restructured to draw upon its own popular mandate to oversee the political branches through a variety of unique mechanisms—like New Hampshire's taxpayer standing provision, for example—it is easier to explain and justify departures from federal standing precedent and chart a new path grounded in popular accountability rather than checks-and-balances.

B. Illustrating the Framework

At this point, it is helpful to illustrate these perspectives and suggestions in real cases. I focus on cases in three general areas: (1) structural disputes; (2) constitutional rights; and (3) constitutional remedies. Some of these cases illustrate how state courts have already invoked modes of reasoning grounded in popular accountability. Other cases illustrate further opportunities for state courts to engage constructively with popular accountability, and how popular accountability might have helped produce better reasoning and result. These categories and cases are not exhaustive. My more modest goal is to selectively illustrate how courts might practically implement popular accountability as a mode of constitutional reasoning under state constitutions.

1. Accountability and Structure

State courts face many disputes regarding the constitutional allocation of power. In this section I examine how state courts have responded to two issues well-known from marque Supreme Court structural rulings: Deference to agency legal interpretations (*Chevron*-deference); and the legislative veto of agency rules (*Chadha*).

Before the Supreme Court's ruling in *Loper Bright v. Raimondo*,[233] several states followed *Chervon* and deferred to reasonable agency interpretations of ambiguous provisions in agency statutes.[234] Of course, in 2024, the Supreme Court overruled *Chevron* in *Loper Bright* and held that federal courts should resolve statutory ambiguities without deference to agencies.[235] *Loper Bright* provided an occasion for *Chevron*-following states to evaluate whether they too would reverse course. The few early cases that have engaged with the issue illustrate how popular accountability has the potential to enrich state constitutional jurisprudence.

For example, in *Rosehill v. State*, the Hawaii Supreme Court reviewed a determination by the Hawaii Land Use Commission (LUC) that "farm dwellings" on agricultural land could not be used as short-term vacation rentals.[236] In making that determination, the LUC had to interpret its authorizing statute to determine the meaning of "farm dwelling."[237] The Hawaii Supreme Court held that it would not follow *Loper Bright*.[238] In support of this conclusion, the court explained that it agreed with Justice Kagan's *Loper Bright* dissent arguing that "*Chevron* made for good, balanced governance, whereby Congress made laws while agencies, subject to accountability from a duly-elected President, implemented those laws and reasonably filled in the gaps."[239] The court further explained that *Chevron* was important because regulation requires professional experts to address "exceedingly complicated areas of American life, including worker safety, air quality, food and drug safety, airplane safety, telecommunications, and the integrity of our financial markets."[240] Thus, the Hawaii Supreme Court held that it would defer to the LUC's reasonable definition of "farm dwelling."[241]

The Hawaii Supreme Court's analysis illustrates how popular accountability might help bolster and authenticate state divergence from Supreme Court precedent. Although it seems plausible that Hawaii's constitutional structure is better suited to *Chevron* deference than the holding in *Loper Bright*, the Hawaii Supreme Court missed an opportunity to connect Hawaii's unique structure to *Chevron* and to explain how the LUC was an appropriate recipient of deference. For example, it's unclear from the court's analysis how the constitutional relationship between the Hawaii courts, legislature, and the LUC is analogous to the dynamics between Congress, the Supreme Court, and the long list of highly technical, professional, and bureaucratic federal agencies that the court recites from Justice Kagan's analysis. Justice Kagan may be correct that the federal regulatory landscape works best when courts defer to agencies, but that conclusion is based on various facts about federal constitutional structure that may not hold true for Hawaii's constitutional structure.

Popular accountability constitutionalism can help here because it shifts orientation towards authentic state structural questions. For example, a focus on popular accountability would ask whether *Chevron* helps popular majorities respond to agency failures or protects agencies from unhelpful popular interjection. Either can be appropriate depending on Hawaii's constitutional structure, but the court's analysis missed an opportunity to engage with these more salient questions of state constitutional law and demonstrate that Hawaii's commitment to agency deference arises from its own structure rather than Justice Kagan's federal institutional analysis—which is not an axiomatic fit.

Popular accountability constitutionalism would also ask poignant questions about the LUC. If the LUC is a highly professional agency engaged in complex technical regulation, *Chevron* may fit for reasons articulated by Justice Kagan. But state agencies are far more diverse in their purpose, structure, and composition than federal agencies. Indeed, LUC commissioners are appointed by the Governor, but they are unpaid volunteers appointed from each county. If the LUC is mostly a layperson agency designed to ensure that local interests are not ignored or overrun by statewide land-use planning or captured by wealthy, outside developers,[242] then the applicability of *Chevron* is more complex. *Chevron* may still be a good fit, but some of Justice Kagan's rationales may have less force because the LUC may be very different than the federal agencies that Justice Kagan relied on for her analysis.[243]

In contrast, consider how state courts have responded to the legislative veto process that the United States Supreme Court ruled unconstitutional in *INS v. Chadha*.[244] *Chadha*'s reasoning was highly formalistic.[245] The Court held that the legislative veto was effectively an act of legislation that evaded bicameralism and presentment.[246] Because Congress cannot legislate without following the full legislative process, the legislative veto is impermissible under the federal Constitution.[247] Various state courts have analyzed the issue differently and with greater sensitivity and nuance regarding popular accountability under state constitutions.[248]

A good example is *Barker v. Manchin*.[249] In *Barker*, the West Virginia Administrative Procedure Act created the Legislative Rule-Making Review Committee to approve all agency rules.[250] The committee was comprised of six senators and six house members appointed by the majority leader of each chamber.[251] The West Virginia court held that this arrangement was unconstitutional for various reasons, including a very detailed analysis of how it would obscure the ordinary pathways of popular accountability and free the legislature from existing constitutional restrictions designed to promote accountability.[252]

The court was especially concerned that placing great power in a small legislative subcommittee would foster improper decision-making dynamics that further reduce accountability to statewide majorities.[253] Specifically, the court was concerned that because the subcommittee would necessarily include representatives from only a subset of the "local electorates," there was good reason to believe that it would not act in a manner consistent with statewide interests and would be misaligned with statewide popular preferences.[254] The court concluded that because the West Virginia constitution went to great lengths to construct a legislative process that would hold the legislature accountable to the broader public,[255] the subcommittee veto mechanism was unconstitutional.[256]

Barker is a masterclass in independent state constitutionalism grounded in popular accountability. The West Virginia court carefully examines the details of the challenged legislative veto process in light of its impacts on the constitution's existing accountability objectives and strategies. In doing so, it arrives at a well-reasoned and truly independent state constitutional analysis that rejects the legislative veto because it would undermine existing constitutional accountability strategies.

2. Accountability and Rights

Before discussing illustrative cases, some background regarding the development of state constitutional rights jurisprudence is necessary. Since the 1970s, the independent adjudication of state constitutional rights has received much attention from scholars and jurists.[257] Justice Brennan, building on the pioneering efforts of Justice Hands Linde, brought attention to state constitutional rights as an extra source of protection when federal rights regressed or fell short.[258] This movement, known as the New Judicial Federalism, called on state judges to avoid blind lockstepping with federal precedent and reach independent judgements about the proper scope of rights under state constitutions.[259]

The New Judicial Federalism was significant, but it was also met with backlash and academic criticism.[260] Backlash came mostly in the form of responsive constitutional amendments that scaled back rights, but there were also judicial recalls and responsive judicial election campaigns.[261] Academic criticism varied, but most argued in some form that independent state rulings were unprincipled and results-oriented, based on dissatisfaction with trends at the Supreme Court.[262] In any event, state courts struggled to fully embrace or develop an independent state jurisprudence of constitutional rights—in part because court opinions were constantly displaced by popular amendments and also because scholars and judges struggled to develop a principled method for their work.[263]

We are now experiencing a revival of interest in independent state constitutional rights adjudication. The Supreme Court's ruling in *Dobbs* has put state courts and state constitutions in the spotlight regarding reproductive rights, and animated new calls from civil liberties groups for state courts to broaden rights rather than lockstep with the Supreme Court. The conservative legal movement has also taken notice of state constitutions, suggesting that originalism might provide a sound theoretical basis for state rights adjudication.[264]

Amidst all this jostling regarding state constitutional rights, few scholars or jurists have asked this basic question: What is the underlying purpose of constitutional rights within the broader structure of a state constitution? This question has been mostly lost or ignored in favor of grander theories about how state constitutional rights can contribute to the overall federal system. Those inquiries are important, and they are part of the story of state constitutional rights, but they tend to obstruct inquiries into state constitutional rights on their own terms. They make state constitutional rights overly derivative of federal constitutional politics, and they stunt an authentic understanding of state constitutional rights.

In other work, I have tried to enhance our understanding of state constitutional rights on their own terms by focusing on their role within the broader history, structure, and texts of state constitutions.[265] I collected and reviewed all known state constitutional convention debates where state declarations of rights were forged and reformed (105 conventions from 1818 to 1984).[266] Those state-centered sources revealed that states view their declarations of rights very differently from how the Supreme Court has viewed the federal Bill of Rights following the Civil Rights Era and incorporation through the Fourteenth Amendment.[267]

Traditionally, the Supreme Court has understood the federal Bill of Rights as a bulwark against abusive majorities and a key instrument for federal courts to enforce a small set of critical counter-majoritarian constraints on politics.[268] This has generated two connected doctrinal prongs. When a claimed right is not "fundamental" (or nowadays explicitly textual and historically supported), the Supreme Court is incredibly deferential to the political branches because it assumes that the political branches are more democratic and best suited to regulate in those areas.[269] The Court applies heightened review only for "fundamental" (or textually explicit and historically rooted) rights.[270] This framework is designed to empower federal courts as a counter-majoritarian force regarding core rights but also to constrain federal courts (which are among the most democratically insulated institutions in

American government) regarding everything else. In this way, federal rights jurisprudence is often a boon for the political branches, which need only present a rational justification to defeat the vast majority of rights claims so long as they head a small (and probably shrinking) set of fundamental rights.

This is not how states have understood the underlying purpose or structure of their declarations of rights.[271] To the contrary, the states have approached constitutional rights as a critical mechanism for empowering popular majorities to protect themselves from wayward government on all manner of issues.[272] Indeed, most state declarations of rights begin by declaring a collective right of the people to amend their constitutions as necessary to rein in government.[273] The convention debates also show that the states have mostly engaged with rights as instruments of popular control over government and not entrenched counter-majoritarian constraints.[274] Indeed, John Dinan and Alan Tarr have found that before the 1970s, state courts very rarely engaged in meaningful rights adjudication because the people enforced rights themselves through various political processes that held government accountable, including through frequent constitutional conventions, ad hoc amendments, and populist legislatures.[275]

This state-centered perspective on constitutional rights explains their unusual structure and content. Most declarations of rights include broad invocations of popular sovereignty and the collective rights of the people, a list of general rights that overlap with the federal Bill of Rights, and then a host of idiosyncratic and detailed rights that were clearly responsive to particular government failures.[276] This last category includes things like prohibitions on debtors prisons,[277] the right to hunt, fish, and access navigable waters,[278] rights related embryonic stem cell research,[279] the right to work,[280] the right to unionize,[281] the right to pick your own healthcare insurance (or not),[282] the rights of crime victims,[283] and the list goes on.

This structure can seem dysfunctional if state constitutional rights must function like the federal Bill of Rights. State declarations of rights do not look like a list of stable fundamental commitments that should be entrenched beyond the reach of popular majorities. Instead, they look like a hodgepodge of popular grievances across time mixed in with deeper collective commitments, basic individual freedoms, and broad structural blueprints. But the state convention debates suggest that this is by design. State declarations of rights were built to ensure that the ultimate right of the people to control government would be realized.[284] They weren't built to function as a higher law beyond the people's reach. They were built to function as a higher law beyond the reach of government but always within the people's reach.

So what does this mean for contemporary state rights jurisprudence? It suggests that state courts should rethink the degree to which federal rights paradigms cohere with state constitutional structure. Specifically, it seems odd that state courts would reduce most rights down to rational basis review or elevate all state rights to fundamental status.[285] Moreover, because many state courts have been restructured around popular elections to empower active judicial monitoring of government on behalf of the people, it seems proper for state courts to consider more searching standards of review across a broader set of rights.[286]

In this regard, Miriam Seifter and Jessica Bulman-Pozen have argued that state courts should apply a form of "proportionality review."[287] Proportionality review has various components, but a key feature is its emphasis on judicial balancing between the significance of a private interest at stake and the government's methods and purpose for infringing a right.[288] Another key component is the willingness to "engage in remedial tailoring in lieu of all-or-nothing dispositions."[289] "Remedial tailoring" invites courts to "draw on their common law tradition" to "do justice in individual cases."[290]

As Professors Seifter and Bulman-Pozen argue, proportionality review may be especially well-suited to state constitutional rights adjudication for various reasons. First, it accommodates the array and variable significance of rights in state constitutions.[291] Proportionality review allows courts to recognize that rights have varying degrees of significance that can justify varying degrees of government intrusion. When adjudicating the right to play bingo, for example, this seems like a useful and authentic framework.[292] Second, unlike federal courts, state courts are "democratically embedded actors, not countermajoritarian interlopers."[293] Proportionality review empowers courts to actively participate in governance. This is problematic for federal courts, which have extreme independence from popular accountability and are immune to corrective amendments. But state courts are deeply connected to the public through various factors and are called to monitor the government on behalf of the public. Their decisions are easily corrected through liberal amendment processes, and they are well-suited to craft outcomes that hold government accountable based on a synthesis of popular preferences expressed across the entire state constitution. Thus, something like proportionality review seems more aligned with popular accountability constitutionalism. Importantly, Professor Seifter and Bulman-Pozen note that state courts already tend to engage in something like proportionality review from time to time.[294]

Here, I use two cases addressing the right to hunt and fish to illustrate how state courts might engage with state constitutional rights in a manner more compatible with the underlying structure of state constitutions than dominant federal frames.

First, a constructive example. In *California v. San Luis Obispo Sportsman's Association*, anglers sued under the state constitutional right to fish because a public utility commission denied them fishing access to a state-owned reservoir.[295] The utility commission argued that it was allowed to ban fishing to protect the quality of the water, which was used for public consumption.[296] The anglers asserted that the right to fish on public land was mostly absolute.[297] The California Declaration of Rights says:

> The people shall have the right to fish upon and from the public lands of State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; . . . . provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.[298]

In deciding the case, the court conducted a form of proportionality review.[299] The court held that the right to fish was not absolute because it applied only to state-owned lands used by the state in a manner compatible with public fishing.[300] The court noted, for example, that state land used for "prisons or mental institutions" would not be subject to the public's right to fish.[301] However, the court found that the commission's interest in protecting water quality was not wholly incompatible with public fishing and inadequate to justify a total ban.[302] The court recognized that the utility commission was subject to competing lawful obligations (water quality versus public fishing).[303] Thus, the court balanced all the interests and constructed a proportional remedy.[304] It ordered that the utility commission institute a program that would accommodate limited public fishing in a manner that allowed the commission to control water quality.[305] The court's order also addressed cost allocation for the new program.[306]

The court's analysis in *San Luis* is illustrative of how proportionality review can cohere with popular accountability constitutionalism. The court located all the competing interests and constructed a remedy that balanced those interests. This, no doubt, was an intrusion on legislative and executive discretion. Indeed, the court asserted that the utility commission had to install bathrooms and surveillance to protect water quality and also addressed how much of the reservoir the utility had to open for fishing.[307] But this intrusion reflects an effort to

take the public's competing constitutional preferences seriously and not allow the government to disregard one preference because it prefers another. The court's balancing approach held the government accountable to the public's expectations expressed in the right-to-fish provision while also honoring the public's other interests and preferences.

Now consider a different example. In *Hunters of Vermont v. Winooski Valley Park District*, a municipal park district prohibited hunting and trapping on all its public lands (almost 2,000 acres).[308] The district justified its ban by asserting that it planned to use the lands solely for recreation and conservation, which were inconsistent with hunting and trapping.[309] A hunting and trapping association sued under a provision in the Vermont Constitution, which provides: "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, . . . under proper regulations, to be made and provided by the General Assembly."[310] The hunters argued that they had a right to hunt on the land, and they presented evidence that the land could safely accommodate hunting, recreation, and conservation.

In upholding the ban, the Vermont Supreme Court effectively applied rational basis review. It held that the state legislature had delegated regulatory authority to the district regarding the proper scope of hunting and fishing on district lands.[311] As a result of this delegation, the court concluded that the district's decision was entitled to deference as a reasonable regulation given its interests in promoting conservation and recreation.[312]

The court's analysis illustrates the potential benefits of shifting towards popular accountability constitutionalism. Although the right to hunt and fish is probably not a fundamental right entitled to absolute protection and heightened scrutiny, the Vermont Constitution surely provides some degree of protection greater than rational basis. Indeed, rational basis review essentially equates the right to hunt with generic due process and thereby renders the right to hunt redundant of generic constitutional structures. By failing to craft a standard of review concomitant with the specific, detailed language of Vermont's right-to-hunt provision, rational basis review undermines the people's expressed preferences in the declaration of rights. This sort of analysis is hard to reconcile with the deep structure of state constitutional design, the commitment to popular accountability, and deep distrust of legislative action.

3. Accountability and Remedies

Popular accountability should also impact how state courts approach constitutional remedies. As noted above, state courts should be willing to synthesize and balance multiple expressions of public will into substantive rulings that keep government accountable to the state constitution's detailed text. But state courts should also rethink their remedial jurisprudence. If popular accountability means that state courts should more actively engage in governance, it follows that state courts should think critically about the types of remedies they construct.

Here, I use two cases that address the proper scope of structural injunctions—injunctions that require a political branch of government to take specific measures to comply with the constitution. The first case locksteps state remedial jurisprudence with the Supreme Court's institutional analysis under the federal Constitution. The second case takes an independent approach that better accounts for popular accountability constitutionalism.

In *Iowa Citizens for Community Improvement v. State*, plaintiffs sued the state (including various state environmental agencies and officials) because of high levels of nitrogen and phosphorus in the Raccoon River.[313] The plaintiffs claimed that the state was in violation of its legal duty to preserve public lands because it failed to address known pollution by farmers.[314] Plaintiffs sought an injunction requiring the state to regulate in a manner that would reduce levels of nitrogen and phosphorus in the river.[315] The Supreme Court of Iowa agreed that the

state had a legal duty on behalf of the public to effectively regulate pollution into the River, but it rejected the claim because the relief sought was improper under federal remedies and justiciability doctrines.[316]

In rejecting the claim, the court explicitly relied on the federal political question doctrine as described by the Supreme Court in *Rucho v. Common Cause*.[317] Quoting *Rucho*, the Iowa Supreme Court explained that the plaintiffs' requested injunction was improper because it would stretch the judicial role beyond adjudicating legal rights in a one-time judgment.[318] The court said:

> Where the plaintiffs have put forth claims that we cannot meaningfully resolve as a court using accepted methods of judicial decision-making, we should invoke the political question doctrine. We do so here and leave this dispute where it stands at present: with the branches of our government whose duty it is to represent the public. In the end, we believe it would exceed our institutional role to "hold the State accountable to the public." Those words, used by the plaintiffs to describe what they ask of us, go beyond the accepted role of courts and would entangle us in overseeing the political branches of government.[319]

The court was especially worried about how it would ensure compliance from the legislature and state regulators. The court further explained:

> How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed against additional costs for drinking water? Even if courts were capable of deciding the correct outcomes, they would then have to decide the best ways to get there. Should incentives be used? What about taxes? Command-and-control policies? In sum, these matters are not "claims of legal right, resolvable according to legal principles, [but] political questions that must find their resolution elsewhere.'" [(quoting *Rucho*)].[320]

This analysis highlights several ways in which popular accountability constitutionalism might enhance and reorient the analysis to better reflect state constitutional structure. First, the court did not examine the institutional reasoning underlying the federal political-question doctrine or consider whether Iowa's constitutional structure might support a different conclusion. Federal justiciability doctrines are tied directly to Article III's "case and controversy" language and the federal Constitution's republican design logic.[321] Iowa's constitution and judicial structure exhibit meaningful differences. Iowa courts are common law courts of general jurisdiction with broad remedial powers and a history of entertaining all manner of equitable relief. Indeed, the Iowa Constitution says that the Supreme Court "shall have power to issue all writs and process necessary to secure justice to parties,"[322] and Iowa's district courts are courts of general common law and equity jurisdiction with the power to issue all remedies.[323] Relatedly, all Justices on the Iowa Supreme Court and all trial judges are subject to popular retention elections.[324] Thus, it's unclear why "accepted methods of [*federal*] judicial decision-making,"[325] should dictate the scope of authority exerted by Iowa's courts over Iowa government on behalf of Iowans.

Second, the Iowa Supreme Court adopted the federal presumption that it is fundamentally improper for courts to oversee policy determinations by the political branches because those branches have a constitutional obligation to "represent the public" *to the exclusion of the courts*.[326] This may be true under the federal constitutional structure, but it is not axiomatic under Iowa's constitutional structure. The Iowa Constitution says that "all political power is inherent in the people" and that all "state government is instituted for the protection, security, and benefit of the people."[327] And, as noted above, Iowa judges are subject to elections. Moreover, Iowans have added vast amounts of policy detail to their constitution, reflecting popular demands and expectations for state government, including

an explicit 2010 amendment that creates "a natural resource and outdoor recreation trust fund" for "the purposes of protecting and enhancing water quality and natural areas in this state."[328] This overall structure suggests a more active role for Iowa courts (especially regarding conservation) than the role proscribed under Article III for federal courts.[329]

Of course, this does not mean that the Iowa Supreme Court's administrability concerns are misplaced. Judicial oversight of structural injunctions is difficult and may be improper in many cases (perhaps even in *Iowa Citizens for Community Improvement*).[330] My comment here is not about the outcome; it's about the mode of reasoning. The court does not engage with Iowa's constitutional structure to arrive at a remedies decision that reflects Iowa's commitment to popular accountability. Administrability costs and difficulties are surely relevant, but they should be weighed against Iowa's constitutional policy mandates and structure to arrive at an outcome that holds government accountable to the constitution. Instead, the court relied on federal institutional analysis and assumptions to circumscribe the role of state courts and thereby devalue the details and structure of the Iowa Constitution.

Now consider a different example. In *New York Lawyer's Association v. State*, private lawyers challenged a state law that set caps on public compensation to private lawyers assigned to represent indigent parties who were entitled to lawyers under the New York Constitution.[331] The plaintiffs argued that the caps were unconstitutional because they "rendered hollow the constitutional right to counsel and obstruct[ed] the judiciary's right to function."[332] The plaintiffs sought an injunction lifting the cap and requiring better compensation for assigned lawyers.[333]

In granting injunctive relief, the court acknowledged that "the expenditure of funds for the purpose of indigent defense . . . is a complex societal and governmental issue best left to the legislative and executive branches."[334] However, the court found a strong likelihood "that indigent litigants in the New York City family and criminal courts are being denied effective assistance of counsel."[335] Moreover, the court found that ineffective assistance of counsel was impairing the judiciary's constitutional function.[336] Most importantly, the court examined its equitable powers under the New York Constitution and concluded that it had "all powers reasonably required" to perform its judicial functions, which included enforcing the constitution.[337] Thus, the court concluded: "Long standing maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State's failure to raise the current compensation rates adversely affects the judiciary's ability to function and presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty."[338]

The value of this illustration is the structure of the court's analysis, not the outcome. Rather than limit equitable relief based on federal separation-of-powers analysis, the court engaged in a balancing of the various interests, costs, and constitutional obligations. On the one hand, the New York Constitution contains a liberal right to counsel for indigent defendants and imposes an obligation on courts to fairly decide cases. On the other hand, separation-of-powers principles generally require courts to defer to the political branches regarding funding policies. On balance, the court determined that general separation-of-powers principles should yield because the court had an obligation (and equitable power) to hold the political branches accountable to more specific constitutional obligations.

Of course, these types of remedies come with significant costs and consequences. Structural injunctions of this type require continued judicial monitoring for compliance, which can draw out litigation for decades. I do not mean to diminish these costs and consequences. I mean only to argue that popular accountability constitutionalism

requires state courts to actively assess these costs rather than avoiding the analysis by invoking inapposite federal justiciability doctrines.

The illustrations I provide above are merely anecdotes that demonstrate how state courts might engage more directly with popular accountability constitutionalism in constructive ways. These illustrations show that, while there is precedent for incorporating popular accountability constitutionalism into state doctrine, state courts must do so deliberately and must avoid the temptation to be guided by broad Federalist tropes rather than the details of their own state's constitutional text and structure. At a minimum, state courts should be critical of doctrines that limit popular accountability as a matter of unjustified first principles and doctrines that rely on institutional analysis under the federal Constitution.

IV. Popular Accountability and Interpretive Approaches

At this point, a few brief comments regarding methods of constitutional interpretation are warranted. A full discussion is beyond the scope of this article,[339] but I offer preliminary thoughts on how the theory of state constitutionalism I defend above is relevant to jurists who follow originalist and non-originalist approaches to constitutional interpretation. In short, I believe it is relevant to both.

A. Non-Originalist Approaches

Popular accountability constitutionalism is relevant to lawyers and judges who ascribe to interpretive techniques beyond text and history. Indeed, the theory of state constitutionalism that I describe above is mostly a holistic structural account of state constitutions that is also grounded in text and history. My claim is that state constitutions (today and in the past) organize government around a deep commitment to popular accountability and that constitutional rules should be tested against that polestar.

Structural reasoning was famously espoused by Charles Black as a useful way to locate constitutional meaning by drawing inferences from constitutional institutions and processes.[340] Of course, structural reasoning is often criticized as being too indeterminate and open-ended.[341] But even Charles Black recognized that structural reasoning does not "supplant" other modalities of constitutional construction, such as text, history, and precedent.[342] Structural reasoning is useful when integrated with other modalities to help triangulate constitutional meaning.

My account of state constitutionalism draws on structural reasoning in at least two ways. First, structural reasoning (along with text and history) reveals and validates the state constitutional commitment to popular accountability. Non-originalist jurists will find significant evidence in the orientation and structure of state constitutions to support the claim that those constitutions are committed to popular accountability. Second, in exploring how popular accountability should impact doctrine, I have assumed that popular accountability is a core pillar in constitutional structure and have reasoned from it to evaluate when doctrine should be augmented or adjusted. This type of analysis should be within the pale of most non-originalist approaches to constitutional adjudication.

For example, when courts review a regulation that imposes higher burdens on the citizen initiative, popular accountability constitutionalism should play some role in assessing that restriction. It may not play a decisive role. And it does not necessarily tip the scales one way or the other.[343] But it should help guide and orient courts as they assess other sources of constitutional meaning.

In short, if you accept my account above, a state judge (especially a non-originalist judge amenable to structural reasoning) should think about how any proposed constitutional rule interacts with the constitution's commitment to popular accountability. This is no different than a United States Supreme Court Justice asking how a proposed rule would affect federalism.

B. Originalist Approaches

The relationship with originalism is perhaps a bit more complicated. Originalism comes in different forms, and a survey of all the variations is beyond the scope of this article.[344] Nevertheless, I understand all major originalist accounts to embrace some version of the "fixation thesis," which holds that "the meaning of the constitutional text is fixed when each provision is framed and ratified."[345]

A committed originalist might find popular accountability constitutionalism useful in at least three ways. First, some originalists argue that structural reasoning can "illuminate" original meaning.[346] Michael Stokes Paulsen, for example, has argued that "it is not at all improper constitutional interpretation to deduce from the document certain rules of law that flow logically from others contained in the text or discernible from its structure and operation, even if this sometimes yields mildly surprising conclusions."[347] Paulsen further explains that the process is like devising a geometric proof: "[I]f the constitutional postulates are sound, and the logical inferences and deductions are rigorous and justified, the resulting theorems are also correct—justified, ultimately, by the constitutional text."[348]

The arguments I have made above are grounded in the text of existing state constitutions and the structures that they create, buoyed by a corroborating historical account. My core claim is that state constitutional text, structure, and history demonstrate that popular accountability is a first-order state constitutional commitment. In many states, that argument does not require inferences or deductions—it's explicit in the opening sections of the state constitution and corroborated by various derivative structural features. To use Professor Paulsen's analogy, popular accountability is an eminently sound state constitutional postulate from which to reason in deciding other constitutional cases. Of course, it must be incorporated into the analysis alongside other substantiated postulates, but it should be on the list even for an originalist.

Second, various "originalist" Supreme Court opinions embrace structural reasoning grounded in historical context even when detached from any particular constitutional provision.[349] In *Printz v. United States*, for example, Justice Scalia began his analysis of the federal commandeering issue by saying: "Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[350] Originalist scholars have sparred over whether to embrace these opinions, but many jurists recognize them as within the originalist canon because of their reliance on fixed meaning at the time of ratification, even if they are formally decided on extratextual grounds.[351]

In this regard, the ideas of popular accountability are as deeply embedded in state constitutional history and historical consciousness as federalism and checks and balances were to the Federalists. There is a temptation among judges and lawyers to assume that after 1789, Federalist logic and thinking predominated all public understanding of *all* American constitutions. But a large literature on state constitutional development shows that since the Founding, there have been hundreds of popular conventions and thousands of rigorous statewide ratification referenda where state voters embraced wildly different understandings of constitutional structure than those espoused by the Federalists.[352] During the Progressive Era, for example, popular state understandings

regarding the proper role of the judiciary were vastly different from the Federalist account. Progressive Era voters ratified many of today's state constitutions with the clear understanding and expectation that courts would actively engage in popular governance in a manner wildly inconsistent with Madisonian logic.

Third, and relatedly, state jurists embarking on originalist inquiries should recognize the significant role that popular accountability has played as a background condition overshadowing state constitutional development. Just as Madison's fear of majority faction infused all of his constitutional design, popular accountability has remained ever-present in the development of state constitutional law. To some degree, this is not surprising because so much of today's state constitutional text was forged by popular state constitutional conventions convened as a result of dissatisfaction with government. Nevertheless, when exploring historical state constitutional sources, it is important to keep this context in mind and not read sources with a bias towards Federalist assumptions about constitutional design. The states did not hold hundreds of constitutional conventions and ratify thousands of constitutional amendments to rehash Madison ad nauseam. They have been working on an entirely different project with a different set of background assumptions and conditions.

I will end with one final illustration of how this context is important for understanding state constitutional history. Unlike the federal Constitution, most state constitutions include an explicit provision declaring a separation of powers between the three branches. Vermont's provision is representative: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."[353] When contemporary state courts encounter these provisions, they often infer that they reflect a super-charged commitment to horizontal checks and balances within state government. Why else would a state constitution make separation of powers explicit when the federal constitution, with its Newtonian emphasis on checks and balances, leaves it to implication?

The irony is that the states adopted these provisions for a wholly different reason related to popular accountability. Blending responsibility between branches was a well-known shell game that colonial leaders used to obfuscate responsibility and avoid accountability. State constitutions hoped to cure this by clearly itemizing government responsibilities for public audit. They adopted separation-of-powers provisions as a way to reinforce the detailed allocation of power spelled out in the remainder of the constitution so that the public would know which department to hold accountable for particular functions. As historian Samuel Williams concluded in 1794 regarding the Vermont constitution, "[T]he security of the people is derived not from the nice ideal application of checks, ballances [sic], and mechanical powers, among the different parts of the government; but from the responsibility, and dependence of each part of the government, upon the people."[354]

Conclusion

Interpreting state constitutions is difficult. They are long, detailed, and constantly changing. They also share many striking textual similarities with the United States Constitution and have overlapping histories. However, it is important that state constitutions are allowed to speak for themselves. It's important that scholars and jurists take them seriously on their own terms rather than orient them around the Federalist themes that dominated constitutional design during ratification of the federal Constitution. The states have charted their own constitutional paths, and they have pursued other ideas for how government should function. At the very core of the state constitutional experience is an enduring commitment to creating, maintaining, and stabilizing government that is truly accountable to its contemporary constituents. This commitment should be recognized by state courts, and it should influence how state courts decide constitutional cases.

Notes

1 *See* G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* Democracy: How Direct? Views from the Founding Era and the Polling Era 87, 89-90 (Elliot Abrams ed. 2002).

2 *See* Sanford Levinson, Our Undemocratic Constitution (2006); Randy E. Barnett, Our Republican Constitution (2016).

3 *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 Harv. L. Rev. 657, 667 (2011); Kenneth Miller, Direct Democracy and the Courts 19-21 (2009).

4 *Federalist 63*.

5 *See* Tarr, *supra* note 1, at 89.

6 *Id*.

7 G. Alan Tarr, Understanding State Constitutions 78 n.73 (1998) (noting that state constitutions were constructed to protect and empower political majorities against corrupt elite minorities and that the "contrast with Federalist no. 10 . . . could hardly be more striking"). This perspective on state constitutional orientation is prolific in the state constitutional convention debates where these documents were forged and reformed. *See* Ind. 1850-51, 683 ("It is a notorious fact that hitherto the agents of corporations have been able . . . to carry through the Legislature almost any measure which their principals deemed of sufficient importance to spend money enough to carry"); 2 *Mass*. 1917-19, 946-47 ("We have found that in our legislative bodies these organized human selfish forces were very powerful and, indeed, at times were able to thwart the will and judgment of the majority").

8 *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 598-99 (2023) (exploring historical push-and-pull between representative democracy and direct democracy in state constitutional design).

9 *Id*.

10 Popular accountability often runs parallel with well-known processes of direct democracy like the initiative, referendum, and recall, but it is a broader and deeper constitutional principle that views direct democracy as a means rather than an end. That is, direct democracy can produce outcomes that both undermine and facilitate popular accountability. For example, if a successful initiative does not reflect the actual preferences of a state majority, then it has not obviously contributed to popular accountability.

11 Thus, popular accountability does not aim to replace representative governance with direct democracy, but it refuses to accept representation as democracy's endpoint.

12 *See Federalist 39*; Madison, On the Vices of the Political System of the United States (1787); Barnett, *supra* note 2, at 52-61.

13 *Id*. at 25.

14 *See* Levinson, *supra* note 2, at 79.

15 *Id*. at 123.

16 *See* U.S. Const. art. V.

17 Levinson, *supra* note 2, at 159. This was, of course, by design and serves various important purposes—especially as a national constitution. My point is not that this reflects bad normative choices in constitutional design. My point is that state constitutions and the federal Constitution have a fundamentally different orientation regarding the structure of democracy.

18 *See* Tarr, *supra* note 1, at 78.

19 *See id*.; *infra* Part II.B (figure charting popular sovereignty and agency provisions in all extant state constitutions).

20 *See* Va. Decl. Rights 1776 § 2; Va Const. 1971 §§2-3.

21 Indeed, the Massachusetts Constitution (along with several others), makes this explicit: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, *and are at all times accountable to them*." Mass. Const. part 1 art. V; *see also* Va Const. 1971 §2 ("That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."); Vt Const. chpt 1 art 6 ("That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.").

22 *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. Ch. L. Rev. 1641 (2014); Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, 110 Am. P. Sci. Rev. 657 (2016).

23 *See* Leonard W. Levy, The Emergence of a Free Press 184 (1985) (describing state constitutions as "primitive", "ineffective", "flabby", and "namby-pamby.").

24 *See* John Dinan, State Constitutional Politics 153-265 (2018) (documenting and cataloging the thousands of state policy amendments over time).

25 *See id*. at 37-73 (documenting and cataloguing structural amendments over time).

26 *See infra* Part III.A.1 (developing and defending this).

27 *See infra* Part III.A.2 (same).

28 *See generally* Marshfield, *supra* note 8, at 560-72 (exploring structural arrangements over time in state constitutions); Dinan, *supra* note 24, at 37.

29 597 U.S. 697 (2022).

30 *Id*. at 721.

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31 *Id*. at 720-22; *id*. at 737-38 (Gorsuch, J, concurring) ("It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ministers."). This rationale works in conjunction with another principal rationale: Courts decide law.

32 *See id*. at 737-38 (Gorsuch, J., Concurring). Critics of the rule argue that it works against democracy because it gives courts more power than agencies. *See* Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 Cal. L. Rev. 899 (2024); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. 1009 (2023) ("It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule").

33 *See, e.g.*, Roberts v. State, 512 P.3d 1007, 1017-18 (Ariz. 2022) (decided 8 days after *West Virginia v. EPA*); Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 Wash. U. L. Rev. 359, 375 (2023) (tracing early state court reliance on *West Virginia v. EPA*).

34 *See, e.g.*, Abbott v. Harris County, 672 S.W.3d 1 (Tex. 2023) (invalidating executive action because of "enormity" of issue and importance of having legislature—rather than governor—speak on issue); Associated Builders & Contractors of Michigan v. Dep't of Tech., Mgmt., & Budget, No. 363601, 2024 WL 387089, at *5 (Mich. Ct. App. Feb. 1, 2024) (endorsing doctrine wholesale but finding it did not apply to state statute).

35 *See* Zoldan, *supra* note 32, at 375.

36 *See also id*. (providing reasons why states should be cautions in adopting doctrine).

37 *See, e.g.*, *West Virginia*, 597 U.S. 737-38 (Gorsuch, J., concurring).

38 *See* Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, Stanford University, The Hoover Institution Center for Revitalizing American Institutions (2023).

39 On the legislative veto in the states, see Dinan, *supra* note 24, at 58-59; Derek Clinger & Miriam Seifter, Unpacking State Legislative Vetoes 9 (2023); Miriam Seifter, *State Legislative Vetoes and State Constitutionalism*, 99 N.Y.U. L. Rev. 2017 (2024).

40 462 U.S. 919, 928 (1983).

41 Clinger & Seifter, *supra* note 39, at 1 (surveying legislative veto in states and finding "in at least 24 states, statutes (and sometimes state constitutions) establish a "legislative veto" system in which the state legislature—or a subset of the legislature—can reject or temporarily suspend agency rulemaking outside of the conventional lawmaking process, while 11 more states utilize models of legislative involvement that are close cousins").

42 *Id*. at 2.

43 As I explain in Part III.B.1, popular accountability constitutionalism can help tee up an even more nuanced perspective on the legislative veto. As it turns out, some states implement the veto in ways that undermine democratic review of agency rules because they empower small legislative subcommittees to mute agency rules.

44 *See* Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 Belmont L. Rev. 342 (2021). For an important account of how state agencies lack public accountability in unique ways, see Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107 (2018).

45 *See* Zoldan, *supra* note 32, at 376-95.

46 *See* Adam B. Sopko, T*he Supervisory Power of State Supreme Courts*, 98 S. Cal. L. Rev. (forthcoming 2024).

47 *See* Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 499 (2107).

48 *See* Marshfield, *supra* note 44, at 358-70 (reviewing various forms of initiative amendments directed at regulatory state).

49 *See* Miriam Seifter, *Understanding State Agency Independence*, 117 Mich. L. Rev. 1537 appendix A (2019); Marshfield, *supra* note 44, at 360-64 (tracing history of constitutional agencies).

50 *See* Marshfield, *supra* note 44, at 360-64.

51 *See id*.

52 *See, e.g*, Federalist 39.

53 Jack N. Rakove, James Madison and the Creation of the American Republic 55 (2d. ed. 2002); Jack N. Rakove, *James Madison and the Bill of Rights*, 22 Pres. Stud. Q. 667, 672 (1992) (describing Madison's fear of "populist sources of unjust legislation" as an "obsession").

54 *Federalist 10* ("The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it.").

55 *Federalist 51*; Rakove, American Republic, *supra* note 53, at 55.

56 Letter from Madison to Jefferson (Oct. 17, 1788), *in* Jack N. Rakove, Declaring Rights 160, 161-62 (1998).

57 Barnett, *supra* note 2, at 52.

58 *Federalist 37* ("the genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people, by a short duration of their appointments."); *Federalist 51* ("A dependence on the people is, no doubt, the primary control on the government").

59 *Federalist 68*.

60 *See* Joseph M. Bessette, The Mild Voice of Reason (1994)

61 *Federalist 10.*

62 *Id*. ("pure democracy, . . . can admit of no cure for the mischiefs of faction. . . . A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking [i.e., majority faction]").

63 *Id*.; *see also Federalist 41* ("the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.").

64 *Federalist 10*.

65 Miller, *supra* note 3, at 21.

66 *Federalist 51* ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

67 *Id*.

68 Daryl J. Levinson, *Rights and Votes*, 121 Yale L. J. 1286, 1295 (2012).

69 U.S. Const. amend. XVII.

70 U.S. Const. amend amend. XV (prohibiting denial of franchise based on "race, color, or previous condition of servitude"); U.S. Const. amend XIX (prohibiting denial of franchise "on account of sex"); U.S. Const. amend amend. XXVI (prohibiting denial of franchise to citizens 18 or older).

71 *See, e.g.*, Arizona Leg. v. Arizona Ind. Rest. Comm'n, 576 U.S. 787 (2015); *see also* Jacob Eisler, *Populist Primacy* (forthcoming paper).

72 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 239 (2020) (Thomas, J., concurring with Gorsuch, J.); United States v. Arthrex, Inc., 594 U.S. 1, 4 (2021).

73 United States v. Arthrex, Inc., 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring).

74 *West Virginia*, 597 U.S. at 697.

75 *Id*. at 750 (Gorsuch, J., concurring) (internal citations and quotation marks omitted).

76 *See* Levinson, *supra* note 31, at 670 (describing federalism as part of Madison's institutional scheme to control majoritarian politics and entrench norms).

77 Levinson, *supra* note 2, at 25 (Senate); *id*. at 79 (President).

78 *Federalist 45*; Levinson, *supra* note 31, at 669-70.

79 Levinson, *supra* note 31, at 670-71.

80 U.S. Const. amnd X.

81 *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

82 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

83 *Id*.

84 *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 Harv. L. Rev. 728 (2024).

85 Antonin Scalia & Amy Gutman, A Matter of Interpretation: Federal Courts and the Law 40 (1997).

86 *Federalist 49*; Versteeg & Zackin, *supra* note 22, at 1668-70 (recounting debate between Jefferson and Madison regarding constitutional entrenchment).

87 Versteeg & Zackin, *supra* note 22, at 659-60.

88 *Id*.

89 *Id*.

90 *Id*. *But see* Levinson, *supra* note 31, at 659 (arguing that actual entrenchment is much harder to explain).

91 M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).

92 Versteeg & Zackin, *supra* note 22, at 659-60.

93 *Id*.

94 *Id*.

95 *Id*.

96 *Id*.

97 The infamous countermajoritarian difficulty as applied to the United States Supreme Court is the classic example. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962).

98 Letter from Thomas Jefferson to James Madison (Sept 6, 1789), *in* The Papers of Thomas Jefferson 392, 392, 396 (Julia P. Boyd, ed. 1958).

99 U.S. Const. art. V.

100 Tarr, *supra* note 1, at 78. A full conceptual history of state constitutional theory is beyond the scope of this article, but I have contributed to that enterprise in other work by examining the convention debates from all known state constitutional conventions since 1776 (approximately 233 conventions with debate records for 115 of those). *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 Nw. U. L. Rev. 65, 118 (2019); Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Pa. L. Rev. 853, 877-93 (2022); Marshfield, *supra* note 8, at 583-600. The account I present here draws on that prior work.

101 Gordon S. Wood, The Creation of the American Republic 147, 164-65 (1998).

102 *Id*. at 129.

103 W. Paul Adams, The First American Constitutions 28-29 (1980).

104 Wood, *supra* note 101, at 128-29.

105 Tarr, *supra* note 1, 69 (quoting N.C. Const. pmbl).

106 Wood, *supra* note 101, at 164.

107 *Id*. at 33.

108 *Id*. at 33.

109 *Id*. at 22-23.

110 *Id*. at 146-47, 157.

111 Evart B. Green, The Provincial Governor in the English Colonies of North America 157-59 (1898) (providing specific examples); Louis E. Lambert, *The Executive Article*, *in* State Constitutional Revision 185, 185-86 (W. Graves, ed. 1960).

112 Green*, supra* note 111, at 158 (including as sheriffs, law enforcement, or mayors).

113 *Id*. at 158; Wood, *supra* note 101, at 157.

114 Green, *supra* note 111, at 154.

115 Wood, *supra* note 111, at 165, 328.

116 *Id*. at 164.

117 Marc W. Kruman, Between Authority & Liberty 41 (1997).

118 Wood, *supra* note 111, at 165.

119 *Id*. at 164-65.

120 *See* Marshfield, *supra* note 100, at 882-86 (surveying all eighteenth-century texts).

121 *Id*.

122 See Robert F. Williams, *The Influence of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 Pa. Mag. Hist. & Bio. 25 (1988).

123 *Id*.

124 *See* Marshfield, *supra* note 8, at 561.

125 Tarr, *supra* note 1, 87, 89-90 (Vermont and Pennsylvania adopted unicameral legislatures).

126 *See* Kruman, *supra* note 117, at 81.

127 *See* Barnett, *supra* note 2, at 55.

128 *See* Marshfield, *supra* note 8, at 561.

129 Barnett, *supra* note 2, at 53.

130 *See id*.

131 *See* Williams, *supra* note 122, at 38 (gathering references to early state constitutional failures in federal convention debates and ratification materials).

132 *See, e.g*., Barnett, *supra* note 2, at 60 ("One by one, each state soon replaced its more democratic constitution with a variation of the new republican one.").

133 The best accounts of the full state constitutional tradition are Tarr, *supra* note 7, John Dinan, The American State Constitutional Tradition (2009), and Dinan, *supra* note 24.

134 Tarr, *supra* note 7, at 95 ("In no period is the divergence between the state and federal constitutional experiences clearer than in the nineteenth century.").

135 *See* Marshfield, *supra* note 8, at 560-72 (tracing this); Tarr, *supra* note 7, at 122-25; Tarr, *supra* note 1, at 94 ("The introduction of checks and balances might suggest that they were emulating the federal Constitution; but despite some surface similarities to the federal model, the state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will, not with checking majority faction.").

136 Governors also got greater appointment powers, longer gubernatorial terms, and increased budget authority. *See* Marshfield, *supra* note 8, at 560-72.

137 Tarr, *supra* note 7, at 122-23 (noting the shift to popular election ran "parallel" with various measures to strengthen office); Mary B. McCarthy, The Widening Scope of American Constitutions 52 (1928) (listing number of states by decade that adopted popular election of governors).

138 Tarr *supra* note 7, at 122-23.

139 New Jersey 1844 Convention Debates at 351.

140 Tarr, *supra* note 1, at 93-94.

141 *Federalist 73* ("The primary inducement to conferring the power in question [i.e., the veto power] upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.")

142 Tarr, *supra* note 7, at 122-23.

143 McCarthy, *supra* note 137, at 50-54 (focusing on the shift to popular election of these offices).

144 Tarr, *supra* note 7, at 122 (citing NY Const. 1846 art. 5, sec. 2 and 3 providing for the statewide election of a canal commissioner, state surveyor, and prison inspector).

145 Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. Chi. L. Rev. 1385, 1400 (2008).

146 *See* Seifter, *supra* note 44, at 1555.

147 *Id*.

148 *See supra* notes 44 and accompanying text.

149 *See* Marshfield, *supra* note 44, at 360-64.

150 Tarr, *supra* note 7, at 46, 73n.48, 49, 157; G. Alan Tarr, Without Fear or Favor – Judicial Independence and Judicial Accountability in the States (2012); Jed H. Shugerman, The People's Courts – Pursuing Judicial Independence in America 30 (2012).

151 Shugerman, *supra* note 150, at 30-56.

152 *Id*.; Tarr, *supra* note 150, at 4 (Progressive Era reformers "championed judicial elections and sought additional weapons, such as the recall of judges and judicial decisions, to enforce judicial conformity with the popular will").

153 Tarr, *supra* note 150, at 4.

154 *Id*. at 10 ("Almost all of these conventions turned to judicial elections as a way to separate courts from the other branches and to enforce the 'people's' constitutional rights against government excess.").

155 *Id*.; *see also* Dinan, *supra* note 133, at 123-36 (exploring many state constitutional convention debate about how to restructure or limit judicial review to conform to popular will).

156 *See generally* Tarr, *supra* note 1; Dinan, *supra* note 133, at 136-83 (recounting rigorous date constitutional debates regarding bicameralism that continued long after Founding).

157 Tarr, *supra* note 7, at 93-135.

158 *Id*. at 111-12.

159 *Id*. at 122-25; G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU Ann. S. Am. L. 329, 334 (2003).

160 *See* Tarr, *supra* note 1, at 94 ("Few believed that checks and balances were sufficient to achieve" accountability from state legislatures; instead they adopted various reforms to "increase transparency of the legislative process, thereby facilitating popular control and deterring legislative misbehavior").

161 *Id*.; Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. Legis. 39 (2014).

162 *See* Tarr, *supra* note 1, at 94.

163 *See* Tarr, *supra* note 7, at 112.

164 *See* Versteeg & Zackin, *supra* note 22, at 664 (noting process is commonplace and likely began during the nineteenth century).

165 Tarr, *supra* note 7, at 150-162.

166 M. Dane Waters, Initiative and Referendum Almanac (2003) (charting adoption of direct democracy devices by state).

167 *E.g*. Oregon Const art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives").

168 The indirect initiative adopted in a handful of states is a nuanced exception to this characterization.

169 *See* Tarr, *supra* note 1, at 94.

170 Elizabeth Garrett, *Hybrid Democracy*, 73 Geo. Wash. L. Rev. 1096, 1097 (2005).

171 National Council of State Legislatures, Report – Recall of State Officials (2025).

172 *Id*.

173 *See* Dinan, *supra* note 133, at 66 n. 13; The Records of the Arizona Convention of 1910, 242-46 (describing the purpose of recall as grounded in the belief that "all officers should be responsible to the voters who choose them and that no man should hold office after he fails to represent the sentiments of his constituents, we favor the recall of delinquent officers").

174 The best account of the full arc of development in state amendment design and purpose is Dinan, *supra* note 133, at 29-64; *see also* Marshfield, *supra* note 100, at 88-105 (connecting that account to the history and theory of the constitutional convention).

175 *See* Marshfield, *supra* note 100, at 88-105.

176 *See* Tarr, *supra* note 7, at 69.

177 *See* Marshfield, *supra* note 100, at 88-105.

178 James Quayle Dealey, Growth of American State Constitutions 258 (1915) ("[The convention] is the great agency through which democracy finds expression. In its latest form, that of a body made up of delegates elected from districts of equal population, it is one of the greatest of our political inventions. Through it popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated.").

179 *See* Tarr, *supra* note 7, at 94-94.

180 *See* John Dinan John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth & Twentieth Centuries*, 34 J. Pol'y Hist. 297 (2022).

181 *See id*.

182 *See id*.

183 *See* Tarr, *supra* note 7, at 136-39.

184 *See* Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 120 (1910); *see also* Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 101 (1864) (framing the legislative model for amendment in terms of the need to bypass cumbersome conventions).

185 *See* Dinan, *supra* note 133, at 48-49.

186 *See id*. at 50 ("a principal benefit of adopting more flexible amendment procedures, in the view of these Progressive Era delegates, was therefore to permit a more ready reversal of errant judicial rulings.").

187 *See id*.

188 *See id*. at 50 (quoting Progressive Era delegate from Massachusetts: "Let us tell the people that they have what our Constitution says they may have—a right to amend that Constitution when their liberty and their happiness and their welfare require it.").

189 *See id*. at 59-62.

190 *See* Versteeg & Zackin, *supra* note 22, at 660-61.

191 *See id*.

192 *See* Dinan, *supra* note 24 (describing this as "governing by amendment").

193 *See* Dinan, *supra* note 133, at 48-51.

194 *See* Dinan, *supra* note 24, at 242-43.

195 *See id*. at 23-24.

196 *See id*. at 23.

197 Versteeg & Zackin, *supra* note 22, at 661-64.

198 *Id*.

199 *See, e.g.*, Mass. Const. part 1 art. V (emphasis added).

200 *See, e.g.*, W.V. Const. art. III, § 2 ("All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them"); Cal. Const. art. I § 3 ("The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.").

201 Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 879 (2021).

202 *See id.* at 869-79.

203 *See id*. at 869 n.48 (listing all the provisions).

204 *See id*.

205 *See* Pa. Const. art. I § 2.

206 *See* Bulman-Pozen & Seifter, *supra* note 201, at 869-79.

207 Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

208 Marshfield, *supra* note 100.

209 *See e.g.*, Cal Const. art. IV § 22 ("It is the right of the people to hold their legislators accountable. To assist the people in exercising this right, at the convening of each regular session of the Legislature, the President pro Tempore of the Senate, the Speaker of the Assembly, and the minority leader of each house shall report to their house the goals and objectives of that house during that session and, at the close of each regular session, the progress made toward meeting those goals and objectives.").

210 Va. Const. art. I § 5. I also included states with provisions that state: "The people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof." *E.g.*, Mo. Const. art. I § 3.

211 Many other more idiosyncratic accountability mechanisms exist in state constitutions. *See, e.g.*, N.H. Const. Pt 1, art. 8th ("The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision."); N.D. Const. art. XIV § 3 ("In order to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government, the North Dakota ethics commission is hereby established.").

212 I excluded all states where judges are elected but exclusively from sub-state districts rather than a statewide basis.

213 Delaware is the only state that does not require a referendum on legislatively referred constitutional amendments, but it requires super-majority approval in two successive legislative sessions and requires a referendum on amendments proposed by a constitutional convention.

214 For an argument in the exact opposite direction that equates state constitutions with republicanism and cast a shroud of suspicion and limitation on all process of popular accountability see *Washington State Farm Bureau Fed'n v. Gregoire*, 174 P.3d 1142, 1157 (Wash. 2007) (Chambers, J., concurring).

215 In Massachusetts, for example, there are explicit subject-matter limitations on the initiative process that precludes its use for (among other things) "reversal of a judicial decision" or alterations to certain rights, including freedom of religion. Mass Const. art. XLVIII § 2.

216 It's clear in Massachusetts, for example, that decisions regarding freedom of religion must pass through representative lawmaking processes.

217 Ill. Const. art. XI § 3.

218 Col. Const. art V § 1.

219 N.H. Const. part 1st art. 8.

220 Carrigan v. New Hampshire Dep't of Health & Hum. Servs., 262 A.3d 388 (N.H. 2021).

221 *Id*. at 395.

222 This is not to say that the court's holding is wrong. I mean only to illustrate some of its reasoning. If the plaintiff's claim was that the law required a certain level of funding for child-welfare services, and the political branches were not allocating that amount, it's unclear why a court would not require them to defend that allocation in light of the strong popular accountability rationale embedded in the taxpayer spending provision.

223 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

224 *See Valley Forge*, 454 U.S. at 475.

225 *See id.* at 474-75.

226 *See supra* part II.A.2.

227 *See* Sopko, *supra* note 46.

228 *See* Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 333-34 (2d ed. 2023).

229 *See supra* Part II.A.2.

230 *See* Shugerman, *supra* note 150, at 10.

231 Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality Review*, 123 Colum. L. Rev. 1855, 1856 (2023).

232 *See* Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833 (2001).

233 603 U.S. 369 (2024).

234 *See* Aaron J. Saiger, *Chevron Deference in State Administrative Law*, 83 Fordham L. Rev. 555 (2014).

235 *Id*. at 412.

236 556 P.3d 387, 403-04 (Hawaii 2024).

237 *Id*.

238 *Id*. at 405.

239 *Id*. at 404-05.

240 *Id*. at 405.

241 *Id*.

242 LUC commissioners are appointed by the Governor, but they are all "non-paid volunteers who represent a cross-section of the community." https://luc.hawaii.gov/about/history-3/.

243 This is not to suggest that *Chevron* deference would be inappropriate. My point instead is that popular accountability provides a basis for the court to more authentically justify departure from *Loper Bright* than simply registering agreement with Justice Kagan's assessment of federal constitutional structure.

244 462 U.S. 919, 928 (1983).

245 *See id*. at 945-52.

246 *See id*. at 952.

247 *See id*.

248 *See* Miriam Seifter, *State Legislative Vetos and State Constitutionalism*, 99 N.Y.U. L. Rev. 2017 (2024).

249 279 S.E.2d 622 (W.V. 1981).

250 *Id*. at 626.

251 *Id*.

252 *Id*. at 632 ("The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.")

253 *Id*. at 635.

254 *Id*. at 635.

255 *Id*. at 632 (listing all the provisions that guide and limit the legislature in pursuit of public accountability).

256 By way of contrast, consider Iowa's legislative veto process, which allows the legislature to "nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly." Iowa Const. art. III, § 40.

257 *See* Williams & Friedman, *supra* note 228, at 137-165 (providing history of New Judicial Federalism).

258 *See id*. at 137-38. Justice Brennan's famous article is: William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). One of Justice Linde's early and influential articles was: Hans A. Linde, *E Pluribus— Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 196– 97 (1984).

259 *See* Williams & Friedman, *supra* note 228, at 137-165. The canonical academic article in support of independent state court analysis is 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 (1984).

260 *See id*. at 154.

261 *See* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 Rutgers L.J. 983 (2007); John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 Alb. L. Rev. 2105 (2012); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 Miss. L.J. 223 (1984); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 Publius 153, 153 (1987); Kenneth P. Miller, *Defining Rights in the States*, 76 Alb. L. Rev. 2061, 2064 (2013); Kenneth Miller, Direct Democracy and the Courts 155 (2009).

262 *See, e.g.*, Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 Ann. Am. Ac. Pol. Sc. 98 (1998); Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993); James A Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992).

263 *See* Justin R. Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41 (2006); *see also* Bulman-Pozen & Seifter, *supra* note 231, at 1881-1891 (emphasizing the lack of theoretical frame to support independent state constitutional rights jurisprudence).

264 *See, e.g.*, Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771 (2021); Justice R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025).

265 *See* Marshfield, *supra* note 100, at 886-926.

266 *See id*.

267 *See id.*

268 *See id*.

269 I am describing, of course, rational basis review.

270 Here, heightened review comes in the form of strict scrutiny (and its means-end variants) or a search for historically analogous, constitutional regulations. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1285 (2007); Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 Wake Forest L. Rev. (forthcoming 2025).

271 *See* Marshfield, *supra* note 100, at 858.

272 *See id.* at 858-59; Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 Conn. Bar J. 3, 17 (1991) (describing the Connecticut bill of rights as an "ordinance of the people" because "it could not be improper to settle certain points—the people were possessed of certain rights, to abridge the power of the legislature, and enlarge the power of the executive or judiciary" and noting further that "[s]ome of the states had made such regulations, and confined their legislatures within such limits, as to prevent the enacting of any law on certain subjects"); Proceedings and Debates of the Constitutional Convention of the State of New York 3264 (1868) ("The theory of our actions so far, has been that we cannot trust the legislature, because from various causes the legislature would often disregard what was required . . . and therefore it is necessary to provide for this in the organic law"); Proceedings of the New Jersey Constitutional Convention of 1844, at 170 (N.J. Writer's Project of the Works Projects Admin 1942) ("How dark are the evils that unbridled legislation has inflicted on the community. We are called upon . . . to guard all the avenues by the which people's rights may be invaded. By adopting the declaration of rights, we will circumscribe the actions of the legislature")

273 These provisions are ubiquitous in current state bills of rights. *See supra* Part II.B.1; Steven G. Calabresi, *Individual Rights under State Constitutions in 2018*, 94 Norte Dame L. Rev. 49, 133 (2018) (as of 2018, forty-nine states have provisions).

274 *See* Marshfield, *supra* note 100, at 893-926 (surveying modes of argument and issues in convention debates).

275 *See* John Dinan, Keeping the People's Liberties 32 (1998); Tarr, *supra* note 7, at 162-63.

276 *See* Bulman-Pozen & Seifter, *supra* note 231, at 1862-81.

277 *See, e.g.*, Ky. Const. Bill of Rights § 18 ("The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.").

278 *See, e.g.*, Ala. Const. art I § 24 ("That all navigable waters shall remain forever public highways, free to the citizens of the state . . ."); Fl. Const. art. I § 28 ("Fishing, hunting, and the taking of fish and wildlife, including by the use of traditional methods, shall be preserved forever as a public right").

279 *See, e.g.*, Mich. Const. art I § 27 (detailed provision regarding embryonic stem cell research).

280 *See, e.g.*, Ariz. Const. art I § 36.05 ("It is hereby declared to be the public policy of Alabama that the right of persons to work may not be denied or abridged. . .").

281 *See, e.g.*, Ark. Const. amd. 34 Rights of Labor § 1 ("No person shall be denied employment because of membership in or affiliation with or resignation from a labor union.").

282 *See, e.g.*, Ohio Const. art. I § 21 ("No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.").

283 *See, e.g.*, Ill. Const. art I § 8.1 (Crime Victims' Rights).

284 *See supra* note 272 (providing examples); *See* Marshfield, *supra* note 100, at 893-926.

285 *See* Bulman-Pozen & Seifter, *supra* note 231, at 1891.

286 Additionally, it's important to keep in mind that state court rulings on rights are rarely the final word precisely because amendment is more accessible under state constitutions. Thus, if state courts get things wrong, voters can usually respond.

287 Bulman-Pozen & Seifter, *supra* note 231, at 1857.

288 *See id.*

289 *See id*. at 1921.

290 *See id*. at 1860.

291 *See id*. at 1895.

292 *See id*. (using this example).

293 *See id*. at 1856.

294 *See id*. at 1912.

295 584 P.2d 1088, 1088 (Cal. 2021).

296 *See id*. at 1093.

297 *See id*.

298 Cal. Const. art. I, § 25.

299 *See* San Luis, 584 P.2d at 1091-92.

300 *See id*.

301 *See id*. at 1091.

302 *See id*. at 1091-93.

303 *See id*. at 1094-95.

304 *See id*.

305 See *id.* at 1095-96.

306 *See id*. at 1095-96 ("From the foregoing, it appears that appellants are under a duty to provide access to the public for fishing under [the state constitutional right to fish]. They are also under a duty to protect the purity of the water supplied from the reservoir to domestic users. . . . Since a fishing program consisting of sanitary facilities and surveillance is necessary to fulfill these dual obligations, we think that the trial court properly concluded that appellants have a duty to provide such a fishing program. We further think that the trial court reasonably apportioned the cost of the program on the basis of the parties' agreement as to the sharing of operating and maintenance costs of the reservoir.").

307 *See id*. at 1095.

308 913 A.2d 391 (Vt. 2006).

309 *Id*. at 393-94, 398.

310 Vt. Const. ch. II, § 67.

311 *Hunters of Vermont*, 913 A.2d at 395.

312 The court did not explain how a total ban is a reasonable regulation, but it seems to have assumed that a total ban was reasonable in light of the district's stated purpose for the land (recreation and conservation).

313 962 N.W.2d 780, 785 (Iowa 2021).

314 *Id*. at 785-87.

315 *Id*. Specifically, they sought "an injunction requiring the state to adopt and implement a mandatory remedial plan to restore and protect public use that requires agricultural nonpoint sources and CAFO's [confined animal feeding operations] to implement nitrogen and phosphorus limitations in the Raccoon River watershed." *Id*. They also sought "an injunction against the State authorizing the construction and operation of new medium and large animal feeding operations and confined animal feeding operations in the Raccoon River watershed" until the remedial program was operational. *Id*.

316 *See id*. at 797.

317 *See id*. (citing Rucho v. Common Cause, 588 U.S. 684 (2019)).

318 *See id*. 797.

319 *Id*. at 799.

320 *Id*. at 796–97.

321 *See Rucho*, 588 U.S. at 695 ("Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.' We have understood that limitation to mean that federal courts can address only questions historically viewed as capable of resolution through the judicial process.") (internal citations and quotation marks omitted).

322 Iowa Const. art. V § 4. Contrast this language with Article III, which includes not language regarding federal court's remedial powers, and the All Writs Act, which is far more restrictive of federal court remedial powers. See 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

323 Iowa Const. art V § 6; Iowa Code Ann. § 602.6101 (West) ("The district court has exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body. The district court has all the power usually possessed and exercised by trial courts of general jurisdiction, and is a court of record."); Pottawattamie Cnty. Dep't of Soc. Servs. v. Landau, 210 N.W.2d 837, 841 (Iowa 1973) (district courts have all common law remedies).

324 Iowa Const. art. V § 17.

325 *Iowa Citizens for Community Improvement*, 962 N.W.2d at 799.

326 *See id*.

327 Iowa Const. art. I § 2.

328 Iowa Const. art. VII § 10.

329 The conservation trust fund that voters approved in 2010 is a tricky amendment. It includes language requiring the legislature to fund the trust if taxes are raised from their rates on the date of the amendment. *See* Iowa Const. art. VII § 10. The legislature has not raised the applicable taxes or funded the trust, which raises questions about the true expressive value of the conservation trust provision. It was approved by 63% of Iowa voters.

330 *But see* Ching v. Case, 449 P.3d 1146, 1182 (Hawaii 2019) ("It is not uncommon for courts to issue generally-stated orders requiring government agencies to submit plans to remedy constitutional violations and then evaluate the adequacy of the plans prior to their implementation. And the Hawai'i Supreme Court has prescribed intensive monitoring to ensure specific compliance with terms of a broadly phrased order").

331 745 N.Y.S.2d 376 (N.Y. Sup. Ct. N.Y. County 2002). The right to a lawyer under the New York Constitution is broader than the Sixth Amendment right to counsel under the federal constitution. *See* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State*, 25 Touro L. Rev. 31 (2009). In New York, indigent parents subject to child custody proceedings are entitled to counsel under the state constitution.

332 *New York Lawyer's Association*, 745 N.Y.S.2d at 380.

333 *See id*.

334 *See id*. at 385.

335 *See id*.

336 *See id*.

337 *See id*. at 388.

338 *See id*.

339 In another ongoing project, I am exploring how originalism maps onto the unique features of state constitutionalism. For various reasons, this is an important and emerging inquiry that should be informed by an accurate understanding of state constitutional structure and development. For example, as I describe below, there is a temptation among judges and lawyers to assume that, after the Founding, Federalist logic and thinking predominates all public understanding of American constitutionalism. But state constitutional convention debates, and the statewide referenda campaigns that ratified them suggest that this is not the case. During the Progressive Era, for example, popular state understanding regarding the role of the judiciary was vastly different from the Federalist account offered at the founding. State voters personally ratified various constitutions with the very clear understanding and expectation that courts would more actively engage in governance on behalf of the people than they had prior.

340 Charles Black, Jr., Structure and Relationship in Constitutional Law (1969); *see* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 Geo. L. J. 833, 834 (2004) (describing structural method).

341 Black, *supra* note 340, at 31.

342 *See id*.

343 After all, strong regulation of the initiative is important for the initiative's accuracy and reliability.

344 *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1 (2015).

345 *See id*. at 29. Identifying the substance of original meaning can be complicated and there are different theoretical approaches. A dominant approach is original *public* meaning, which focuses on how an ordinary adult at the time of ratification would understand the constitution. A less prominent strand focuses on the drafter's subjective intentions. Another focuses on the original methods of legal interpretation at the time of ratification. *See id*.

346 *See* Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, so Help me God!*, 81 U. Chi. L. Rev. 1385, 1385 (2014) ("The text of course must be understood in terms of the original public meaning of its words and phrases, in the linguistic, social, and political contexts in which they were written: history and context illuminate textual meaning; so does constitutional structure; so can precedent, at least sometimes.").

347 *Id*. at 1394.

348 *Id*.

349 *See generally* Thomas B. Colby, *Originalism and Structural Argument*, 113 Nw. U. L. Rev. 1297 (2019).

350 521 U.S. 898 (1997).

351 *See* Colby, *supra* note 349, at 1299-1300.

352 *See supra* note 100 (listing sources from this literature).

353 Vt Const. chpt II § 5.

354 Samuel Williams, The Natural and Civil History of Vermont 343 (1794).

Oral Remarks of Professor Marshfield

Thank you to the National Civil Justice Institute for this opportunity to speak with you and share some of my work. It is truly a humbling and wonderful experience for me to be able to not only share with you some of what I have been working on but also to have the chance to talk to you throughout the day and to learn from you about how these ideas fit or don't fit with what it is that you do and how it is that you do your jobs from the bench on a day-to-day basis, and I am incredibly humbled and honored to be able to be part of this wonderful event and grateful for the chance to be here with you.

My paper is titled "Popular Accountability and State Constitutional Law." In the paper and in my remarks today, I am going to do my best to convince you of two things. First, state constitutions have a unique and deep commitment to popular accountability that is not present in the same way in the federal Constitution. And second, this commitment should inform how state courts approach constitutional disputes and, even more importantly, empower state courts to critically discern and assess non-binding federal constitutional precedents and determine how they should or should not be applied under state constitutions.

Before I dive in, I think a definition and a qualification might be helpful in describing my claim and my argument. When I talk about "popular accountability," I mean that a core function of a state constitution is to provide formal, legal, and accessible processes for statewide electoral majorities to respond to misaligned government outputs. And in this way, state constitutions are uniquely grounded in the idea that the electorate has both a right and a formal legal process, through various different mechanisms, to intervene and realign government. This is the first point that I hope to convince you of today and I will elaborate on it momentarily.

Permit me to add a limitation. When I argue that popular accountability should inform state courts and how they adjudicate state constitutional disputes, I do not mean that state courts should operate as some sort of real-time conduit for popular opinion. I am not, for example, suggesting that state constitutional disputes should be adjudicated by real-time polling where the public is casting its views on cases and the court is in some way considering this, or even that state courts should try to discern the popular vibe on issues or cases that are pending before them. I am not advocating for mob rule as brought about by the judiciary.

The point that I am trying to make is deeper and, I hope to convince you, more serious. And it goes something like this: When state courts decide any state constitutional issue, they are invariably applying institutional constraints on different branches of government, including themselves. When they decide rights cases, they are really in some way making an institutional judgment about the degree of deference the legislature should receive in regulating a certain aspect of society, and when they decide cases about separation of powers, they're making judgments about the degree to which the legislature should have the prerogative to regulate another area of society. I think all constitutional disputes are in some way infused with institutional judgments and constraints on the branches of government and the people.

Those institutional constraints and the substance of those constraints don't come to us as fully-fledged, predetermined, platonic forms that just speak for themselves. They are in many respects highly contextual. They are the product of the constitution that set up those institutions. They are the product in many respects of positive constitutional law. This means that different constitutions can give rise to different forms of institutional constraints.

As an example, to kick us off, let's take federal standing doctrine. I have traditionally understood it as a rule of thumb that not everybody can sue for everything in federal court. The U.S. Supreme Court seems to have different ideas on standing from day to day, so we'll see how standing doctrine evolves. But as far as I know, basic black letter law holds that you must have a concrete redressable injury to sue in federal court.

That limitation on federal jurisdiction to adjudicate cases is grounded in an explicit textual provision in Article III.[1] It is also infused with institutional understandings about the role of the United States Supreme Court as an unelected judiciary with a great degree of independence from the political branches, and about the specific prerogatives of Congress and the President and their roles as policymakers, and also a relatively formalistic understanding of the separation of powers that holds everything together under the federal Constitution.

All of those institutional constraints have informed how the U.S. Supreme Court has determined the proper scope of "cases" and "controversies,"[2] and the accessibility of the federal courts to litigants to bring particular claims.

But now imagine a constitution that requires an elected or recallable judiciary, a judiciary that has explicit authority not just to decide cases and controversies but explicit authority to actually issue advisory opinions. Imagine a court that sits within a constitutional structure where it's hard to precisely define "separation of powers" because different types of authority are given to all manner of different institutions and boards. If all of those institutional factors are so different under this hypothetical constitution, then surely standing doctrine needs to be thought about a little bit differently than the way that the U.S. Supreme Court tends to think about standing under Article III.[3]

This is where I think popular accountability ultimately should do some work, because one of the core pillars of state constitutionalism is this commitment to popular accountability. It's an existential institutional commitment that pervades all of state constitutional law, and it should be part of how state courts think through just about any constitutional dispute that they adjudicate.

With those qualifications and that definition in place, let me try to convince you of my first point, that state constitutions actually have this unique commitment to popular accountability. if you will indulge me for a second, I am going to describe historical anecdotes that I think help illustrate exactly what it is that I'm talking about before describing how pervasive these structures and expressions of popular accountability are across state constitutions.

Let's go to Indiana in the 1840s. At the time, Indiana was in a really tough spot. Following a financial crisis in 1837, the state had a crushing amount of past-due public debt, and the debt was largely the result of bad governance, outright corruption, and irresponsible speculation during an infrastructure boom. The situation on the ground was terrible. Banks were closed, and there was massive unemployment. The state effectively defaulted on all of that debt, and the public services from the state were essentially non-existent.

As you can imagine, as a result of all of this, there was a massive public outcry. Following a process that was outlined in the existing Indiana constitution, the public used a referendum and called a constitutional convention to try and fix the causes of this catastrophe.

When the delegates assembled in Indianapolis in 1850, they could have taken a few different approaches to constitutional reform. Following in the footsteps of Madison and his jolly gang of federalist fellows, they could have identified the problem as rash decision-making by the people, that the people had acted too hastily. They

could have said, “We need to control the mobs.” And they could have worked to build a constitution that would further limit the influence of reckless popular impulses by creating more robust internal checks and balances that slowed and refined government and limited the power of extant popular majorities. They could have taken the federal approach in response to the catastrophe that they were facing.

However, the delegates quite explicitly, clearly, and repeatedly did not do this. In fact, they did almost the exact opposite. They attributed the primary cause of the problems they faced to corruption and undue special influence by government officials who had strayed from the public good. And so, in the words of one delegate to that convention, “Our work consists not of imposing a number of restrictions that may be placed on the people, but of removing those restrictions and enabling the people to better govern themselves.”

Indeed, in almost all respects, that convention set out to design a constitution that would funnel power back to the voting public as directly and immediately as possible at all critical governance inflection points. The convention adopted limitations on special legislation. It adopted a single-subject rule, the direct statewide election of various officials, boards, and judges, a strong substantive cap on public debt, and the liberalization of constitutional amendment procedures to allow the public to more readily change the constitution’s text.

To the delegates of the Indiana convention, at least in 1850, if the state constitution did nothing else, it had to function as an active and effective instrument of popular control over government. Indeed, several decades later in an 1892 Harvard Law Review article that surveyed the nature of state constitutionalism during that period, the author concluded that the theory underlying state constitutions is that the agents of the people, the legislative agents, executive or judicial, are not to be trusted, so that it’s necessary to enter into the most minute particulars as to what they shall not do.

Indiana’s constitutional convention was definitely a product of the time, but it has now become representative of many state constitutions today, with special legislation prohibitions, single-subject rules, and the election of state judges. Many of these institutions have become widespread across the states.

But now let’s jump ahead to 2010, following the adoption of the Affordable Care Act and its provisions that made Medicaid expansion available to the states. In 2014, when all of that was happening, thirty-four states quickly expanded Medicaid, but several, mostly Republican states, opted not to expand Medicaid.

As time passed, popular sentiment in those states shifted strongly in favor of expansion. This was presumably because, if the federal government was going to largely foot the bill for an extreme state benefit, the citizens of the states that had not adopted it wouldn’t want to be left out when everybody else was adopting it. But many Republican governors and legislatures continued to toe the party line, and they refused expansion despite strong popular support for it.

To address this, in 2017, voters in a variety of states, including Maine, Idaho, Utah, Missouri, Mississippi, Oklahoma, and Nebraska—that you might not normally associate with citizen-sponsored initiatives—approved Medicaid expansion in ballot initiatives. This closed and realigned the policy gap between what Republican governors and legislatures preferred and what the median voter and the majority of people in those states preferred.

These stories are admittedly anecdotes. They are products of many unique forces, actors, and different variables. I do not attempt to prove more than is warranted from these very specific instances, but I do think that they illustrate how state constitutions are built around a commitment to popular accountability. The core purpose

of state constitutions is to provide formal, legal, and accessible processes for popular majorities to hold state government accountable when voters deem it necessary and worthwhile.

In my paper, I argue that history, text, and structure all support this claim, but right now I would just like to focus on text because it's hard to imagine a stronger textual argument for this claim in many different state constitutions.

Consider, for example, the text of the Massachusetts Constitution, which was the handiwork of John Adams, who was anything but an eighteenth-century populist. It provides that: "All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive or judicial, are their substitutes and agents and are, at all times, accountable to them."[4]

The Vermont Constitution similarly provides that: "All power being originally inherent in and consequently derived from the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants and are at all times accountable to them."[5]

In the paper, I try to show that there is robust data to support the notion that these expressions occur across all state constitutions. Indeed, all states have at least three expressions of these principles of popular accountability. State constitutions commonly include various mechanisms to execute their vision of popular accountability, such as recall, term limits, and the referendum. These different processes appear across a variety of states.

I now want to contrast the state approach to the federal approach, which I believe represents the primary way of thinking about all constitutions.

The federal Constitution definitely relies on democratic norms. I'm not suggesting that it does not. But its entire design and structure is focused on muting and mediating national popular majorities. Indeed, I think it might be fair to say that an essential function of the federal Constitution is to ensure that national popular majorities do not have any direct formal way to intervene and interrupt government. Federal democratic accountability is real, but it is indirect and infrequent. It is bottlenecked around presidential elections conducted through the electoral college instead of direct popular vote and congressional elections, which give disproportionate influence to small states in selecting U.S. Senators.

From this point of view, the federal Constitution and state constitutions are very different creatures. They were designed with different problems in mind and have starkly different government structures. This helps explain why they look so different. The federal Constitution is a deeply entrenched framework document, where the text doesn't change all that much, and one of its primary goals is to maintain the status quo and slow the movement of national popular majorities.

State constitutions are different. They are best described as active instruments of popular control over government. They have just about everything you can imagine in them. Why? Because over the course of a state's history, the people have taken issue with just about everything the state government has done in some way, shape, or form, and they have gone out of their way to make sure that their desire to hold their government accountable is reflected in the text of their constitution. When we start to view the document as an active instrument of popular control and not a deeply entrenched framework document, I think it starts to make a lot more sense, and a lot of the characteristics of state constitutions that at first blush appear to be bugs of the document turn out in fact to be useful features serving its underlying goals.

Let's say that you agree with me that state constitutions have, as one of their core pillars, this unique commitment to popular accountability that's different from the way the federal Constitution approaches democratic accountability. What do you do with that? Where do we go from here?

In the paper, I try to weave the principle of popular accountability through various areas of state constitutional law and provide some examples. Today, in my remarks, I want to make three quick points that I think could be useful in trying to take this underlying point and wrap it through into jurisprudence.

> I think that popular accountability should be added to the state constitutional canon of argument in a manner that's analogous to how federalism is part of the federal constitutional canon.

First, I think that popular accountability should be added to the state constitutional canon of argument in a manner that's analogous to how federalism is part of the federal constitutional canon. In any number of federal constitutional cases, you will hear federal justices asking how a particular outcome is going to affect the balance of power between the state and federal governments. In rights cases, in spending clause cases, in separation of powers cases, an ever-present concern is how a ruling in one direction or the other is going to affect the state and national balance of power.

In *Dobbs*,[6] the Supreme Court based its argument on text and history, but Justice Alito seemed incredibly pleased that one of the outcomes of this ruling was that it was going to send this issue back to the states. This was not the main argument, but it appeared to be a comforting theme to Justice Alito that the issue of abortion was going to be returned to the states.

The way the Supreme Court deals with federalism is an illustration of how state judges should think about popular accountability. When state constitutional issues arise, state courts should consider how particular rulings and outcomes will affect the public's ability to hold government accountable. That is a legitimate form of argumentation under state constitutions, and it's something that state judges should be mindful of in figuring out how to decide constitutional cases.

The example that I give in the paper for this is the legislative veto, which is when the legislature has the option, through a series of different processes, to override agency rulemaking. Courts have had to consider whether this is consistent with separation of powers and have frequently been influenced by the Supreme Court's decision in *Chadha*.[7] That was a highly formalistic decision which said that the legislative veto is not appropriate because it violates bicameralism and presentment to the President.

But when state courts take up this issue, they have, not infrequently, considered how the specifics of the legislative veto process might undermine democratic accountability. In West Virginia, for example, there was a process that allowed a really small group of state legislators to veto agency rules. The West Virginia Supreme Court objected and said this essentially created a random minority veto authority in some subset of legislators from a subset of places in the state. The court believed that this was no way to ensure statewide popular accountability. The process was therefore unconstitutional—not only because of bicameralism and presentment problems, but because of how it undermined popular accountability.

Second, I don't think that state courts should accept arguments against popular accountability as self-justified. I think in federal constitutional law that is an argument that can work. Why shouldn't the government operate in

a particular way, or a certain process be allowed to unfold? Because we are a republican form of government, and we have representative democracy, not direct democracy.

I am not entirely sure that strain of argument works under state constitutions. State constitutions are far more open and supportive of the fact that there should be processes of direct popular accountability, and so when those are limited and infringed, state courts should explain exactly why it is that they would intrude on this fundamental core principle of state constitutional law.

Lastly, I think state judges should be empowered by the principle of popular accountability to be inherently suspicious of any Supreme Court precedent that is based on federal institutional analysis. From my point of view, cases that are based on horizontal separation of powers, notions about what federal courts can and cannot do, notions about what Congress should do, what the President should do, might turn out to be analogous under state constitutional law, but they are inherently suspicious because they exclude as one of the core driving pillars the notion that the people are an institutional force in state constitutional law. The people have a direct legal right to intervene in government, and none of that federal institutional analysis is going to accommodate that particular principle, and so I think state courts should be emboldened to be critical and to think through the degree to which that institutional analysis applies and is analogous to the states.

Comments by Panelists

Professor Quinn Yeargain, Michigan State University College of Law

I want to begin by saying I agree, mostly. At its core, I fundamentally agree with what Professor Marshfield has laid out, both in his critique of how federal constitutional doctrine might apply in the states as well as how we might be able to use the idea of popular accountability constitutionalism to arrive at potentially different results in the states than we might at the federal level and treat popular accountability as a new canon of construction.

I would further like to register my strong agreement with an argument that Professor Marshfield has laid out previously, and reframing it slightly. Federal constitutional law should really have no purchase when it comes to deciding state constitutional questions, which is a little bit more of an extreme invocation than his exhortation at the very end. The structures are totally different. Any time that we talk about the federal Constitution, we are all textualists now, we can agree, but as I put the question to my students in U.S. Constitutional Law earlier this year, what text?

If you look at the federal Constitution, it is one of the shortest national constitutions in the world, and every state constitution, for better or worse, is longer, sometimes substantially so, than the federal Constitution. At the federal level, we spend a significant amount of time debating the meanings of minute uses of words and phrases because there isn't much to parse. But at the state level, there is far more detail that allows us to have richer conversations about the text, and that difference is meaningful.

Anytime that we're debating something at the federal level, we're talking about a very specific balance of powers, but in every single state, the balance is different. There are more elected officials. The administrative state in many state constitutions is constitutionalized in some form or another in a way that it unequivocally is not at the federal level. The basic assumption of the federal system of separated powers, which relies on an idea of Madisonian separation of powers, does not apply in the states in the same way as Professor Marshfield has laid out.

This is also true for rights adjudication. At the federal level, as Professor Marshfield explained, there is no role for the public in rights development. That is seen as a good thing because it prevents the tyranny of the majority from taking away the rights of the minority. In fact, there is no mechanism for the public to express its opinion other than symbolically on any part of the constitution. It violates the U.S. Constitution for a state to submit a proposed amendment to the U.S. Constitution to the voters. States are not allowed to do that, even in states that have the initiative and referendum process.

But voters can and clearly do participate in rights development at the state level. They have created an entire body of rights that differs from and supplements federal rights in various contexts. Here, Professor Marshfield's argument is utterly persuasive to me that the existence of this popular accountability ought to affect how we interpret rights and anything else in this context. But to promote some healthy debate, I will throw a couple of wrenches into this.

First, what do we do when voters add rights into their constitution that they might not fully understand and that clash with other rights? Those are difficult things to deal with. And second, what do we do when voters actually do try to take away the rights of disfavored minorities or classes of people?

I'll turn to the first one. It's probably fair to say that the electorate lacks fluency in constitutional rights parlance. Constitutional rights are difficult to lay out, difficult to understand, and difficult to separate. It's all very confusing. And having taught U.S. Constitutional Law, I can assure you that the lawyers who will soon be practicing before you also find it confusing.

In 2014, Alabama voters were presented with a constitutional amendment that would subject any restrictions on the right to bear arms to strict scrutiny, a phrase that we all understand what it means in some form or another but that voters may not. As a state senator said at the time, "If you don't know the meaning of strict scrutiny, it could sound like you're limiting the right to bear arms." And that is a fair point, that expecting voters to fully understand what the words in the constitutional amendments that they're ratifying mean is really quite challenging.

Courts always have a hard time when it comes to balancing different rights with each other, deciding which ones should take precedence. Adding the electorate to the conversation makes the task more difficult.

For example, the Louisiana and Texas constitutions guarantee in very different language the right to practice one's religion by attending worship in a physical place. Were these provisions intended to limit the power of local governments to zone where churches could be? A number of states in the country, following the passage of the Affordable Care Act, added rights to healthcare freedom to their state constitutions. Does this guarantee an unequivocal right to obtain whatever type of healthcare one wants? Does it separately guarantee a right to abortion, to receive gender-affirming care?

It's probably fair to say that voters were not specifically contemplating those questions when voting on those measures, but insofar as we're thinking about the role of the public in rights development, rights adjudication, and constitutional interpretation, those are fair questions that are difficult to answer.

The second problem I flagged is probably the more serious one. There are moments when voters use their power either to initiate constitutional amendments or to ratify amendments referred by the legislature to disenfranchise disfavored minorities and to strip people of their rights. Several state constitutions expressly entrenched segregated schools even after *Brown v. Board of Education*.[8] All of these provisions took a little bit of time to remove, and voters were sometimes reluctant to actually do so.

More recently, two decades ago, voters defined marriage in a way that expressly precludes the recognition of marriage equality. And in almost all the states that adopted these, they remain on the books, whether they are zombie provisions or are actually enforceable.

And perhaps most concerningly, voters routinely ratify constitutional amendments that strip rights from people who are accused of crimes or convicted of crimes. These can certainly be relevant for contemplating how to factor in popular accountability in interpreting the meaning of punishment clauses that exist in state constitutions. They include restrictions on the right to bail, which have transitioned the right from something meaningful into something weak with a lot of exceptions; victims' rights, which have a really indeterminant effect on other core criminal procedure rights that the Warren Court handed down; entrenching the death penalty and other forms of specific punishment, as well as amendments that actually nullify and overturn state supreme court decisions.

Together, these ideas suggest that at least some of the time, voters are interested not in pushing back against the government but in empowering the government to take away rights from disfavored groups and deny their basic humanity. It's difficult to know exactly how to think about that reality if we are to incorporate the idea of popular accountability into the project of state constitutional interpretation.

I fully agree that Professor Marshfield's development of this idea of popular accountability constitutionalism is a powerful call to action. The relationship between the "People" as a proper noun and their rights is a contentious and hotly debated one, but unfortunately, it is tragically under-theorized at the state level. And Professor Marshfield's work adds something meaningful to that discussion that I hope is a meaningful starting point to new conversations and new ideas.

I will note that I have thrown in a lot of questions as to what this might mean in a variety of different contexts and have answered virtually none of them. Since I'm running out of time, I will be unable to reveal the one neat trick that brings this all together, makes everybody in the universe happy, and puts a little bow on it. How tragic! I'll leave that to Justice Cruz.

Regardless, I am genuinely very happy to have been here, to have this opportunity to be in conversation with you. I look forward to hearing your questions and hearing your thoughts in the discussion groups, and I look forward to the rest of the day. Thank you very much.

Honorable Maria Elena Cruz, Supreme Court of Arizona

Little did I know this morning that when I joined you, I would be revealing the one trick to resolve all of the problems Professors Marshfield and Yeargain raised.

There are three key ideas that touch on the overarching goal of building public trust, and that is where I want to focus my comments. I think it's important to remember that popular accountability should play a role in state constitutional interpretation, but there are limits.

First, I would push back against the part of Professor Marshfield's paper where he says, "Engaging in active governance on behalf of the people rather than passive dispute resolution should be a goal of jurists." In my view, that could run against the core principle that decisions should be objective, impartial, and rooted in legal principles rather than in populism or the whims of the electorate.

I am from Arizona, and our state supreme court's chief justice has created a task force on public communication to determine the sources of the public distrust that we're suffering from now in the judiciary. I am a member of

that task force, and our very preliminary survey of members of the public revealed that the public is often ill-informed on the functions of the judiciary, its role as a branch of government, how judges are selected, and the duties of those judges.

On that last point about the duties of judges: I propose that the well-informed voter ought to be interested in electing judges who will apply the law in a manner that is divorced from their own personal and ideological leanings.

I propose that the well-informed voter ought to be interested in electing judges who will apply the law in a manner that is divorced from their own personal and ideological leanings.

If we talk about judges engaging in active governance on behalf of the people rather than passive dispute resolution, we should be careful about how we define that active governance. Does that mean that we protect the electoral systems that allow the public to participate in government, such as referendum, initiative, and recall, or does it mean that, as to discrete issues that come before us, we look to arrive at outcomes that we believe are more consistent with popular sentiment? It should be our goal to educate the public on the need to select judges who will make decisions based on principles of objectivity, impartiality, and well-settled legal principles, whether they are popular or not.

Second, I would suggest that clearly stating in our opinions how our analysis adheres to a goal of accountability to the people, as stated in an Arizona constitutional provision providing that all political power is inherent in the people that and governments derive their just powers from the consent of the governed and are established to protect and maintain individual rights. Making these clear and restating them serves the goals of promoting trust.

It is not an easy task to explain constitutional protections, as we just mentioned earlier, and to write opinions that are clearly understood by lay people, but it is not an impossible undertaking, and we must try to find ways to communicate those concepts to the public, not only the ultimate decisions in our cases, but also how we arrived at those conclusions. And we have a duty to be persuasive such that even if the voters, the public, disagree with the ultimate outcome, they can understand and trust the mechanisms that brought us to that conclusion, and so that they understand what recourse they have as part of our system when they do disagree.

I would like to finally make a few comments about a decision that I authored while at Arizona's Court of Appeals. That case is *Arizona Creditors Bar Association v. State of Arizona*,[9] and the sponsoring organization on the side of the state was a group of citizens, which I love the name, Arizonans Fed Up with Rising Healthcare. If that doesn't really match what we're talking about here I am not sure what does. It captures it perfectly.

But it serves as an example of upholding the constitutionality of a ballot initiative by adhering to the standing requirements that are not consistent with those in the federal system and by leaning on Arizona's own historical tradition. In that case, Arizona voters approved Prop 209, which is also known as the Predatory Debt Collection Act. The new law lowered the interest rate cap on medical debt, increased the amount of the homestead exemption, increased the dollar value of personal property and assets exempt from creditors' claims, and increased the amount of exempt earnings in garnishment actions. You can probably imagine there were some people who were not thrilled with Prop 209.

The Act included a provision labeled "the Saving Clause" to address when the Act applies. Judgment creditors argued that the Saving Clause failed because it does not spell out whether it applies when a judgment predates the Act, but the wage garnishment proceeding to enforce that judgment postdates the Act. They proposed that this failure rendered the Act completely unconstitutional.

The constitutionality of the Act was upheld, and the judgment creditors appealed, and that's how it got to the court of appeals. The state and the organization that sponsored the initiative alleged that the judgment creditors lacked standing to raise the constitutional challenges and cross-appealed the trial court's ruling on that basis. To have standing under the Uniform Declaratory Judgments Act ("UDJA"), there must be an actual controversy ripe for adjudication and parties with a real interest in the questions to be resolved.

Importantly, this is different from the federal system where actual injury is required. But, under the UDJA, if an actual injury is missing, standing for a declaratory judgment still exists if an actual controversy exists between the parties. Our decision in this case, therefore, highlights the difference between federal and state jurisprudence. We ultimately decided that an actual controversy existed between the parties. We tried to make clear that the decision adheres to our state law regardless of the standing requirements in the federal system, and I think we were successful in doing that. I don't think you need a law degree to be able to read that case and see exactly what the turning point was for us.

The state, in its constitutional claims, argued that the judgment creditors lacked actual injury, and that ended the inquiry. The state argued that the judgment creditors could not bring a pre-enforcement facial challenge because the Act's Saving Clause does not impact constitutional interest. In response, we reasoned that a prime reason for the Saving Clause was to ensure the Act did not impair existing contracts. We relied on the principle that the United States and the Arizona Constitutions contain protections against any law doing so, and those protections are important, no less important than other express constitutional rights and protections.

The judgment creditors argued that the Saving Clause was so vague and unintelligible as to be rendered unconstitutional in its entirety. There was also the portion of the Saving Clause that stated that the Act applied prospectively only. We recognized that applying statutes prospectively has deep roots in Arizona. The first state legislature in 1913 passed a civil code providing that no statute or law is retroactive unless expressly so declared therein, and given the statute's long existence, the Arizona courts have developed a rich body of case law implementing its limitation on lawmaking.

That case law directs that unless the statute expressly says otherwise, it will not be applied retroactively, so it was important that we lean on Arizona's own statutory and historical prospective application of the law in arriving at our decision.

At present, the federal and executive branches are stepping back from recognition and protection of individuals' rights and telling us that they're leaning on the states to protect these rights for ourselves. As an elected officer on the highest court of my state, I aim to follow the law in a manner that our citizens recognize as faithful to the law.

This dynamic requires public communication and education that builds trust in the judiciary. That is my accountability to the public—to communicate, to help educate them about what we do, and then to interpret the law in a manner that is honest and consistent with the law even when they disagree with it. And I have told that to the public face-to-face many times. This is not an aspirational statement.

Before being appointed to the Supreme Court of Arizona and before that, a Court of Appeals judge, I was a trial court judge in a county where I was directly elected by the people. I was out in the community in a very literal sense, gaining their trust, educating them on what a good judge ought to do for them. When they have asked me directly, if we elect you, "What are you going to do for us," I told them directly what I would and would not do for them.

I have let voters know, as recently as my investiture on May 31st, that I will sometimes have to issue rulings with which they will disagree, but they can trust that those rulings will fully adhere to their laws. That is what the law requires of me, and that is what they may require of me as well. My public accountability is reflected in an approach to deciding controversies that leaves no room for my judicial independence to be compromised, not even by the public itself. Thank you.

Jeffrey Lowe, DRI—Lawyers Representing Business

I agree that the concept of popular accountability has merit in recognizing the ability of the citizenry to govern itself. I am here to address some concerns that potentially may be implicated by judges involving public accountability or proportional review in their case analysis of constitutional issues. The theory cannot and should not be used to dispute or displace precedential decisions of the courts.

Professor Marshfield asserted that state courts in addressing claims under the state constitution should not necessarily accept the manner in which federal courts have evaluated claims under the analogous federal amendment. However, for state courts that have already decided state court issues in engaging in proportionality review, the courts should not disregard decisions that have already been made by the state courts with regard to those state constitutional issues. You cannot do so according to the concept of *stare decisis* without great reason and great care, or a compelling reason to do so. So, engaging in proportionality review of state constitutional claims should not result in courts disregarding the previous decisions of the court.

Additionally, the theory should not be used to permit the judiciary to substitute its judgment for that of the legislative branch or administrative body appointed to address certain areas, and judges must enforce the separation of powers within their structure. Recognizing that popular accountability has its roots in the citizenry having different methods to express its will should not mean that the courts should intrude into areas that have been placed within the other branches of government.

Professor Marshfield recognized as much in his paper when he said, "The state constitution's separation of powers provisions were intended to provide a detailed allocation of power so the public could know who to hold accountable." Legislatures or administrative bodies tasked with a specific area are generally recognized as being better suited to balancing the values underlying the legislation or rules than the courts. The legislative branch may have more involved records, a more involved history with the topic, and may receive information on a specific topic that is not provided to the courts. Legislative bodies are better suited for balancing competing interests and determining the appropriate policy for a majority because they are elected by a majority.

Courts, on the other hand, traditionally make decisions that are all or nothing. Courts made decisions based on generally principled rationales, as Justice Cruz said, because their decisions have precedential value. When a court does not make a generally principled decision, it becomes difficult for courts in the state to treat similar cases similarly, and it makes it difficult to develop coherence and integrity within the judicial system.

Additionally, the decisions the court makes provide guidance for lower courts about how to apply the law in the future. When a decision is based on what a court believes is a current popular belief or majority, it is no longer making a decision based on general principles. Certainly, that does not preclude courts from engaging in analysis of values, but it does not mean that a court's decision to engage in proportionality review may involve it stepping into the legislature's role, and that is something the state courts' constitutional structure is not authorized to provide.

Professor Marshfield recognized as much when discussing the administrability concerns of the Iowa Supreme Court in the *Citizens for Community Improvement*[10] case. Despite the Iowa constitution stating that state government is instituted for the protection, security, and benefit of the people, the Iowa constitution also states that the government of Iowa shall be divided into three separate departments: a legislative, an executive, and a judicial, and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any function appertaining to either of the others.

Therefore, the Iowa constitution clearly separates the powers of the government, and popular accountability should not be used to permit the judiciary to exercise the powers of the other branches of government because that is what the populace approved when it adopted the Iowa constitution.

A New York case cited by Professor Marshfield regarding the public defender rates recognized the same, and it rejected certain parts of that injunctive relief because it specifically held that the judiciary may not usurp the legislative function. It is clearly an area of concern when engaging in popular accountability that the separation of powers must be maintained.

Further, given any state's separation of powers doctrine and all the other methods to assert popular accountability from citizens' initiative, to referendum, to recall, to constitutional conventions, to judicial elections, to elections for multiple executive and multiple offices, placing judicial officers in a position to make value-based judgments by conducting proportionality review seems unnecessary and a potential violation of the separation of powers doctrine within those state constitutions.

If the populace wants to hold the judge accountable for his or her decision to adhere to precedent, it can do so with a judicial election in a non-retention vote or an amendment to the state's constitution.

Popular accountability can also lead to inconsistent decision-making within a state. Different judges may value and interpret rights protected within their own constitution differently. Inherent in a judge's or panel's value-based judgment is the judge's own belief as to what the majority of the populace's belief may be. One panel of judges may determine the populace to believe one thing, while another panel may believe it to be something very different.

Obviously, according to Professor Marshfield's analysis, that review should be guided by the state's constitution. However, the court was not part of the process that led to the constitution's creation; therefore, the court will have to base its decision on legislative history and value judgments, which can lead to subjectivity and may lead to inconsistent application of proportionality review and an inconsistent outcome for any given state.

Finally, the impact of state courts engaging in popular accountability and proportionality review to address claims under the state constitution potentially could have widespread effects on interstate commerce. The manner in which one state treats an issue could vary widely from the manner in which another state treats the same issue under its respective constitution. That could lead to inconsistent decisions, which I believe to be acceptable under Professor Marshfield's analysis and under every state court's jurisprudence.

However, the effect that could have on interstate commerce and the businesses operated across this country could be significant. I understand Professor Marshfield believes state courts should be engaging in their own analysis of each issue under their own constitution. However, the manner in which the federal courts address these issues that impact the nation, as opposed to focusing on individual states' methods of addressing the issue, provides consistency for interstate commerce.

I am not here to say that interstate commerce should be the guiding principle of any court's analysis of a state constitutional claim; however, given the manner in which the current federal government is consistently passing issues to the states to address, the need for consistency is important and cannot be understated for purposes of protecting states' rights and states' economies. Different states treating the same issues differently under their state constitutions will undoubtedly have an effect on whether a business decides to locate in the state or whether an existing business remains in the state. Accordingly, we believe consistency in analysis is important to avoid the potentially negative impacts on interstate commerce.

Additionally, inconsistency across state lines regarding the manner in which state constitutional issues are valued could potentially impact the supremacy clause. As you all know, the supremacy clause makes the federal Constitution and the laws passed pursuant to its provisions the supreme law of the land. Additionally, the supremacy clause provides that federal law is supreme over state law, and any state law that stands in conflict with federal law is preempted. Therefore, state courts must ensure that claims seeking relief in areas claiming to be state-related but that encroach upon a uniquely federal interest are treated similarly in all states, as federal law preempts that area.

The attempt to localize harm caused by regulated and legislative areas must be avoided, and popular accountability should not be used as the basis to avoid federal preemption.

In summary, popular accountability has merit in resolving state constitutional issues, and I am not here to say that it does not. But it does raise concerns that need to be addressed in the court's analysis. The treatment of *stare decisis* and the separation of powers doctrine must be part of the analysis. Sole reliance on popular accountability and proportionality review may potentially lead to inconsistent results because of potential subjectivity. Finally, the application of popular accountability and proportionality review should not be used to avoid the mandates of the supremacy clause of federal preemption.

Thank you again for the opportunity to speak to you today. I look forward to further discussion on this issue.

Lori Rifkin, The Impact Fund

It's an interesting time to talk about popular accountability as a normative democratic value. Professor Marshfield defines popular accountability constitutionalism as state government outputs aligning with the preferences of the state's median voter. He also discusses popular accountability as processes that empower extant majorities to intervene to determine government outcomes.

He encourages state court judges to consider how state constitutions promote democratic accountability much more than the U.S. Constitution does when deciding various cases, although he believes they can, of course, consider federal precedent where appropriate.

Through my commentary here today, I hope to further enrich the kinds of questions Professor Marshfield is encouraging you all to ask because we are not just talking about "the people" in a theoretical sense or the median voter in a thought experiment. In considering the value of popular accountability, we need to assess how our democratic institutions are functioning in the real world. Currently, many of us might describe our institutions as being in a precarious state. "Precarious" might even be too generous a term to describe the state of our democratic institutions.

In considering the value of popular accountability, we need to assess how our democratic institutions are functioning in the real world.

I would posit that popular accountability works only if the integrity of the constitutional mechanisms for the populace to express opinions and influence government outcomes is protected. Before considering what the popular majority appears to have expressed, we need to ask whether the question before the court actually presents an opportunity for the kind of theoretical popular accountability that Professor Marshfield discusses. This requires unpacking the assumptions behind who counts as "the people," the "median voter," and the "populace."

In addition to the question of what type of government entity enacted the measure, rule, regulation, or law at issue and whether that government entity is directly accountable to voters, we need to ask who got to vote. Who had the right to vote? Who had the actual opportunity to vote? Who did vote? Did the demographics of the people who voted reflect the demographics of the eligible voter pool? If not, what was the difference? And is there a meaning in that difference that the court should consider? Who was chilled from voting by fear of violence at the polls or immigration enforcement? Who was able to access information about the measure being voted on, and where did this information come from? Who controlled the channels of information, and how was the information presented?

These kinds of questions will help a decision-maker pressure test the idea of popular accountability and how much weight should be given in determining what the just outcome is in any particular dispute.

Whose voice is the so-called popular majority representing? Whose voice is it leaving out? Putting aside the serious objection that the majority might enact policies disadvantaging different kinds of minorities, we have to know that the popular majority cited to support a particular outcome actually reflects the will of the majority of people or even of eligible voters.

California is often cited as a paradigmatic example of the intersection between popular accountability and state courts. In 1986, as a result of a statewide vote, California voters chose not to renew the judicial appointments of three supreme court justices, Rose Bird, Cruz Reynoso, and Joseph Grodin. The story goes that the California electorate was angry because Justice Bird had voted against the death penalty in every case to come before the court and punished Justice Bird and the other two most liberal justices for their perceived stance against the death penalty.

That story is often repeated as a cautionary tale in California about what happens if a court rules in a way that is out of step with the majority of the people. They were the first justices to be removed from the court by voters since the California constitution was amended in 1934 to subject appellate judges to retention elections.

The election results were that 67 percent of voters voted to remove Justice Bird, 60 percent of voters voted to remove Justice Reynoso, and 57 percent of voters voted to remove Justice Grodin. So, was this popular accountability?

Campaign spending was reported to be about $7 million against the justices and $4 million in support of them. The governor at the time, Governor Deukmejian, a Republican, championed the campaign against the justices so he would have the opportunity to flip the court's political balance. He didn't have to pay for the media airtime he got campaigning against them. One criticism of the media during that time was that the coverage gave the impression that people convicted of murder were being freed, when what was actually happening was that they were often being granted new trials instead.

The New York Times quoted poll results about the effectiveness of TV commercials in which parents of murdered children talked about the courts setting aside the death sentences of the killers. Who was funding the

campaign against the justices? Business corporations and insurance companies that wanted a court friendlier to their interests.

Rose Bird, the principal target of that campaign to remove the justices, was also the first woman justice ever appointed to the supreme court in California. Cruz Reynoso was the first Latino justice. In the 1986 California election, less than one-half of eligible voters actually voted, 43 percent. 67 percent of that 43 percent voted to remove Justice Bird, far less than the majority of eligible voters. This is, of course, without examining the question of who was eligible to vote in the first place.

Who were the 43 percent of voters who went to the polls, and who were the majority of that minority who voted to remove the justices? And why did those 57 percent of eligible voters not go to the polls? Did they simply not care? Were they too lazy? Did they not have an opinion? Or were there reasons that might implicate the fundamental values of liberty, justice, and equality that are enshrined not just in the Federal Constitution but also in the state constitutions? I think these questions are of the utmost importance if we are going to incorporate popular accountability as one of the fundamental values and norms to uphold in judicial decision-making.

I wasn't able to easily find demographic information about the race and gender of voters in the 1986 California election, but our history with racial discrimination suggests that popular accountability is frequently difficult to assess.

In 2013, the U.S. Supreme Court eliminated one of the central components of the Voting Rights Act in *Shelby County v. Holder*.[11] State jurisdictions with histories of race discrimination in voting no longer have to get preclearance for new voting policies. More than one hundred new restrictive voting laws have been enacted by states since the *Shelby County* decision. Approximately one-third were passed in states that had been subject either in whole or in part to preclearance prior to *Shelby*.

There is evidence that the gap between turnout rates for white voters and voters of color has grown since 2013, including in the states previously subject to preclearance. In Alabama, where Shelby County is located, data indicate that the white versus non-white voter gap has more than doubled since 2012, right before *Shelby County* was decided.

This can help us answer questions in the present day about why people may not be voting. The restrictive laws make voter registration more difficult, eliminate early voting opportunities, reduce polling places, limit voter assistance, establish more onerous voter ID requirements, and reduce or eliminate voting by mail. Since the 2020 election, twenty-one states have adopted new restrictions on voting by mail. These kinds of measures disproportionately impact voters of color, as well as voters with disabilities and low-income voters.

One example documented by the Brennan Center is a 2021 Texas law requiring a voter to include their driver's license or the last four digits of their social security number on mailed ballot applications and mail ballots, and that these must match the voter file data. During Texas's March 2022 primary, thousands of mail ballots and mail applications were rejected. Non-white voters were at least 30 percent more likely to have their ballots rejected than white voters.

And of course, we haven't talked about gerrymandering or other tools that are used to change the weight of votes and manipulate how state legislatures are constituted. I have not talked in detail about the role of money in controlling the information that voters or even legislators have today.

So, what does popular accountability mean in this context when our democratic processes, both on a state and federal scale, are not working to represent the will of all the people impacted by state policies and practices? Perhaps we are not so much in a conversation about supremacy or parity of state and federal constitutional law and interpretation but looking at the pendulum of federalism swinging heavily in the states' direction as a protector of democratic ideals. Thank you.

Response by Professor Marshfield

I will be brief because I'm anxious for an opportunity to hear other questions. I'm grateful for the incredibly insightful observations about my paper. I have much to consider.

I will say two things for now. The first is that I believe in the rule of law and the impartiality of the judiciary, and I think that is very consistent with what I'm suggesting in this paper. I am not suggesting that judges should be divining popular sentiment. Instead, I claim that the people have spoken in incredible detail in many instances in state constitutions, and part of the problem I often see state judges facing is that detail is hard to account for and hard to use when deciding cases.

I think a really good example here is the right to hunt and fish provisions that have been added to state constitutions. When you look at those, they don't fit the federal paradigm. The provisions seem like rights. The people cared about them and put them in the constitution. Are they fundamental rights? You might believe they are, and you might have voted for them on that understanding. But as we look at our panoply of rights in state constitutions, it doesn't feel like they have the same quality as some of the other rights.

And so, what do you do? If you use a federal framework, you essentially apply rational basis review, which is the lowest level of scrutiny courts apply. Such a lenient standard of review might render the rights to hunt and fish practically meaningless.

My point here is that if we think about popular accountability as describing some of the deep structure of state constitutions, then we have a new framework to help decide cases. Popular accountability is about trying to pick up on the popular vibe: It's about how to account for the actual legal content in a state constitution instead of simply defaulting to using a federal framework to decide state constitutional disputes.

The other thing I will say is that I think when we talk about voters and voter information, we as lawyers need to be humble about what exactly voters are able to do. Because I think we tend to believe that voters, especially the median voters, cannot adequately grapple with complexity and tend to make mistaken decisions. In some circumstances, that may be true, and I have likely made poor choices of my own as a voter.

But a lot of what we're learning about how these decisions are made is that they tend to be incredibly accurate about where the public sits on issues, as long as certain realistic conditions are met. And ironically, one of the conditions that helps produce high-quality ballot question results is the degree of competitiveness and funding in a race. If there's spending parity, high energy, and high engagement in the race, election results tend to reflect the actual preferences of voters.

I think we need to absorb some of that. We can't just trivially throw away ballot question results and even election results, and suggest that all voters are ignorant and incapable of making these choices. I am not entirely sure that is accurate.

And I also think we need to compare it to the way that legislators make decisions. I am not totally enamored with the way those decisions are made either, and it really should be a comparison between those two processes when we're talking about the quality of popular expressions of will and preferences.

Questions from Participants

Professor Miriam Seifter: Thank you for such a wonderful panel. I am a law professor at the University of Wisconsin, and I am one of the other faculty members for this event. I want to enthusiastically congratulate Professor Marshfield on a great paper and register my strong agreement.

Four or five years ago, I wrote an article titled "The Democracy Principle in State Constitutions."[12] It has a similar idea that state constitutions, their structure, history, and text, are committed to political equality, majority rule, and popular sovereignty. As an aside, we have a website, democracyprinciple.law.wisc.edu, where you can search by state or by provision and see all of these provisions that Professor Marshfield has referenced. It's an idea that courts embrace, and so I am very much on board with the idea of popular accountability being a strong component of that.

My question, which ties together something that both Quinn and Lori got at, is about the role of political equality. The "Democracy Principle," as we understand it, contains a pillar of political equality. That means things like a constitutional amendment that divests people of their voting rights or disenfranchises them would not be supported by the Democracy Principle, and I wonder how popular accountability differs. Would it be that a constitutional amendment disenfranchising some people is still a constitutional mandate because of a commitment to popular accountability?

Professor Marshfield: That's the tough question. Before I answer, I would like to highlight another really important article that Professor Seifter and a colleague have written called "State Constitutional Rights and Democratic Proportionality," [13] which has informed my thinking about popular accountability. It's a fantastic way to think through how to deal with rights and also these democratic norms.

I do not make quite the same substantive commitment to political equality in the framework as you do. I think it's one of the things that distinguishes the framework. My primary reason is that a lot of these provisions come to us historically when that was not at all the case.

Analytically, I do agree that political equality must be present in some form for popular accountability to work as a framework. If political equality is not protected in some way, shape, or form, then the political process can be captured by a minority group that's just going to manipulate the process. Under those circumstances, popular accountability is not present as a practical matter. Lori's points were incredibly compelling on that.

The one thing I will add, though, is that I am also curious, when those captures occur, where are they coming from? Are they coming from the median voter? Truly, where are they coming from? Because there's a lot of great work especially in parliamentary systems that suggests that courts and systems that are able to capture the collective sentiment towards our fellow citizens tend to mediate themselves towards equality, and that courts often can swing dramatically one way or the other as we're experiencing, and so to place all of our hope in courts as working to protect those things is not necessarily the best approach.

In Florida, for example, we had 60 percent of voters who wanted to stop disenfranchising felons and approved a citizen-sponsored initiative to that effect. That has been completely gutted over time, but not because the voters don't want it. In fact, restoring voting rights to people with felony convictions remains popular.

The reason it has been gutted is because elites with power were threatened by that expansion of the franchise, and they had the ability, through these institutions that are supposed to be accountable to the people, to nullify the initiative expanding suffrage to people with felony convictions. Now, that's one counter example, but it leaves me wondering where we want to place trust in finding these true, meaningful equality protections for the process.

A non-answer that is something of an answer.

Honorable Karl Procaccini: I'm a justice on the Minnesota Supreme Court. I really appreciate the discussion. It speaks to an ongoing internal debate.

My question is, if we agree with you about the relevance of a popular accountability framework, what does that mean for the many precedents our courts have formulated that closely track federal precedent or suggested that following a federal approach is important? Attorneys in our state would be surprised if we started veering in different directions.

Are there states that have pivoted in meaningful ways to account for the principles that you're describing, but that also might represent a break in jurisprudence in the jurisdiction where we serve? I would find those states' experiences highly relevant and instructive.

Professor Marshfield: That's a difficult question because your jobs are incredibly hard and the constraints you labor under are real, and a lot of what I might be suggesting you do may not immediately feel practical.

I do have a helpful suggestion, not about a specific state, but about a general litigation trend. One of the things I have noticed is that before federal courts, including the U.S. Supreme Court, lay down a headline ruling on a key issue, you will often see that state courts were wrestling with it in an incredibly authentic and real way that isn't being driven by the same considerations that will inform federal courts. Then, when decision comes down from the U.S. Supreme Court, many states lockstep behind.

State court decisions in the legislative veto context before *Chadha* was decided are a helpful illustration. Rich analysis, right? But then, once *Chadha* comes down, there's a lot more lockstepping with it. A rule of thumb that I tend to apply is I look for when those landmark decisions came down from the federal courts and try to find how the state courts were thinking about the issues raised by the federal decision *before* that federal decision came out.

Professor Yeargain: To some extent, I wonder if the scenario that you're describing is because of general illiteracy on state constitutional law. Lawyers were not trained in state constitutional law or what their constitution said as they went through law school, and therefore, judges deciding state constitutional issues did not have robust arguments based on unique state constitutional provisions to consider.

In teaching state constitutional law, I found that a lot of my students who had U.S. Constitutional Law first were resistant to some different ideas, and it was the one student in the room—at the school I taught at I had federal constitutional law as a second year class—who was taking both simultaneously who was the most open person in the room to different views as to what a lot of these principles mean. And certainly, there is precedent, or at least there's suggestive language that's baked in.

But to some extent, I would suggest that this is a project that I think we are committed to in terms of invigorating state constitutions, making it a course that is more commonly taught, engaging with it more directly so that lawyers have the tools to actually raise those arguments in the first place. Because they are complicated. I'll be the first to admit that there are incredibly high barriers to entry in understanding what a state constitution says, what its history is and so on, which is why the work that Miriam's group is doing is so fantastic. And I think that's a huge part of it, too.

Honorable Cruz: I think another thing to consider, even though we're seeing attorneys now bringing state constitutional issues and claims more than we used to, when that doesn't happen and under a state claim the result might have been different, I think as part of our education to the public we can comment on that and say, "Under our state constitution these are issues we would be looking at," or, "These are the questions we would be considering. One, that tips the attorneys to start raising those issues more, but also it alerts the public as to this separate track, this separate system. And I think we can't underestimate the value of our speaking to those points in our opinions.

Honorable William Montgomery: I sit on the Arizona Supreme Court. First, I want to wholeheartedly second the comments that my colleague made earlier. I think she has touched on and shared what the general feeling is of our court about the idea of judging with popular accountability in mind.

When I first read the paper, I had some of the same reactions as some of the panel members. I thought to myself, "Wait a minute, I've got to interpret these cases dispassionately, impartially, and independently." But as I heard from Professor Marshfield how he discussed the ideas, I felt that he had an important point for us to consider. So, thank you, Professor Marshfield.

I think what you're suggesting is what we actually do. We just do not explicitly refer to popular accountability principles when making decisions. Our state constitution in Arizona was initially adopted in 1910, and we became a state in 1912 at the height of the Progressive Era. Our constitution reflects every major progressive platform at the beginning of the twentieth century.

For example, with our initiative provision, we interpret that in a way to protect the people's reserved power to legislate, and so we apply the very same sorts of principles in looking at initiative action as we do to legislative action to protect that.

In hearing you this morning, I understand you to mean that we should be doing that because it is reflective of the desire for popular accountability that the people wanted to see within the constitution to begin with, in which case all I have to do is apply the words that have been written and be mindful of the popular accountability principle when discharging my oath. I am supposed to protect the power of the people.

Again, maybe somewhat of a softball, but I hear more of an emphasis on that today than I thought I initially got from the paper.

Professor Marshfield: Thank you. That is exactly what I'm hoping to emphasize, because I also think that if we're not careful, we can miss that language and we can sort of jump to the assumption that legislative power resides exclusively in the legislature. But in many state constitutions, the legislative article doesn't say that. The legislative article reserves all residual power to the people through the initiative process, sometimes even through referendum, and then there's some delegated power to the legislature.

My mentor, Robert Williams, the distinguished scholar and teacher of state constitutional law, really wants to emphasize that the state legislatures have plenary power as compared to the federal Congress, which has this enumerated policy-making power. What I want to emphasize is that maybe they don't even have plenary power. They do have plenary authority over subjects, but they don't have exclusive, residual, default law-making power in many states because that actually resides in those states with the people, and that distinction gets lost if all we have to work with is this idea of the federal government having enumerated powers, and states having plenary powers. There's this other distinction that we need to capture and I think popular accountability helps flag that for us. We see that language now differently and try to incorporate it into cases.

Honorable Christopher McFadden: I sit on the Court of Appeals of Georgia. I would like to suggest that there is at least one other fundamental structural difference between the state and federal systems that relates to how the constitutions ought to be construed, and that is that while in the federal system, district judges preside over courts of limited jurisdiction, state court systems have courts of general jurisdiction, and that is particularly applicable to standing.

Professor Marshfield: Thank you. It's incredibly helpful. The fact that state courts are courts of general jurisdiction may have remedial powers that federal courts of limited jurisdiction lack.

Notes

1 U.S. Const. art. III § 2.

2 *Id.*

3 *Id.*

4 Mass. Const. of 1780 Part the First, art. v.

5 Vermont Const. of 1777 Part the First, art. v.

6 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (overturning Roe v. Wade and finding that the U.S. Constitution did not protect a general right to abortion).

7 INS v. Chadha, 462 U.S. 919 (1983).

8 347 U.S. 483 (1954).

9 257 Ariz. 406 (Az. Ct. App. 2024).

10 Iowa Citizens for Comm'n. Improv. v. State, 962 N.W.2d 780, 785 (Iowa 2021).

11 Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

12 Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

13 Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855 (2023).

Luncheon Keynote

Federal and State Courts in Conversation: Evolving Through Shared Insight

Judge Jacqueline Nguyen, United States Court of Appeals for the Ninth Circuit

Dean Erwin Chemerinsky, UC Berkeley School of Law

Dean Erwin Chemerinsky: It is truly my great honor and pleasure to be with you, and it is very special to me to get to do this program with Judge Nguyen. We were asked to focus on the relationship between federal and state courts. I cannot think of anybody better suited to start that conversation than Judge Nguyen, who spent seven years as a state court judge, several years as a federal district court judge, and has been on the Ninth Circuit for thirteen years.

Before we get to that topic, I thought it would be important to hear from Judge Nguyen a bit about her background and then what brought her to the courts. I think that we often overlook the importance of a judge's background and how the judge comes to look at the issues. I am really interested in discussing your background and how you think it has influenced your judging.

Honorable Jacqueline Nguyen: Thank you. First off, let me start out by thanking you all for giving me the opportunity to be here. It is special for me to be able to do this with Dean Chemerinsky, and it is nice to see some familiar faces in the crowd.

I came to the United States as a war refugee when I was 10 years old, following the fall of South Vietnam to Northern Communist forces. It was summer, so I had about three months to learn English and then integrate myself into the public school system in Los Angeles.

Like most obedient Asian children, especially from immigrant backgrounds, I was supposed to be a pre-med major, but I quickly realized that that was not the path for me. Much to the disappointment of my parents, I became an English literature major, which my father said would lead to guaranteed unemployment. But as it turned out, that was a pretty good major for law school, so I went to law school after taking a gap year. I was a public-school teacher in the Los Angeles Unified School District for that year, and decided that the law was a better path for me.

As you mentioned, I was an Assistant United States Attorney ("AUSA") in the Central District of California for a number of years. However, I also spent three years in private practice, focusing on civil litigation at a large law firm in Los Angeles.

Coming from my background, I think being a judge was not something that I ever envisioned or that my parents could have ever envisioned. But I was really strongly encouraged. I had terrific mentors who encouraged

me to apply to the state court bench because I had the combination of civil law, criminal law, and trial experience. My path to the bench started with my failure to succeed as a pre-med student.

Dean Chemerinsky: You served for seven years as a state court judge and many years as a federal court judge. What do you see as the biggest difference between the state courts and the federal courts?

Honorable Nguyen: I think something that at least a vast majority of the public does not fully appreciate is how large the state court system is compared to the federal courts. We are courts of limited jurisdiction. At any given time, there are about 1700 federal judges. Last year and, I believe, the year before that, there were between 40,000 and 42,000 cases filed in federal court.

I think something that at least a vast majority of the public does not fully appreciate is how large the state court system is compared to the federal courts.

Contrast that to the state court. There are about 30,000 state court judges handling tens of millions of cases each year. In 2022 or 2023, coming out of the pandemic, I believe about 100 million cases were handled in state courts across the country. For the vast majority of the public, their sole interaction with a court is actually in state court. Their impression of what the court system can do for members of the public really comes from the state court system. As a state court judge, I definitely saw that. It was very high volume.

I think there is an immediacy, an accessibility that you feel as a state court judge to your local communities and to the public that you do not feel as a federal judge. As soon as I switched over to being a federal district judge from the state court, I immediately felt that isolation.

The docket is very different as well. This is especially true of the Central District of California, where we do a lot of diversity jurisdiction cases.[1] In diversity jurisdiction cases, we are called upon to decide questions of state law. Of course, federal judges should be and are trained to be incredibly deferential to state court judges because they are the ones who decide what state law means.

In my court, for example, we very rarely publish in diversity jurisdiction cases because we feel that state court judges are arbiters of state law, and state supreme court justices are the final arbiters of state law. Where the law is not clear, we do our best to interpret state law, but we are not the ones who get to say what state law is. I worry that publishing decisions in diversity jurisdiction cases could establish a rule of law that state courts might not entirely agree with. It is a way of giving state courts some flexibility to move their case law in a different direction than what federal courts envision.

Dean Chemerinsky: On a day-to-day basis, how was it different being a state judge compared to being a federal trial court judge?

Honorable Nguyen: Day to day, I have to say being a state court judge is the most fun that I have ever had in terms of a traditional gig, especially at the trial court level. You are called upon to juggle numerous things on a daily basis. I could be calling a calendar of forty to fifty cases in the morning, do a preliminary hearing in the afternoon while the jury is out deliberating in a case, while I am getting ready to call in another jury because it is day ten of ten and there is no waiver of speedy trial. I took the state court bench when I was a fairly young judge, and I just cannot imagine having a better learning environment in how to be a judge, how to think about the law, and what the practical implications of your ruling are. I think that experience really gave me a sense that, yes, I

am there to do the best I can to apply the law. But at the same time, there is a lot of room for creativity as well to make sure you efficiently manage your docket.

Federal judges have the luxury of time. Granted, the dockets are much bigger than what I think they should be. But they do have the luxury of more patiently reflecting on the law, especially at the circuit court level.

The biggest difference when I transitioned from district court to the circuit court is really the appreciation of the fact that we are writing precedential decisions. And it is not just worrying about the litigants before me in a given case. But it is really worrying about how that principle of law could apply in future cases. I am not smart enough to figure out all of the different factual permutations that may come along. We are very careful in thinking a lot about limiting principles.

The other big difference between the trial court and the appellate bench is that we sit in panels of three. As a district court judge, I never worried too much about whether my colleague next door would find something persuasive. You are doing your best to move the cases forward. But as a circuit judge, I spend a lot of time thinking about and trying to anticipate where my colleagues would go and trying to write in a way that at least gets one person on my side, if not unanimity. Unanimity is best. I am a firm believer, especially with a circuit as large as ours, that we should work to achieve unanimity when we can.

In the Ninth Circuit, the judges do not talk about the cases in advance. Relationships are very important. It is really getting to know how they approach cases. I spend time reading other opinions that they have written to consider questions to ask during an argument, which I hope will aid in the conference and discussions between the judges after our argument is over.

Dean Chemerinsky: What about resource difference? In the federal court, both district and court of appeals, you have law clerks. You can have clerks who serve for fixed terms. You can have career law clerks. How does that compare to state court, and how does that affect your work as a judge?

Honorable Nguyen: There is, unfortunately, a vast difference in resources, which might depend on the jurisdiction as well. I am most familiar with Los Angeles, where judges are handling complex cases like massive class actions and cases involving advanced technological issues. Courts in Los Angeles have to pool the law clerks. Fortunately, I have the luxury of hiring some of your students, Dean Chemerinsky.

Dean Chemerinsky: They are very fortunate.

Honorable Nguyen: I just hired one from Berkeley, in fact, for the 2027–2028 term. Judges are increasingly hiring law clerks years in advance, which is a phenomenon deserving greater consideration. But I think we benefit so much from having access to the best and brightest young legal minds in the country. I cannot imagine doing my work successfully without them.

Dean Chemerinsky: One worry that I have is, given the cuts in federal funding that are going on, will there be a ripple effect in state courts? About a third of state budgets nationally come from federal dollars. And if federal dollars for other things are being cut to the states, will that then mean that state court funding will be reduced? How will state courts be able to compensate?

Honorable Nguyen: I think that is a serious concern as well. Every year, inevitably, there are two or three months where we talk about how we are going to manage the shrinking dollars in light of exploding dockets. As

you know, populations have exploded, particularly in certain jurisdictions in the states, as well as in the federal courts. And the number of appointments and dollars and resources have not kept pace. I think federal courts and state courts are really looking for ways to innovate and to be more efficient. I think that is where state and federal court collaboration could happen. Collaboration could really benefit both systems.

Dean Chemerinsky: What surprised you most when you became a state court judge, and what surprised you most when you became a federal judge, having been a state judge?

Honorable Nguyen: One of the things that actually surprised me is that we all live in the era of vanishing trials, and that is true for state courts as well as federal courts. But when I became a federal judge, I was surprised by how few trials I had. I think it is just so expensive to litigate. And of course, it is a different nature of the docket, risk assessment, trust in the jury pool, and type of jury pool. But I was surprised by how few cases I got to try as a federal judge. It was not at all unusual in state courts for me to at least have a trial a month, sometimes multiple trials a month, depending on whether it was civil or criminal. Of course, there were more trials in the criminal arena than civil. But in federal court, I have observed that jury trials are shrinking.

One of the things that actually surprised me is that we all live in the era of vanishing trials, and that is true for state courts as well as federal courts. But when I became a federal judge, I was surprised by how few trials I had. I think it is just so expensive to litigate.

Dean Chemerinsky: One of the topics that is most important for our conversation is tensions between federal courts and state courts. Do you see tensions between federal courts and state courts, and of what sort?

Honorable Nguyen: There are definitely those tensions there. I think that sometimes, depending on the nature of the case and the panel that you draw, the federal judges get a little bit ahead of where the state judges should go. On our court, we do have discussions about this. Rather than getting ahead of the state court justices and interpreting it, we have sometimes been asking, "Why don't we think about certifying it to the state supreme court instead?"

The certification rate waxes and wanes depending on what is going on with the state court. Federal courts really value feedback from state courts about how they handle certified questions.

From my standpoint, there is the idea that justice delayed is justice denied. We want to move our case forward in the most efficient way possible and not wait for a resolution a year or two years out. Therefore, understanding how the state courts would resolve a case is important. Of course, we don't want to certify a question that we know state courts will reject. It would be beneficial for state courts to share what they think about certification questions.

For example, the California Supreme Court has not always been consistent in terms of how open it is to taking certified questions. Some states are quite comfortable having federal panels decide questions of state law. Others are not. Some state courts take the position that if there is a question of state law in an evolving area, they want the chance to resolve it first. There is that tension in terms of who gets to say what the law is in any given situation.

And then, of course, in the *habeas corpus* arena, we do directly review decisions of state courts. I think that is where some tensions may exist as well.

Dean Chemerinsky: Let me focus on each of those in a bit more depth. The former [cases where federal courts would certify a question to state courts] would seem to arise in diversity cases or supplemental jurisdiction cases where state law issues are coming before you. It might also arise in instances where state statutes are ambiguous and need to be construed. You say certification has the benefit of letting the state court decide state law. But the downside is that it delays the case because the case is now going from your court back to the state courts. Do you think it would be better to revise the certification statutes? How much of it is about the state certification laws, and how much of it is receptivity of state courts to certification?

Honorable Nguyen: Maybe it depends on the state. But it is a combination of both. Even if the statute dictates the issues that we need to think about in deciding whether certification is appropriate, I would be more reluctant to certify if I did not think that the state supreme court justices were not open to hearing it and deciding it in a way that definitely resolves the case.

When I write certification orders, I try to write them narrowly and work hard to frame the state law issue in a way that is likely to attract the state supreme court justices' attention so that they are more likely to certify it.

If it turns on just the facts of the case, I am not going to do that. But if it turns on an issue of law that has that wide-ranging implications in state court, that is more likely to be a question that the panel certifies.

Certification also depends on the dynamics of the panel within the Ninth Circuit as well. One judge may be particularly interested in certifying the state law issue. The other two judges may say, "No. I know what the answer or what the answer ought to be. I am not going to be in favor of that." If I were the judge pushing for certification, I might argue that the relevant state court judges are anxious to decide state law questions. I think we can draft orders in a narrow way that increases the likelihood of state courts certifying the questions and addresses the efficiency concerns of some of my federal colleagues. I am not sure that the certification statutes really need to be revised.

Dean Chemerinsky: Let me ask one more follow-up question. There are a lot of state court judges in the room. And what you say is that it would help to know that the state courts are receptive to certification. Do you discern whether state courts are open to certifying by reading their opinions? Do you look at the speed with which they handle certification, or are there actual conversations between state court judges and federal court judges about this?

Honorable Nguyen: It is a little bit of both. We assess how open state courts are to certification by their acceptance rates and the speed at which they make decisions. If a state court says it is open to certification, but then takes several months to decide and eventually refuses, it puts me in a difficult position when deciding whether to attempt certification in future cases. Within the Ninth Circuit, and I imagine in most jurisdictions as well, there are state-federal councils. I think it is a really important vehicle for collaboration between the state and the federal bench. And through these informal conversations, I think they can share with us how we can best help the state courts and how they would like to see us handle issues that come up through diversity jurisdiction.

I pay a great deal of attention to the information that I get informally through back channels or through these informal conversations. In fact, the federal judicial center has—and I think they have had it for a long time—a toolkit on how to revitalize state-federal judicial councils if a particular jurisdiction council is dormant or how to create state-federal judicial councils to the extent that your jurisdiction does not already have one.

Dean Chemerinsky: Can I ask for a show of hands? How many of you are in jurisdictions where there is a federal court/state court judicial council? Let us talk about this then.

Honorable Nguyen: I am actually a little surprised.

Dean Chemerinsky: I am too. If everyone had raised their hand, then I would say we can talk about what those councils could do better. Since very few people have indicated that they are aware of such councils, it would be really useful to talk about what they do and how they get established.

Justice Jon Streeter: Perhaps this is an issue of nomenclature. Informal cooperation between our state courts and the federal courts may not be called a council, but there may be a group within our respective states that performs that function.

Dean Chemerinsky: Let me ask Judge Nguyen a follow-up question to get at this issue of nomenclature. What do these federal and state court councils, regardless of what they are called, do? How do these councils get established? Why do you think they are beneficial? Because if such councils do not exist in some of the jurisdictions the judges in this room are serving in, then they might want to consider forming such councils where they live.

Honorable Nguyen: I have not gone through the different models, but I know that there are different models depending on the jurisdiction. How big the jurisdiction is, I think, one factor in determining what the model is. And then, I believe that the preexisting relationship and collaboration between state and federal courts dictate what model you would like to adopt.

I am most familiar with the Ninth Circuit state-federal judicial council. How formal that council is depends, in part, on who the chief justices of the state supreme courts within the Ninth Circuit are.

For example, not too long ago, the relevant judge convened a meeting of the state-federal judicial council, and it was quite formalized in the sense that there was discussion beforehand with the various state supreme courts within the Ninth Circuit to talk about an agenda. And then there was an agenda set and a meeting at which the judge went through the agenda.

I think meetings tend to be more formal, where you go through agenda items. But then, after that, subcommittees can be formed to work on particular issues.

Dean Chemerinsky: Could you give the audience a sense of what kinds of things are on the agenda for these, so that if they go to create these, what they should be focusing on?

Honorable Nguyen: I think certification questions are always at the top of mind for federal judges. The volume of cases in which we are called upon to decide state questions of law is pretty high. We are always looking for some guidance in a state as big as California. Sometimes there is case law that provides guidance, but sometimes the case law conflicts. There are different appellate divisions within California that may address very similar issues, and they have seemingly gone opposite ways.

What do we do with that? We look for ideas. We look for opportunities to work together and, just as important, opportunities to really get to know each other. There is no undervaluing the utility of being able to pick up the phone and call a state court colleague that you trust, to discuss questions of process and procedure. I think that is an important function of state court collaboration as well.

Dean Chemerinsky: The other area besides certification that you pointed to was *habeas corpus*. *Habeas corpus* is the one context in which federal courts directly review state court decisions. Generally, only the U.S. Supreme Court can review state court decisions on federal law. You say there is tension there. Is there any way to lessen that tension, or is it simply inherent to the federal court reviewing state court criminal convictions and sentences?

Honorable Nguyen: That is an interesting question. I think part of the tension has to do with whether state court justices feel that sufficient deference is being given to their opinions. As you well know, the U.S. Supreme Court and the Anti-Terrorism and Effective Death Penalty Act have limited the extent to which federal courts can rigorously review state court *habeas* decisions.

In the Ninth Court, in particular, there is a sizable capital case docket. In fact, just this week I was scheduled to hear an argument in a capital case coming out of California. I think that tension is inherent in the fact that state court judges and justices have already given their final word on a case of tremendous significance and importance, and now federal courts come in.

Dean Chemerinsky: So far, we have discussed lessening tensions between federal and state courts through more certification and federal-state judicial councils. Are there other things based on your experience as a state and federal judge that can be done to address any tensions that exist? Or to put it another way, are there ways in which federal courts and state courts can better collaborate than they have been doing?

Honorable Nguyen: I think one of the things that I personally am appreciative of is the fact that state court judges do the heavy lifting in the American legal system. I think that some federal judges might not be fully cognizant of that. We can benefit from a better appreciation of how state courts are because they are courts of much broader jurisdiction, and they are much closer to local communities. I think they are in some ways better suited to be laboratories of innovation than the federal court. Sometimes we tend to be a little slower in moving along.

With greater resources, we do some things better. I think we are very quick to adopt innovations like e-filings, and the state courts could really benefit from that, provided the resources are there. There are opportunities to learn from each other. But in terms of most issues that I can think of, the federal courts can really benefit from looking to the state courts' example.

I will give you a concrete example. When I first joined the district court bench in Los Angeles, one of my colleagues there was also a former state court judge. And as a state court judge, he handled a drug rehabilitation court created by Proposition 36. He eventually found that the federal government lacked similar courts. He therefore created what is now a very well-established program called the Striving to Achieve Recovery ("STAR") program. And in that program, individuals who had already been convicted of a crime can have an opportunity to earn, for example, a reduction in their term of supervised release by voluntarily agreeing to engage in intensive drug rehabilitation treatment, and that, of course, statistics show, really reduces the rate of recidivism. That model was established directly because of his experience as a state court judge.

And from there, we went on to create the Conviction and Sentence Alternatives ("CASA") program, which extends the concept of the STAR program to post-indictment but pre-plea discussions where people are eligible for a reduction in charges or reduction in their incarceration sentence, or in some instances, even a dismissal of charges. That program, I think, has now become the model for a lot of courts around the country. And that innovation came directly from a state court.

State courts frequently develop innovative solutions to many of the problems that eventually make their way into federal court. Homelessness could be another example.

Dean Chemerinsky: Are there ways in which federal courts and state courts can better collaborate beyond what we have talked about?

Honorable Nguyen: I think that just engaging in conversations and sharing ideas in forums such as this, where federal judges have an opportunity to interact with state judges, would be helpful. I see a state court judge with whom I was involved for a time in the ABA's appellate judicial conference. The conference presents one of the few opportunities that I have to engage with state court judges directly and to learn from them how we can do things better.

Dean Chemerinsky: As we have been talking this afternoon about the differences between state courts and federal courts, what about the difference with regard to life tenure? In approximately forty states, judges face some form of electoral review. In some states, the judges run in partisan elections. In some states, it is retention elections. In some states, it is nonpartisan elections. But of course, once you become a federal district court and court of appeals judge, you, like a law professor, have life tenure.

Honorable Nguyen: It is pretty nice.

Dean Chemerinsky: I do not know that there is anyone in the country who gets life tenure other than professors and federal judges. Does it matter in terms of judicial independence? Does this difference between state courts, where judges often have to face electoral review, and federal courts, where there is no electoral review, matter?

Honorable Nguyen: From my perspective, it should not matter in terms of the results of cases. You do the best you can. You have taken an oath to do the best you can to apply the law to the facts as you use it.

But psychologically, I have to say, when I was a state court judge, there was the prospect of an opponent running for my position at one point. There was a concern in my mind about what I would do if I were challenged. Do you think about starting to raise money? Do you consult with a judicial elections expert? Judges on the state courts do think about it and do talk about it. It is just the reality if you are being challenged for a seat, and especially in a jurisdiction that is as large as Los Angeles County. It would take a tremendous amount of money and resources to fight off a challenger who has a lot of resources behind her. It is something that you do think about. But as a state court judge, I do not think I ever let it affect how I looked at a case.

When you have life tenure, I think there is a psychological freedom from not thinking about going through a judicial election.

One issue that I know from conversations with many state court judges is how much money has been injected into state judicial elections. We saw some quite high-profile challenges. I think in the mid-term cycle of 2022 or 2023, I read somewhere that there were over $100 million spread across just a few states. I think it is a concern.

On the one hand, elected judges arguably are much closer and more responsive to their constituents, and there is more accountability there. On the other hand, if it takes that much money then you have to think about what power and influence the groups that have funded those races would want to see in exchange for their support. That is, I think, a real concern, and it is something that we should all think about.

Dean Chemerinsky: I have long argued that the rules of campaign finance created by the supreme court in a case like *Buckley v. Valeo*[2] should not be applied with regard to judicial elections. That restrictions on expenditures and

contributions should be allowed in judicial elections because the desire for an independent judiciary is different than when we are talking about other office holders. I do not know if there is anyone here from Wisconsin.

Honorable Nguyen: I was just thinking about Wisconsin.

Dean Chemerinsky: I think the enormous amount of money spent in the Wisconsin race is a precursor to what we are going to see in many other states. And what does that then mean in terms of the independence of the judiciary?

Let me then use this as a transition to the other topic we were assigned to talk about, which was judicial independence. You have been a judge in the state and federal systems for a long time now. Do you see a difference with regard to threats to judicial independence now compared to when you started, and how they have changed?

Honorable Nguyen: I would say, from a historical perspective, that threats to judicial independence are not new. But I have been on the bench for a very long time now. I would say that I and the vast majority of judges—I believe—feel that there is a qualitative difference in the current climate, and that because of the attacks on judges, judicial independence is at serious risk of erosion. Threats of impeachment and security risks feel very different now.

From a historical perspective, threats to judicial independence are not new. I have been on the bench for a very long time now. I would say that I and the vast majority of judges—I believe—feel that there is a qualitative difference in the current climate, and that because of the attacks on judges, judicial independence is at serious risk of erosion.

I have gotten to know and have worked closely on several occasions with Esther Salas, a judge in New Jersey. Almost five years ago now, an angry litigant showed up at her door over the Christmas holiday and ended up shooting and killing her son and very seriously injuring her husband as well. There was a state court judge who was gunned down just a couple of years ago in his driveway. There is a man who traveled from California to Justice Kavanaugh's house with zip ties. He turned away only because the justice's security detail was in front, and he saw that. But I think that level of threat and just the personalization of attacks, not on opinions, but on the judges themselves, feels very different and very dangerous.

Dean Chemerinsky: What can the profession do with regard to judicial independence? Obviously, providing more security for judges is absolutely essential. And then we must confront an important question: What can we do to help more Americans see the value of judicial independence? My experience has been that judicial independence does not resonate with people. When you talk to people about it, it just is not something that persuades them.

We had an instance here in California where a superior court judge issued a sentence in a case. It was within the statutory guidelines. It was within what the probation office recommended. But then he got targeted for a recall campaign. The first judge to be recalled in California since the 1930s.

I argued fervently that we should not remove a judge merely for disagreeing with one ruling and that judicial independence was vital in a democracy. Sixty to forty, the voters voted to recall him from office. And the conclusion that I drew from that is that the phrase "judicial independence" may be too abstract to resonate in this environment. Do you have thoughts about how to better educate people on this topic of judicial independence or how to better protect judges to ensure judicial independence?

Honorable Nguyen: You raise a really important point. Of course, you will recall what happened to the California Supreme Court in the Rose Bird era on death penalty issues. Citizens are going to vote in ways that reflect strong convictions on emotionally or politically charged issues. I think a big part of helping voters see the importance of judicial independence is civic education. I think we have got to do a better job, the bench and the bar, at educating the public on what it is that we do.

There was an interesting article that I saw not too long ago in the New York Times about how judges in Poland really got out of their chambers and went to far-flung villages in remote areas just to talk about what judges do and how it impacts everyday lives. And of course, paired with that are lawyers who basically speak for the judges.

Judges feel very constrained in speaking out, and of course, there are potential conflict issues. Most judges that I know are still active sitting judges and are very reserved about commenting on even just general areas because we do not want to create not only conflicts, but the appearance that you have already weighed in on a particular issue.

We rely very much on the lawyers and the bar to engage with the public and be a part of that public education. But I think judges can do more to leave our chambers and to interact in different forms, not just with other judges like this, as wonderful as it is, but really out in the community. There are efforts like that at the state court level. I think civic education is really a key component of that.

You were telling me earlier, Dean Chemerinsky, about the importance of social media these days. I have not engaged on social media, and judges generally tend not to. That whole social media world has just completely bypassed me.

Dean Chemerinsky: I am not on social media either, to be clear. Let me pause to something you said and I will answer that question directly. I think one of the things that you point to that is important is that lawyers in each state need to have a group that is there to respond when judges are being attacked for their decisions, because the judge obviously cannot go to the press. You cannot write the op-ed. But the lawyers need to be there to be able to explain. Judges might need something like a rapid mobilization team within the states to respond when attacked. We need to find a way to be able to organize that.

I also very much think that we need as a society to do much in the way of civic education. And one of the things that I have struggled with is how to operationalize that. It is really easy for us to sit here and say we need to do better civic education.

I came up with an idea at the end of April. What if we got a bipartisan group of people together and tried to draft a set of principles of constitutional democracy that they would agree to, and then hopefully a larger audience could agree to, and then use as a basis for civic education?

I asked Michael Luttig, the former conservative court of appeals judge, to be my co-chair, and a professor at Drexel, Lisa Tucker, to be involved. And then we recruited twenty people to be the drafters. I went to a former conservative federal court of appeals judge, Tom Griffith, of the D.C. Circuit, and a liberal former court of appeals judge, David Tatel. I recruited some liberal politicians. Stacey Abrams agreed to do this. Jamie Raskin also agreed. Pete Buttigieg agreed. And then I asked some conservatives, Christine Todd Whitman, the former Republican governor, and Brian Sandoval, the former Republican governor of Nevada. I asked Seth Waxman, the former Solicitor General, Sherrilyn Ifill, and some top former conservative Justice Department officials. I also asked

some law professors, such as Harold Koh at Yale, and Melissa Murray at NYU. The goal was to see if we could publish something in the New York Times based on this idea.

We wanted what we wrote to fit on one page of the New York Times as an ad, but also not just be full of platitudes. I suggested we divide into five groups. One focused on the rule of law, one on democracy and elections, one on the separation of powers, one on personal freedom, and one on equality. And each group then proposed its principles to the twenty, and then we arrived at a unanimous agreement about these principles. It appeared as an ad in the New York Times on page A7 on July 4. It appeared in many other regional newspapers. We call it, "We Hold These Truths," and we will see if something can come of it.

But I think that this is just one example of things that we need to do in part to show that the values that unite us are still greater than what divides us, and in part to be able to communicate to people who do not read the op-ed pages of major newspapers.

Honorable Nguyen: One thing that judges themselves can do in order to have the public have more trust in institutions is to make our opinions more accessible to the public. I am a big fan of plain language in opinions. I also believe in writing shorter opinions where possible, although I do not always succeed. I always tell my law clerks that an opinion should look nothing like a bench memo. Starting from a bench memo is the wrong way to approach the opinion writing process. I have seen a lot of judges do that now. If we are talking about a trademark dispute, why not just put the photos of the different shoes in the opinion itself so that people can readily see what it is?

Sometimes I used to go to the dissent first as well: Shorter, punchier, easier to digest. How do we make majority opinions just as easy to access? I think that is something that a lot of judges think about and are trying to accomplish. You will see that on the Supreme Court as well with Justices Kagan and Brown Jackson. They write in a much punchier way. I think that is a way judges can help contribute to public education.

Dean Chemerinsky: I would like to plead with judges to refrain from sarcasm and caustic language in opinions. I think the nature of judicial opinions has changed as our society has changed. It has often become much more sarcastic and caustic. I see students imitating this behavior when they write papers or draft briefs. I understand the desire to do that. But I also think that it does not put the judiciary in a good light, and it does not help people understand how what judges do is fundamentally different from what other government officials do.

Honorable Nguyen: I could not agree with you more. I think the tone in some opinions has definitely shifted since the time that I have been on the court, and not necessarily for the better. I am not a fan of dissents from denial of *en banc* petitions, as you know, which is a pretty cemented practice because they just read differently, and I think it is an appeal to the U.S. Supreme Court to take up cases. Personally, I do not think that it is our job to do that.

Dean Chemerinsky: I would like to talk about judicial independence in one other way. We have been talking about judicial independence in a decisional sense, and what factors might influence how judges decide cases.

There is also judicial independence in the institutional sense, and how we protect the judiciary as an institution. And certainly, we have seen in some state courts efforts that would really undermine the independence of the judiciary, the proposal in Congress to do this. I do think it is worth separating decisional and institutional independence. I would appreciate your thoughts on whether there are things that we can do to better ensure the independence of the judiciary as an institution.

Honorable Nguyen: Again, I think I think education is the answer. I think the importance of the judiciary as an independent branch is not sufficiently appreciated by members of the public. We are a public institution. We serve at the pleasure of the public. When courts get too far ahead of public opinion on particular issues, that can cause difficulties with public perception even if the ruling is correct. Those unpopular rulings can claim a greater hold on the public than the many rulings with which it agrees. We should emphasize to the public that even if you do not like the opinion, there is value in the institution being protected. That is not something that young people sufficiently appreciate.

Sometimes, I think even young lawyers do not have a sufficient appreciation of why judicial independence is so important. I think education about the importance of the judiciary as an institution is going to be key to maintaining that independence.

I think the other part of it is that we live in a very polarized environment. And since I have been a federal judge, I do not recall ever seeing my name in the papers without the fact that President Obama appointed me being mentioned. When decisions come out, I frequently see media outlets say that an "Obama-appointed judge said this." Or, a "Clinton-appointed judge said that." Or, a "Trump-appointed judge said that." Or, "on this panel, there are two Democratically-appointed judges and there is a Republican judge." I think that only serves to undermine the appreciation of the importance of the judiciary as an independent branch of government.

I think during Trump's first term, the attacks and the partisanship got so severe that Justice Roberts issued a statement that there are no Obama judges, Clinton judges, or Trump judges.[3] I think it was important for him to send that message out. But I think the message landed, and then it died out. It is very hard to maintain a message on with such a fast-moving news cycle. But we just have to keep at it.

Dean Chemerinsky: We saved the last 15 minutes for questions, comments, and discussion. I have plenty more that I can ask Judge Nguyen. But your comments, questions, thoughts. There are microphones, or you can just talk loudly.

Participant: I think we could do civics education with young people on TikTok.

Dean Chemerinsky: I completely agree. And one project that I have done is to help create a series called "It's the Law." They are 60- to 90-second Instagram and TikTok videos where they answer a question. For example, "Can a president serve a third term?" We had over a million viewers of it, and it is again trying to find a way to educate people about the law who do not necessarily read the op-ed pages of the newspapers or who are getting their news in various ways, and trying very hard to do these videos in a neutral way and just saying here is the law and then we can discuss our opinions of the issues. Other institutions can do these too. But I think there is a need to reach people where they are.

Honorable Nguyen: I just heard about that for the first time earlier today. Dean Chemerinsky on TikTok. That is a sign of the times right there.

Dean Chemerinsky: My daughter, when she heard about it, asked, "Do you dance?" and I said, "No." It is me sitting there talking in 60-to-90 second increments.

Participant: We have started opinions along with a press release and a short video clip of a summary written by the court and read by our court reporters (AI Avatars). The video clips are available on our social media channels.

Dean Chemerinsky: That is a terrific idea and something that hopefully other courts will follow. Other suggestions, thoughts, questions.

Honorable David Gass, Arizona Court of Appeals: I would like to raise two issues. First, how do we explain what "Rule of Law" means in the 60-to-90 second increments that will fit modern attention spans, and how do we make citizens really care about the concept after we explain it to them? Second, I wanted to let everyone in the room know that our court has commenced a "Rule of Law Ambassador" program for lawyers. We will provide materials for them to distribute to schools and local communities to talk about it. We will be giving incentives to sign up and do presentations, including emblems for their websites, recognition on the State Bar website, and recognition at the annual convention.

Honorable Nguyen: We mentioned earlier that it is really the U.S. Supreme Court that gets the immediate attention. There is a robust debate among the judges about how open the U.S. Supreme Court should be to social media. One thing that the Ninth Circuit does is livestream all our arguments. The U.S. Supreme Court mulled over what they should do during the pandemic and opted to do telephonic hearings and, I believe, provide a real-time transcript. But the justices are slow to move, and I think we should discuss the extent to which the U.S. Supreme Court should adopt state court innovations to make opinions a little bit more accessible to the public.

I think now it is fair to say that most members of the public learn of U.S. Supreme Court opinions from just the brief blurb, two or three sentences at the most. That is the impression they have of a U.S. Supreme Court ruling. And the rationale behind the decision is never really penetrating, even within the legal profession.

Based on the feedback we have gotten, I commend the Ninth Circuit's decision to livestream arguments. Not everybody can get to the courtroom, but they can sign on and listen in real time. I think that is something that we have done for a long time, and the practice has always been praised. In some cases, frankly, there are not many views. But some cases get quite a few views.

Dean Chemerinsky: I also wish the U.S. Supreme Court would livestream arguments because people would see nine human beings who are superbly prepared and are working very hard to figure out the law. And unfortunately, when people do not see that, what they see is the conclusion, and 6-3 votes in high-profile cases. Then they just conclude that the U.S. Supreme Court decided a case a particular way because there are six Republican justices and three liberal justices.

I also think that there is a burden on lawyers to explain the complexities of U.S. Supreme Court opinions in an accessible way because the justices must be careful in speaking off the bench. I do not think that the lawyers have done nearly enough to take on the responsibility they should have.

Let me give an example. I do not mean to sound political, but it just happened last week. A federal judge in Los Angeles last week issued a preliminary injunction against stopping people on the basis of race, stopping without reasonable suspicion, apprehending them without probable cause, and racial profiling.

The Secretary of Homeland Security responded and said to that judge, "He is stupid." First, it was a female judge, and so the secretary got the gender wrong. And second, what does it mean when a judge issues a sixty-page opinion and a government official says it is "stupid"? I am quoting for you. The lawyers should be out there saying, "This is not how we talk about judicial opinions." As lawyers, we need to focus on the appropriate nature of discourse about judges and judging. I do not think lawyers have done enough in this regard, and I think the bar needs to step up.

Honorable Pedro Colón, Wisconsin Court of Appeals: I often wonder why judges don't speak up enough. I think about the situation in Wisconsin two months ago involving an immigration dispute. This was a good judge and a good person, like I believe most of us are. A media outlet [the judge believed CNN to be the outlet] called me to make a statement on the news. I thought about it for 48 hours because I was reluctant to make the statement. But I just do not believe that we should relegate all of the responsibility for defending the judiciary to lawyers. I think we should take responsibility for our own branch. And when something is deeply wrong, we should say so. When we see a colleague in the news and that colleague is a really a good person wrongly treated for irrational and unethical political points, we should point it out. But I think it is really hard to do. It felt really uncomfortable to do the interview. As soon as I did, I worried that some deranged individual would threaten me at my home. I did think the interview turned out well.

My point is that I kept the comments within the confines of defending the judge and not talking about the case. But sometimes we should take that responsibility and defend our colleagues when we have nothing at stake. We cannot rely on attorneys to do so, and I can understand why they would be hesitant. I have seen other cases where judges are unfairly attacked and caricatured, and nobody says anything.

Honorable Nguyen: I think you raised an interesting point. And certainly, judges' organizations are engaged in those sorts of discussions. When do we speak up? Under what circumstances do we speak up? What is that message? Of course, keeping in mind that there are separation of power concerns. If there is an ongoing case, we do that. But I think judges, as a group, are so used to making sure that we do not create appearance issues that we are very reserved and cautious in speaking out. Perhaps there is a role for organizations to issue statements.

I have to tell you that among the federal judges, this is something that is being talked about right now. What is the role? Is it the chief justice's role as the head of the judiciary in any state? Is it the top court's responsibility to issue a message on behalf of the branch, or is it individual judges or individual judges within the context of an organization? I think that is a really important point that you raised.

Dean Chemerinsky: I will just end by saying I believe that democracy and the rule of law are more in danger right now than they have been at any point in American history. I believe that democracy and the rule of law will survive. It is because of the judges in this country. You are truly the guardrails of democracy, and never has it been more important to be a judge than now, and never has what you are doing been more important than what you are doing right now. Thank you, Judge Nguyen. Thank you so much.

Notes

1 U.S. CONST. art. III § 2.

2 424 U.S. 1 (1976).

3 Pete Williams, *In Rare Rebuke, Chief Justice Roberts Slams Trump For Comment About 'Obama Judge,'* NBC NEWS (Nov. 21, 2018), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-trump-comment-about-obama-n939016.

Afternoon Paper, Oral Remarks, and Comments

The Bottom-Up Constitution: States and the Evolution of American Constitutional Law

Gerald S. Dickinson, University of Pittsburgh School of Law

Executive Summary

In this work, Dean Gerald S. Dickinson rethinks how American constitutional law develops. Most accounts focus on the U.S. Supreme Court and treat federal law as the engine that drives the country's constitutional evolution. Dean Dickinson challenges that view. He argues that the real story is more complicated—and more democratic. States, he says, have long played a central role in shaping constitutional law, and federal doctrine often grows out of legal experiments that happen first in state courts and legislatures.

Part I lays the historical groundwork. Dean Dickinson shows how the framers of the U.S. Constitution didn't create the federal government from scratch. They borrowed heavily from existing state constitutions and experiences. State courts had been exercising judicial review before Marbury v. Madison. State legislatures had experimented with rights protections that later appeared in the federal Bill of Rights. In fact, many of the structural ideas in the Constitution—like checks and balances, bicameralism, and the veto—were borrowed directly from states.

Part II focuses on how this state-led innovation continues today. Dean Dickinson explains that when federal courts retreat from expanding rights, state courts often step in. He discusses what he calls the "percolation effect": the way new constitutional ideas bubble up from the states and sometimes make their way into federal law. He gives examples from areas like jury selection and the exclusionary rule, where states recognized protections before the Supreme Court did. Dean Dickinson argues that this bottom-up influence is both common and underappreciated.

A major overall theme is that constitutional law doesn't have to flow from the top down. State courts and legislatures can lead and often have led. Dickinson calls on federal judges, especially on the Supreme Court, to pay more attention to state-level developments. He argues that states don't just offer alternative models; they are active partners in building national constitutional norms.

This Article is excerpted from a longer book-length project about how state-level developments have influenced the federal Constitution.

Introduction

The Bottom-Up Constitution: States and the Evolution of American Constitutional Law presents a bold rethinking of how constitutional law develops in American constitutional law. Challenging the traditional, federal-centric narrative, I argue that states—both courts and legislatures—play a foundational and often underappreciated role in shaping constitutional doctrine. In this "bottom-up" view, state courts and legislatures act as laboratories of constitutional innovation, developing legal norms that later influence and inform federal jurisprudence.

The book examines the dynamic interplay between state and federal constitutionalism, showing how state-level decisions frequently expand protections or articulate principles later adopted by the U.S. Supreme Court. Through a series of landmark case studies, I illustrate that transformative federal rulings often build upon legal groundwork laid at the state level. This iterative process, I argue, reflects a decentralized model of constitutional evolution in which state experimentation enriches the national legal landscape.

Rather than focusing solely on federal institutions like the Supreme Court, I attempt to reorient the narrative of constitutional development by placing state constitutions and state courts at its center. My analysis spans key areas such as civil liberties, privacy, and property rights, demonstrating how state-initiated doctrines have informed federal interpretation. By situating these developments within a comparative, bottom-up, vertical context, the book also shows how American federalism aligns with broader patterns in other federalist democracies, where subnational units drive constitutional change.

Drawing on my recognized scholarship, I offer both a theoretical and practical contribution. *The Bottom-Up Constitution* provides, most importantly, a perspective that state and federal jurists will appreciate, but also a new framework for understanding how state-level governance shapes (and arguably should shape) national constitutional norms. But the audience extends beyond constitutional scholars, law students, practitioners, and policymakers. The book will especially be useful for understanding the interdependence between state and federal jurisprudence, while policymakers and advocates may use it as a roadmap for how state-level reform can influence federal outcomes. State jurists, undoubtedly, will find the book useful as a greenlight to innovate, knowing that one day, federal jurisprudence may (and is likely to) be shaped by their creativity.

The book is also accessible to historians, political scientists, and general readers interested in constitutional development. Its clear, engaging style, combined with its historical grounding, makes it a valuable resource for understanding how states function not merely as local actors but as key participants in shaping the U.S. Constitution over time.

As a teaching tool, *The Bottom-Up Constitution* is well suited for courses in first-year constitutional law, federal courts, and state constitutional law. It provides an essential complement to traditional casebooks by highlighting how state rulings have shaped major federal decisions. It is also suitable for undergraduate and high school classrooms exploring the role of states in civil rights and constitutional governance, as well as for graduate students examining the doctrinal interplay between federal and state systems.

The book complements—and significantly expands—the existing literature on federalism and constitutional change. While David Osborne's *Laboratories of Democracy* highlights state-level policy innovation, I zero in on constitutional doctrine. Unlike Sanford Levinson's *Our Undemocratic Constitution*, which argues for federal reform, I show how constitutional evolution already occurs from the ground up, driven by state practice. Compared to Feeley and Rubin's *Federalism: A Theoretical Inquiry*, which focuses on structural theory, I offer a case-based, doctrinal approach grounded in legal history.

Alan Tarr and Emily Zackin—leading scholars of state constitutionalism—offer useful comparisons. Tarr's *Understanding State Constitutions* (1998) provides a broad, comparative overview of how state constitutions differ from the federal Constitution. Tarr emphasizes their structural features, policy focus, and amendability, arguing that the U.S. has "dual constitutional cultures." But where Tarr offers a descriptive account, I analyze how state legal innovations influence federal constitutional doctrine—shifting the emphasis from variation to influence.

Emily Zackin's *Looking for Rights in All the Wrong Places* (2013) makes the case that many positive rights—such as education, labor protections, and environmental guarantees—are found in state constitutions, not the federal one. Through rich historical analysis, she shows how reformers used state charters to advance progressive rights agendas. While Zackin highlights the content of rights, my focus is on process and doctrinal transmission—how state court reasoning and constitutional interpretation shape federal legal norms. Where Zackin recovers a neglected tradition of rights, I reinterpret the mechanics of constitutional development itself.

The most direct comparison is with Jeffrey Sutton's *51 Imperfect Solutions* and *Who Decides?*, which champions the value of state constitutional law. Sutton emphasizes state autonomy and legal diversity. I build on that by showing how state courts don't just provide alternatives to federal law—they often lay its very foundations. In this sense, *The Bottom-Up Constitution* offers a deeper analytic framework for understanding the reciprocal relationship between state and federal constitutional systems.

The book arrives at a critical moment. As recent U.S. Supreme Court decisions—including *Dobbs v. Jackson Women's Health Organization*—return power to the states, the constitutional spotlight has shifted. Scholars, jurists, and advocates are increasingly focused on how state constitutions and courts shape national norms. My argument—that federal constitutional doctrine is often state-led—provides timely insight into the decentralized future of American constitutional law.

Ultimately, *The Bottom-Up Constitution* has the potential to reshape constitutional theory, legal education, judicial thinking, and public policy. It offers a compelling case for recognizing states not as peripheral players but as central, generative forces in the evolution of American constitutionalism. By reframing the Constitution as a product of both national and subnational dialogue, I hope to present a rich and original vision of how American constitutional law is—and always has been—built from the ground up.

Part I: The Founding Generation and the Origins of Bottom-Up Constitutionalism

The framework of modern American constitutional law is dominated by a top-down culture.[1] Federal constitutional law wields immense influence over state constitutions, state courts, and state legislatures.[2] This influence has, for nearly a century, created a constitutional culture in which the Supreme Court issues a decision, and state supreme courts follow in lockstep, interpreting the corresponding provisions of their own constitutions accordingly.[3] This hierarchical model of interpretation positions the Supreme Court as *the* de facto authority, even when its rulings are not binding on state courts.

State supreme courts perpetuate this top-down dynamic by adopting the Court's rulings, applying its reasoning to their own state constitutional texts with minimal independent analysis.[4] This practice of "wholesale borrowing" from federal law diminishes the autonomy of state courts and minimizes the relevance of state constitutional law, creating the false impression that the Supreme Court is the final word on constitutional issues.[5] As a result, state courts often resort to federal precedents as a guide for resolving state constitutional questions, rather than engaging in an independent inquiry grounded in state constitutional law.[6]

This is the modern day "nationalization of constitutional discourse."[7] Some scholars contend that this has relegated state constitutional law to a "second-tier" status.[8] The impact may extend even further. In many instances, state

courts have increasingly shied away from interpreting their own constitutions altogether. Instead, they borrow federal constitutional law as if it were interchangeable with state law, resulting in a dynamic where state courts appear to defer to the nationalization of rights and protections. The origins of this federal dominance over state constitutional law derive from prior eras.

The New Deal and Warren Courts played a prominent role in expanding federal rights and protections, alongside the massive growth of the federal government itself. In response, state courts eased their state-centered approaches to interpretation, instead waiting for the "next [federal] landmark decision" to guide their rulings. Consequently, state courts today operate "in the shadow" of the Supreme Court's rulings and the federal doctrines that flow from them.[9] This habitual construction of "parallel federal provisions" by state courts has embedded layers of federal constitutional precedent into state judicial doctrines across the country, extending the reach and influence of federal law over state law.[10] State legislatures are no different.[11]

The Court's reach extends far beyond state courts, influencing how state legislatures draft statutes, even in areas where federal law doesn't preempt state action.[12] Many state legislatures actively align their laws with federal judicial precedent, particularly by following the Supreme Court's doctrines.[13] Legislators often interpret state rules "in light of" federal court rulings, using them as a guide.[14] Some scholars call this practice "legislative underwriting" where state lawmakers explicitly endorse a Supreme Court decision by incorporating the substance of the opinion into state law.[15] This means that lawmakers might draft statutes that cross-reference or even directly cite Supreme Court decisions, believing these rulings accurately reflect the correct interpretation of the law.[16] State legislatures have also long followed the Supreme Court's lead in shaping their own laws, particularly when it comes to property rights.[17] For example, some states have passed "takings assessment" statutes that align with the Court's regulatory takings doctrine. Others, echoing federal jurisprudence, enacted "compensation statutes" and devised tests to determine when a regulatory action constitutes a taking.[18] In these instances, state lawmakers directly incorporate the Court's interpretation of constitutional rights into their legislation. This influence extends beyond property rights.[19]

The Supreme Court's interpretation of federal statutes, grounded in constitutional principles, has also significantly shaped state laws in other areas.[20] Take employment discrimination, for instance. The Court's decision in Title VII cases created a burden-shifting framework to prove discrimination, and many state legislatures quickly adopted that framework for their own statutes.[21] When the Court later adjusted its analysis, requiring a burden of production rather than persuasion, state legislatures followed suit, amending their laws accordingly.[22] Similarly, state legislatures frequently adopt the Supreme Court's interpretations of the federal rules of evidence.[23]

What about the Supreme Court? The Justices consistently look to Supreme Court or lower federal court precedent for guidance on new or difficult constitutional questions. When faced with federal constitutional controversies of complexity or that have no obvious answer, the Supreme Court generally turns to federal actors and precedent for insight.[24] But when those sources offer no clues or clear answers, why not look down to the state courts or state legislatures? Despite the constant state borrowing of federal law, there remains little discussion of the opposite phenomenon—the Supreme Court looking to state constitutional law or state legislation for guidance on federal constitutional law.[25] Indeed, there is scant attention paid to how or why state legislative enactments or state court doctrines might serve as a rich source of authority for the Supreme Court in interpreting the federal Constitution and developing federal constitutional law.[26]

The Supremacy Clause prevents state courts and legislatures from offering less protection than federal law requires.[27] But the Clause does not prevent the Supreme Court from considering state court doctrines or state legislation as persuasive authority to create new or modify existing federal law.[28] Indeed, decisions and actions by these state actors could, if the appetite was ripe, to serve, not as a secondary reference or afterthought, but the primary interpretive tool and source to guide the Court to a decision.[29] There is little reason for the Court to avoid engaging in this kind of consultation or borrowing, particularly when state courts or legislatures have already tackled similar questions.[30] In cases where the Court is confronting a blank slate, state courts may offer a "relatively uniform and well-developed" body of jurisprudence that the Court can consult.[31] Or, alternatively, the decisions of only a few or a minority of these state actors may be persuasive for the Justices. In fact, this bottom-up idea is not new.[32] Indeed, the Court has been known to follow the lead of state courts and legislatures in expanding the scope of federal guarantees.[33]

State courts have often "blazed their own paths" under state constitutions, offering the Supreme Court an opportunity to recognize the value of these innovations.[34] State legislatures have passed laws that create new or protect existing rights where the Court has yet to step into the breach.[35] The creative legal claims that emerge from state court decisions have, on occasion, captured the attention of the Supreme Court, providing the Court with a chance to "profit from the contest of ideas" arising from state doctrines.[36] In doing so, the Court may decide to federalize a right or protection after studying the competing doctrines developed by state courts or enactments passed by the legislatures.[37]

Meanwhile, as the Supreme Court from above waits for these innovations from below, state courts continue to work their way through constitutional issues, developing their own tests and doctrines and state legislators battle in the trenches to politic their way to the passage of new laws.[38] The result is a process where federal constitutional law can evolve based on the experiences of these state actors. This bottom-up approach to constitutional development emphasizes the value of the Supreme Court stepping out from its federal shadow and learning from the experiences of state courts, rather than the other way around.[39] The U.S. Supreme Court is a major player and influencer in the theory of bottom-up constitutionalism. For the theory to manifest, the Justices must be willing to be open to and persuaded by the idea that state actors are appropriate—if not legitimate—sources to rely upon to enrich their understanding of and make decisions about federal constitutional law. The evolution of the theory would not be possible without Justices such as John Roberts, William Brennan, Tom Clark, William Rehnquist, Antonin Scalia, Anthony Kennedy, Sandra Day O'Connor, Byron White, Lewis Powell, and John Paul Stevens. Whether liberal or conservative, each of these Justices played instrumental roles in writing majority or dissenting opinions that endorsed bottom-up constitutionalism by heavily consulting, adopting, or borrowing the doctrines, texts, and laws of the states to shape new or modify existing interpretations and meanings of federal constitutional law.[40] This book explores this forgotten bottom-up dimension in American constitutional law.

Bottom-Up Judicial Review and Constitutionmaking

In the years following the U.S. Supreme Court's 2022 ruling in *Dobbs v. Jackson Women's Health Organization*, overturning the federal right to abortion, state courts emerged once again as critical actors in the American legal landscape, playing a pivotal role in shaping constitutional law and governance on the ground level. This was no new development, however. The influence of state courts, and the judicial review they wielded, has deep roots in the history of the Republic.[41] The case of *Moore v. Harper*, one year after the *Dobbs* decision, thrust state courts and their history into the spotlight, raising an essential question: How far can state courts wielding powers of judicial review go in checking state legislatures, particularly concerning federal elections?[42]

Moore arose in North Carolina, where, after the 2020 census, the General Assembly redrew congressional and state legislative maps. These maps were soon challenged by voters and advocacy groups, who argued that they were extreme examples of partisan gerrymandering, designed to favor one political party and dilute voter influence.[43] The North Carolina Supreme Court took the case and ruled that the state constitution allowed for judicial review of these partisan gerrymandering claims, placing the state judiciary in direct conflict with the legislature. This ruling set the stage for a confrontation over the boundaries of state legislative and judicial power.

The North Carolina legislature, defending its actions, leaned on the U.S. Constitution's Elections Clause, arguing that state legislatures had exclusive authority over federal elections, free from oversight by state courts.[44] This "independent state legislature" theory contended that legislatures could regulate federal elections without the checks typically imposed by judicial review.[45] The theory had radical implications for the balance of power between state legislatures and courts, yet this battle over legislative overreach was as old as the Republic itself.[46]

As *Moore* moved to the U.S. Supreme Court, it revived an age-old conversation about judicial review, a power first exercised by state courts long before *Marbury v. Madison*.[47] Amicus briefs filled with historical references flooded in, many citing William Treanor's *Judicial Review Before Marbury*, which traced the practice of judicial review to the state courts of the 1780s.[48] Treanor's work highlighted key cases like *Holmes v. Walton*, where the New Jersey Supreme Court struck down a law that violated the right to a jury trial.[49] In Holmes, the court ruled that a New Jersey statute allowing a jury of only six people, instead of the customary twelve, in certain cases violated the state's constitution.[50] In striking down the law, the court set a precedent for state-level judicial review, demonstrating that courts had the authority to declare legislative acts unconstitutional when they conflicted with individual rights protected by the constitution. This case, and others like it, would come to inform the later development of judicial review at the federal level.[51]

North Carolina's own history with judicial review was equally significant, particularly in the case of *Bayard v. Singleton*. In *Bayard*, the North Carolina Supreme Court confronted a law that barred British loyalists from challenging the seizure of their property after the American Revolution.[52] Elizabeth Bayard, the daughter of a loyalist, contested the state's confiscation of her family's property under the law, arguing that it violated her constitutional rights.[53] The court ruled in her favor, declaring the legislative act unconstitutional.[54] James Iredell, a prominent figure in this case who would later serve on the U.S. Supreme Court, articulated the principle that legislative authority must be "limited and defined by the constitution," stating that "if the legislature may pass a law inconsistent with the constitution, it will come to this, that the legislature may repeal the constitution itself."[55] The ruling in Bayard was a defining moment in the early practice of judicial review, making it clear that courts had the authority to overrule legislatures when their actions violated constitutional protections.[56]

Cases like *Holmes* and *Bayard* were not isolated instances but were part of a broader tradition of judicial review developing in the states.[57] These cases laid the foundation for the federal judiciary's power to declare laws unconstitutional.[58] As amicus briefs in *Moore* argued, the Framers at the Constitutional Convention in 1787 were keenly aware of these state court rulings when they devised the structure of the new federal judiciary.[59] When James Madison spoke of a law violating the Constitution being "null and void," he was drawing directly from state court rulings that had already set that precedent.[60] Madison referenced cases like *Trevett v. Weeden*, where the Rhode Island Superior Court struck down a state law that imposed harsh penalties on merchants who refused to accept paper currency.[61] In Trevett, the court held that the law violated constitutional protections of due process and property rights.[62] This decision, which predated the ratification of the U.S. Constitution, was one of the many examples that informed Madison's view that courts must have the authority to overrule unconstitutional laws.

During the Constitutional Convention, delegates like Alexander Hamilton and Gouverneur Morris also leaned heavily on state court rulings to shape their arguments in favor of judicial review.[63] Hamilton, who had argued in *Rutgers v. Waddington* (1784) that a New York law conflicted with treaties between the U.S. and Great Britain, saw judicial review as essential for preserving the supremacy of constitutional law.[64] In The Federalist Papers, Hamilton argued that it was the duty of "courts of justice" to "declare all acts contrary to the manifest tenor of the Constitution void," a principle he viewed as applicable not just to the federal government but to the states as well.[65] Gouverneur Morris, familiar with the implications of *Holmes v. Walton*, carried these ideas into the debates at the Convention, reinforcing the importance of judicial review as a safeguard against legislative overreach.[66]

Elbridge Gerry, another key figure at the Convention, referenced numerous state court decisions where unconstitutional laws had been set aside, arguing that these examples provided a model for the federal judiciary.[67] Virginia delegates Patrick Henry and Edmund Pendleton also drew on their state's experiences with judicial review, noting that Virginia courts had routinely exercised the power to invalidate unconstitutional legislative acts.[68] These historical examples underscored a point made repeatedly during the Convention: Judicial review was not an innovation of the federal system but a well-established practice rooted in the states.[69]

This history played a central role in the oral arguments of *Moore*. Justice Alito questioned Neal Katyal, counsel for the respondents, about the extent of state court authority over election laws. "Suppose the state supreme court says the essence of our state constitution is fairness, and we don't think that the map adopted by the legislature is fair. Is that okay?" Alito asked. Katyal responded by explaining that state courts had been making similar determinations for centuries, using judicial review to strike down laws that violated constitutional principles, whether based on fairness, due process, or other constitutional mandates. The long history of state courts interpreting their constitutions to check legislative power, Katyal argued, supported the role of state courts in overseeing election laws today.

When Chief Justice John Roberts delivered the Court's opinion on June 27, 2023, he did so with a clear nod to this rich historical tradition. Roberts rejected the independent state legislature theory, stating that the Elections Clause "does not vest exclusive and independent authority" in state legislatures to regulate federal elections without judicial oversight.[70] But Roberts's opinion was not just about settling the present case—it was about situating judicial review in its proper historical context. He noted that "before the Constitutional Convention convened in the summer of 1787, a number of state courts had already exercised judicial review," and pointed out that Marbury "did not fashion [judicial review] out of whole cloth."[71] Judicial review, Roberts emphasized, was not a federal invention but a practice that had deep roots in the state courts, where cases like *Holmes*, *Bayard*, and *Trevett* had already established the precedent for courts striking down unconstitutional laws.[72]

Roberts continued by connecting these early state court rulings to the debates at the Constitutional Convention.[73] He explained that figures like Madison, Hamilton, and Gerry had drawn on the experiences of state courts when they argued for judicial review in the new federal system.[74] The Framers, Roberts noted, understood that judicial review was essential for ensuring that legislatures remained within the bounds of the Constitution, and they relied on the practices of state courts to inform their decisions.[75] Roberts's opinion traced the lineage of judicial review from the state courts of the 1780s to the present day, reinforcing the idea that state courts have always been—and continue to be—key players in upholding constitutional limits on legislative power.[76]

Roberts was engaging in a practice I have coined as federalization, where the Court looks to the states' experiences as a rich source for informing contemporary federal questions of constitutional law, and that often shapes the trajectory of American constitutional law.[77] Here, Roberts offers a dual perspective of federalization.[78] He first shows how the pre-Republic state court rulings invalidating state laws were prime examples of judicial review long before the federal

principle was established in *Marbury*. Second, Roberts looks to the founding generations reliance on those state courts to inform and shape their understanding of judicial review while building the federal Constitution. The delegates' reference to those cases during the Constitution Convention debates adds a political layer to federalization; that is, the Supreme Court recognizing how the founding generation adopted and borrowed the concepts of judicial review from the state courts when debating the fabric of the provisions that would later be ratified into history.

In rejecting the independent state legislature theory, Roberts anchored his decision in the history of judicial review, demonstrating that state courts have long held the authority to check legislative overreach.[79] The story of *Moore* was not just about resolving a present-day controversy—it was about affirming a tradition of bottom-up constitutionalism, where state courts, acting as the original arbiters of constitutional law, have shaped the very foundations of American legal principles. Judicial review, far from being a novel creation of the federal courts, was a practice developed and refined in the states, and it remains a cornerstone of American governance today.

Indeed, the early state constitutions played a foundational role in shaping the form and substance of the U.S. Constitution.[80] The Bill of Rights, along with other fundamental aspects of the federal Constitution, can trace its roots directly to the precedents established by state constitutions and the legislative frameworks they supported.[81] The Founders didn't create the federal Constitution in isolation; instead, they relied heavily on the "positive modeling" provided by state constitutional and legislative provisions, which served as both inspiration and blueprint.[82]

The impact of these state documents on the federal Constitution was profound.[83] The Bill of Rights, for instance, drew largely on protections that already existed in state constitutions.[84] Rather than introducing new rights, the federal Bill of Rights was built on a foundation of pre-existing state guarantees.[85] The influence of state constitutional principles on the federal level is a testament to the enduring legacy of state-based governance in the early years of the United States.[86] The federal Bill of Rights was not created in a vacuum; it was built upon the foundational protections already embedded within the early state constitutions.[87] This "bottom-up" approach was integral to how the Framers drafted and debated the federal Constitution and the Bill of Rights, using state precedents as a rich source of inspiration.[88] This method serves as a compelling historical and theoretical foundation for the Supreme Court's modern-day practice of referencing state court rulings and state legislation to interpret federal constitutional law.[89]

Historians Patrick Conley and John Kaminski capture this perspective well, noting that "not only was the role of the state central in framing, ratifying, and revising the Constitution, but the new federal Constitution was permeated with the influence of state constitutions and local precedents."[90] The evidence supports this, as scholars and jurists alike have documented this practice of bottom-up constitution-making, where state-based governance informed the crafting of federal principles.[91] While Justice Louis Brandeis later coined the term "laboratories of democracy" to describe the states' innovative role, it was the Framers themselves who first recognized how state laws and practices could shape federal constitutional law.[92]

John Adams once asserted, "I made a Constitution for Massachusetts, which finally made the Constitution of the United States."[93] This sentiment captures the influence of state constitutions on the federal document, reflecting the state- level experimentation that paved the way for the U.S. Constitution.[94] Historian Jackson Turner Main echoed this idea, describing state constitutions as "laboratories for testing theories," where various institutional forms and principles were trialed before they found their place in the U.S. Constitution and even influenced other countries' charters.

The Framers looked to states with declarations of rights as essential references in developing federal rights.[95] These state documents served as blueprints, guiding the establishment of the federal Bill of Rights and providing a tested foundation upon which the federal Constitution could be built.[96] In this way, the state constitutions did more than inform; they were instrumental in shaping the rights and structures that define American constitutional law.[97] Robert Williams highlights Pennsylvania's significant influence on the federal Constitution, noting that "elements of Pennsylvania's early constitutional experience were incorporated into the federal Constitution and became basic elements of American constitutionalism." The Framers paid close attention to Pennsylvania's constitutional experiment, which played a pivotal role in shaping their ideas during the 1787 Constitutional Convention.[98]

Perhaps Pennsylvania's most crucial contribution was its robust debate over separation of powers and checks and balances—issues that lay at the heart of the new government's structure.[99] Pennsylvania's 1776 constitution sparked competing arguments on these essential topics, offering the Framers concrete examples of how these principles could function in practice. By drawing on this experience, the Framers were able to refine their own understanding of checks and balances, embedding these foundational concepts into the fabric of the U.S. Constitution. Justice Robert Nix,[100] Jr. of the Pennsylvania Supreme Court emphasized the impact of Pennsylvania's constitutional legacy, remarking that "Pennsylvania's rich constitutional history—particularly the ten years of debates over the Pennsylvania Constitution of 1776—had undoubted influence upon constitutional thought at the time the federal Constitution was written." This period of intense debate and experimentation in Pennsylvania helped shape the Framers' understanding of governance, as they drew on the state's experiences to address fundamental issues like the separation of powers and checks and balances.

The prolonged discussions around the Pennsylvania Constitution offered real-world insights and served as a testing ground for principles that would later be embedded in the federal Constitution.[101] As such, Pennsylvania's constitutional history provided a crucial reference point for the Framers, contributing significantly to the foundational ideas of American constitutionalism.[102] The state constitutions, however, were not without flaws. James Madison himself acknowledged that some state protections were either deficient or even inappropriate.[103] Nonetheless, every state constitution included provisions for individual rights, and the federal Constitution ultimately borrowed from and mirrored these state models.[104] Over time, however, the narrative shifted—particularly during the Warren Court era—when federal constitutional law grew so prominent that the influence of state constitutions on the federal Bill of Rights became almost a forgotten story.

It's a common misconception that state constitutional provisions merely mimic the federal Constitution, but in many cases, the state versions actually came first.[105] This doesn't mean the influence was one-sided. After the ratification of the federal Constitution, its principles began to shape state constitutions as well. Some states amended their own charters to align more closely with the federal model, while others—particularly newly admitted states—crafted their constitutions to reflect the federal one almost verbatim. The interplay between state and federal constitutions is a testament to a dynamic relationship, where influence flows both ways, continually shaping the evolution of American constitutionalism.

The Framers drew heavily on the states' experiences when crafting the federal Bill of Rights.[106] In fact, the foundational ideas that shaped the Bill of Rights were directly influenced by the early state constitutions. Justice Felix Frankfurter, for example, highlighted three state constitutions from the founding era that included protections for legislative immunity, which he used to help interpret similar provisions in the federal Constitution.

Even before the federal Constitution was ratified, the states had been actively developing and interpreting their own constitutions.[107] These state documents provided a wealth of ideas and examples that the Framers could adapt, reference, and sometimes replicate in the federal Constitution. The states' constitutional experiments were instrumental in shaping what would become key aspects of American constitutional law at the national level. The states served as testing grounds for new ideas about government, experimenting with various forms of governance well before the federal Constitution was established. Through a process of trial and error, each state developed its own constitution, featuring unique provisions and language. These diverse state documents provided the Framers with multiple models to draw from, offering blueprints for what would become the federal Constitution—and laying the groundwork for the ongoing influence of state practices on federal law.

The influence of state constitutions wasn't limited to the initial drafting of the federal Constitution.[108] Many rights that were eventually protected in the federal Bill of Rights had already been recognized in state constitutions.[109] These early declarations of rights were the "origin and model" for the federal version, with the Framers carefully selecting elements from existing state governments. Historian James Harvey Robinson noted that the federal Constitution drew on the "framework, the language, and the tales of failure and success" found in the state documents.[110] In this way, the states' experiments provided both inspiration and cautionary tales, shaping the very foundation of the federal Constitution.

The Framers' practice of "constitution-borrowing" offers a strong foundation for today's federalization doctrine.[111] This approach underscores the U.S. Supreme Court's engagement with state courts and legislatures, much like the collaboration that took place between state and federal Framers in crafting the Constitution. By borrowing ideas from existing state constitutions, the Framers fostered a "mutual collaboration" that would help shape the federal document.

At the time, the "science of constitution-making" was in its early stages, evolving through years of trial, adaptation, and refinement.[112] This period saw state constitutions act as laboratories for testing governmental principles and protecting rights, which the Framers consulted closely. Their work was guided by pre-Republic state court rulings, which informed not only the drafting of specific provisions in the federal Constitution but also the principles that would guide their interpretation. Through this approach, the Framers created a dynamic framework that has continued to influence federal and state judicial practices to this day.

The roots of federalization are evident in the events surrounding the creation and ratification of the U.S. Constitution.[113] James Madison's Journal of the Federal Convention reveals how the Framers borrowed from existing state constitutions as they crafted the federal document.[114] During the Convention, delegates cited examples and lessons from state constitutions on roughly thirty occasions, reflecting the importance of state experiences in guiding their decisions.[115] This influence is underscored by the fact that the states are referenced, either directly or by implication, around fifty times within the Constitution itself.[116]

The parallels between the state protections the Framers relied upon and those referenced by the modern Supreme Court are striking.[117] Just as the Framers drew on state constitutions to establish federal rights and protections, today's Court often consults state precedents to interpret and define federal constitutional principles. This continuity illustrates how state influence has remained a central feature of American constitutional law, helping shape its evolution from the earliest days of the Republic.

Constitution-borrowing was essentially a "skillful synthesis" in which the Framers carefully selected elements from various state governments and constitutions.[118] Much like the modern practice of legislative federalization—

where the Supreme Court looks to find consensus among the states in deciding important federal constitutional questions—the delegates at the Constitutional Convention recommended adopting specific parts of the federal Constitution based not only on the substance of those provisions but also on the number of state constitutions that included similar ideas, as a way to reflect shared values.[119] Interestingly, the Framers' initial focus wasn't on individual rights. Their primary concern was defining the functions and powers of the new federal government, establishing a strong yet balanced structure that could unify the diverse states under a single national framework.

The most influential blueprint for the Framers was the structure of the legislature as established by Maryland's constitution.[120] Similarly, many of the federal Constitution's powers and duties were inspired by the Massachusetts Constitution. The Framers combined elements from various state constitutions, blending state-based practices with their vision for the new federal government. This synthesis influenced everything from the structure of the federal legislature, the process for adjusting representation, and procedures for impeachment, to the way laws were enacted, the separation of powers, the formation of a judiciary, and the methods for appointing judges. In essence, these foundational principles were carefully assembled from the best ideas found within the state constitutions, reflecting both state values and federal aspirations.

James Madison, when discussing the frequency of elections for the House and Senate, observed that the proposed federal rule was simply a blend of practices from two state governments—Maryland and New York—which individually had proven inadequate.[121] By combining these state approaches, the Framers aimed to create a more balanced system at the federal level. Similarly, some scholars believe that the Necessary and Proper Clause was directly inspired by language found in state constitutions and incorporated into the federal framework.[122] This approach of borrowing and adapting state practices reflects how the Framers used existing state models to shape and strengthen the federal Constitution. The language of the Necessary and Proper Clause likely comes from the state constitutions of Vermont, New Hampshire, and Massachusetts. These states had outlined the powers of their legislatures with similar "necessary clauses" added to the end of their lists of powers. This state influence extended beyond specific clauses, as the Framers also borrowed concepts like residency and office terms from state constitutions.

James Madison, for instance, pointed out the ambiguity of the term "resident." He noted that in Virginia, disputes over what counted as "residence" for representatives were often decided based on personal feelings toward the candidate rather than any clear, consistent definition. By drawing on these state precedents, the Framers sought to clarify such terms within the federal Constitution, aiming for more standardized interpretations.

The Framers modeled the terms for elected representatives on the shorter terms found in nearly every state constitution, except South Carolina's. They also borrowed the residency requirement for Senators from various state constitutions. The idea of longer terms for Senators, compared to House Representatives, came from Maryland's constitution, where it was seen as a way to enhance stability. Proportional representation in the federal Constitution also closely mirrored state governments' approaches. In fact, Pennsylvania's James Wilson suggested that the Convention's committee consider adopting a model similar to that of Massachusetts, which would benefit smaller states without straying from the principle of proportionate representation.

New York's constitution served as a "striking precedent" for the Framers by requiring representation to be periodically adjusted based on census results. Additionally, the concept of a qualified veto was borrowed directly from the constitutions of Massachusetts and New York, even using "the very words of the Massachusetts constitution."[123] These examples demonstrate how state constitutions provided a direct blueprint for the federal framework.

The delegates at the Constitutional Convention looked to the constitutions of Massachusetts, New York, and Virginia when crafting the powers of the President. For instance, the relationship between the Senate and the President's appointment powers closely resembled the system under New York's 1777 Constitution, where the executive was required to make appointments "by and with the consent of a select committee of the senate."[124]

Delegate Gouverneur Morris argued against having the legislature elect the executive, advocating instead for popular elections—a system he believed had worked well in New York and Connecticut and could do the same for a national executive.[125] The role and structure of the Vice Presidency also mirrored state models. The federal office closely resembles New York's Lieutenant Governor, who was elected alongside the Governor and held the power to preside over the state senate, casting tie-breaking votes—a function adopted in the federal version as well.[126]

When drafting Article III, which established the judicial branch, the Framers largely followed the example set by the majority of the states. Alexander Hamilton praised this approach, noting that many states had wisely entrusted judicial power to independent bodies rather than to legislative branches.[127] He explained that the federal judicial structure was essentially modeled after the state constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. In other words, the federal system reflected a consensus among the states, emphasizing the importance of an independent judiciary.

Most state constitutions at the time referenced a hierarchical judicial system, though none had fully established such a structure. At the Constitutional Convention, Delegate Nathanial Gorham proposed that judges should be appointed by the Executive, with the advice and consent of the Senate—a process modeled after the Massachusetts Constitution.[128] This approach offered a way to ensure both executive involvement and legislative oversight in judicial appointments, aligning with the principles of checks and balances that the Framers sought to embed in the federal system.

The reality is that the very concept of a written Bill of Rights, along with much of the content in the U.S. Bill of Rights, originated at the state level.[129] It's a common misconception that state declarations of rights were drafted to mirror the federal Bill of Rights, but the reverse is actually true.[130] Starting in 1776, state constitutions contained dozens of individual rights provisions, many of which were compiled in separate bills or declarations of rights.[131] While not every state had a formal declaration, those that did provided essential models for the federal Bill of Rights.

As legal scholar Bernard Schwartz notes, "if we look at the rights protected by the Federal Bill of Rights, we find that virtually all are protected in the state constitutions and bills of rights adopted during the Revolutionary period."[132] These state-level protections formed the foundation upon which the federal Bill of Rights was built, reflecting the influence of state precedents on the new nation's founding principles.[133] A closer look at the early records of the debates and drafting of the federal Bill of Rights reveals that the Framers and delegates drew heavily from a range of sources. They consulted statements from delegates, as well as decisions from state courts and actions by state legislatures, which had already crafted, ratified, and interpreted their own declarations of rights. This blend of state-level insights and experiences shaped the federal Bill of Rights, reflecting the influence of established state protections on the national stage.

The final federal Bill of Rights included twenty-six distinct rights, but the declarations of rights in various state constitutions were often much more extensive. In many ways, the strong connection between the federal Bill of Rights and these state documents should come as no surprise. The delegates, along with those who later ratified the

Constitution, needed a foundational reference point—and they turned directly to "their respective state constitutions and bills of rights." These state documents became the blueprint for both the form and content of the federal Bill of Rights, serving as the primary source for its drafting and creation.

The first American charter to include detailed individual rights provisions that foreshadowed the Federal Bill of Rights was the 1641 Massachusetts Body of Liberties.[134] The 1776 Virginia Declaration of Rights followed, often hailed as the "first true bill of rights in the modern American sense." Virginia's declaration became a landmark document, directly influencing the rights later enshrined in the federal Bill of Rights.[135]

The Virginia Declaration outlined several familiar protections, such as safeguards against cruel and unusual punishment, the right to a jury trial in both criminal and civil cases, protections against general warrants, rights to liberty, and freedoms of conscience, including the free exercise of religion and freedom of the press.[136] This document didn't stand alone for long; it inspired seven of the next eleven state constitutions—Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Connecticut, and Rhode Island all adopted provisions similar to Virginia's.[137]

By the time state ratifying conventions gathered to discuss the federal Constitution, the amendment proposals they recommended reflected a consensus that had formed around fundamental rights, as defined by state constitutions and declarations of rights. History shows that the Framers relied heavily on the language and concepts found in state constitutions. This practice of borrowing rights from the states wasn't limited to a few select provisions; many of the rights that ultimately appeared in the federal Bill of Rights were already well-established in various state constitutions. Long before the federal Bill of Rights existed, these individual rights had been interpreted independently by state courts, resulting in a rich body of precedent.[138]

This wealth of state-level interpretations offered the Framers a diverse foundation when drafting and ratifying the federal Bill of Rights. It also provided the Supreme Court with a guiding framework, as these state precedents continued to inform interpretations of federal rights for years to come. By 1787, there was already a "consensus on fundamental rights," with many of these rights enshrined in nearly every state bill of rights. State courts were actively engaging in judicial review, interpreting and upholding—or invalidating—provisions within these state documents.[139] As preparations for ratifying the federal Constitution unfolded, the influence of these state precedents was unmistakable.

Although the federal Constitution itself did not initially include a specific bill of rights, it did contain provisions protecting individual liberties.[140] It was only later, prompted by discussions and proposals from those involved in drafting the Virginia Bill of Rights, that motions were raised to create a federal Bill of Rights, drawing from the well-established protections found in state declarations. One of the most contentious issues at the ratifying conventions was the lack of a bill of rights in the original Constitution. Ultimately, this concern was addressed by adding these rights as amendments. During the ratification process, delegates from various states proposed separate amendments, many of which closely resembled the rights outlined in their own state bills of rights.

In Pennsylvania, eight of the proposed amendments became part of the federal Bill of Rights, highlighting the "direct relation" between state documents and the federal amendments.[141] Similarly, Massachusetts delegates noted that creating a federal Bill of Rights would be straightforward, suggesting that it could be modeled directly on their state's existing bill of rights.[142] The Massachusetts delegates suggested that the federal Bill of Rights could be crafted by simply using their own state's bill of rights as a guide.[143] However, the proposed federal amendments were considered "but a mild version of a bill of rights," as they left out several protections included in the Massachusetts

declaration.[144] It was the approach taken by the Virginia Ratifying Convention, though, that most closely resembles the federalization doctrine today.[145] Virginia's process of consultation, guidance, and borrowing from existing state rights provides a strong parallel to the way federal courts often look to state precedents.[146]

As Bernard Schwartz points out, "all those who had been responsible for including the pioneer Declaration of Rights in the Virginia Constitution of 1776 were members of the 1787 convention."[147] These delegates expressed serious concerns about the lack of a similar bill of rights in the proposed federal Constitution.[148] They were so committed to protecting these individual rights that they initially stalled the ratification process, insisting that the same—or substantially similar—protections from the Virginia document be included in the federal Bill of Rights.[149]

In the end, every proposed amendment from the Virginia convention made its way into the final federal Bill of Rights.[150] This makes Virginia's practice of constitution-borrowing arguably the most influential of all the conventions. As Virginia delegate Patrick Henry put it in 1788, "A bill of rights is a favorite thing with the Virginians and the people of the other states likewise."[151] Virginia's insistence on these amendments highlights the profound impact that state rights had on shaping the federal Constitution.

Part II: State Courts Shaping Federal Constitutional Rights

The Percolation Effect

The concept of "scope of rights" laboratories introduces a form of experimentation akin to traditional laboratory federalism, but with a specific focus on individual rights at the state level, as defined by state constitutional provisions and interpreted by state courts.[152] In the 1970s, state courts began increasingly to rule on cases based on state constitutional grounds rather than federal law.[153] This shift has sparked significant debate among jurists and scholars.[154] Justice William Brennan played a pivotal role in this transformation, heralding what he termed the New Federalism.[155] He noted that "[r]ediscovery by state supreme courts of the broader protections … is probably the most important development in constitutional jurisprudence in our times."[156] While he did not explicitly invoke laboratory federalism, his observations suggested that state courts were poised to serve as new laboratories, not just of democracy but of rights.[157]

This "laboratory of rights" perspective was grounded in Brennan's prediction that state courts would turn to their constitutions as independent sources of power and protection for individual rights.[158] These reopened judicial laboratories became active and productive spaces for constitutional law to evolve.[159] Justice Brennan urged states to take the lead in the rights battle, encouraging courts to engage with their constitutions to define rights more expansively.[160]

State courts began to see themselves as pathbreakers and laboratories for others to observe and learn from.[161] It is now well-established that "state supreme court decision-making increasingly defines the meaning of constitutional rights throughout the country." These courts have the opportunity to learn from one another's experiments and to replicate successful innovations under their own state constitutions.

Justice Brennan's call highlighted a form of laboratory where the scope of constitutional rights is defined by the "font of individual liberties" enshrined in state constitutions.[162] The once-ignored provisions within these state constitutions are increasingly becoming focal points for extending rights protections beyond what the Supreme Court requires.[163] This evolution in rights-based laboratory federalism arises from the Supreme Court's failure to articulate and expand individual rights, creating a void that state courts have stepped in to fill.[164]

The closure of federal remedies has spurred a new generation of state judges to occupy the constitutional gaps left by the Court.[165] Scholars have noted that while the Supreme Court has established doctrines promoting traditional laboratory federalism, acknowledging that "state courts need not be independent laboratories" could respect the role of states as part of a broader research initiative alongside the Supreme Court. Brennan's dissenting opinions often encouraged state courts to broaden the scope of constitutional rights.[166]

For example, in *Michigan v. Mosley*, the Supreme Court held that law enforcement could resume questioning suspects who had previously invoked their right to remain silent, as long as the suspect's right to discontinue questioning was honored.[167] Justice Brennan viewed this as another instance of the Court eroding rights, prompting him to assert that "no State is precluded by the decision from adhering to higher standards under state law."[168] He emphasized that state courts could enforce greater protections based on their constitutions.

These dissenting opinions have influenced the behavior of state judicial laboratories, turning them into the new focal points for rights innovation. The "constellation of rights" embedded within state constitutions offers state jurists the opportunity to grant broader rights protections, as these courts have the discretion to interpret state provisions differently from their federal counterparts.

Justice Goodwin Liu of the California Supreme Court articulated that "the notion of states as laboratories suggests that" the Supreme Court can also learn from the experiences of state courts.[169] Similarly, Justice Barry Albin of New Jersey emphasized that his state operates as a separate and independent laboratory, where the court can reject a federal "one-size-fits-all" approach to interpreting state constitutional rights.[170] The difficulty of applying a uniform approach across diverse jurisdictions underscores the advantages of a state-centered laboratory model.

Justice Robert Utter of the Washington Supreme Court pointed out that the Supreme Court must create rules that account for the variations across states, resulting in guidelines that often represent the lowest common denominator.[171] This dynamic is evident when states exercise their rights to define jury trials for juvenile court systems; the Court has been cautious not to restrict states from exploring alternative methods to address juvenile justice issues.

State supreme courts have increasingly asserted their authority to shape the scope of rights and protections under their constitutions, particularly in areas such as jury trials and regulatory takings.[172] For example, after the Supreme Court ruled against federal constitutional protections against racially motivated peremptory strikes in *Swain v. Alabama*, state courts filled the gap by interpreting their own constitutions to prohibit such practices.[173] The California and Massachusetts Supreme Courts established the Wheeler-Soares doctrine, protecting jurors from race-based strikes.[174]

The rights-based laboratories also extend to takings and eminent domain cases.[175] Following *Kelo v. New London,* which upheld broad eminent domain powers under federal law, several state courts articulated stricter protections under their constitutions.[176] The South Dakota Supreme Court restricted economic development takings, asserting that its state constitution provides more robust protections than the federal counterpart.[177] Similarly, the Ohio Supreme Court reaffirmed its independence in interpreting the Public Use Clause, emphasizing that its analysis was guided by the dissenting justices in *Kelo*.[178]

The landscape of state courts as rights laboratories is characterized by a unique blend of innovation and independence.[179] In areas like regulatory takings, state courts have experimented with various approaches to determine when a taking has occurred.[180] Many state courts established their own standards before the Supreme Court addressed the issue, demonstrating the effectiveness of state-level experimentation.[181]

Moreover, state courts have historically recognized the validity of exclusionary rules long before the Supreme Court mandated them.[182] The California Supreme Court's ruling in *People v. Cahan* highlighted the need for state courts to carve out their own interpretations, free from confusion caused by the federal approach.[183] In the realm of First Amendment rights, state courts have often taken the lead in interpreting their constitutions to provide protections that exceed those offered by the federal government.[184]

In summary, the scope of rights laboratories represents an important facet of judicial federalism, where state courts define and expand constitutional rights by interpreting their own state constitutions.[185] While Justice Brennan's vision for a rights-based laboratory model has taken root, there remains an underexplored opportunity to investigate how state courts can function not just as laboratories for constitutional rights, but also as laboratories for innovative policy and political experimentation, mirroring the legislative branches they complement.[186]

The structure of modern American constitutional law is primarily top-down, with federal constitutional law exerting a strong influence over state constitutions and state court doctrines.[187] This gravitational pull creates a constitutional culture in which "the Supreme Court announces a ruling, and state supreme courts move in lockstep to interpret the corresponding guarantees of their own constitutions."[188] This hierarchical model of judicial interpretation inadvertently positions the Supreme Court and its decisions at the forefront of constitutional law, shaping how state courts understand and apply their own legal principles.[189]

This default guidebook mentality persists even though state courts are not obligated to follow the Supreme Court's commands. State supreme courts play a significant role in fostering this top-down culture. They often borrow the Court's rulings and adopt its reasoning under state constitutional law with little scrutiny. This practice of "borrowing wholesale" from federal constitutional law diminishes the authority of state courts and state constitutional law. It creates the impression that the Supreme Court thoroughly addresses constitutional litigation and the discussions surrounding constitutional rights. This "lockstep approach" leads state courts to habitually rely on federal precedents and analyses as a guide for interpreting state constitutional questions, rather than pursuing an independent interpretation of their own state constitutions.

The "nationalization of constitutional discourse" and its associated "doctrinal vocabulary" shape how state courts interpret both federal and state constitutions. Some scholars argue that this trend has relegated state constitutional law to "second-tier" status.[190] The implications of this shift may be even broader, as it has often led state courts to avoid interpreting their own state constitutions altogether. Federal constitutional law is treated as if it were synonymous with state constitutional law, resulting in a dynamic where state courts seem to yield to the nationalization of rights and protections. The origins of the federal constitutional law's significant influence over state constitutional law are not entirely clear, but there are some hints. The New Deal Courts, followed by the Warren Court, played a substantial role in this phenomenon, exerting considerable pressure on state courts to conform to federal standards.[191]

The nationalization of rights and protections, alongside the general expansion of federal government authority, has influenced how state courts operate. As a result, state courts have often relaxed their own state-focused interpretive methods, waiting for "the next landmark federal decision" to follow and apply at the state level.[192] Consequently, "state courts operate today in the shadow" of the Supreme Court's rulings and the federal constitutional doctrines that arise from those decisions.[193] This routine "construction of parallel federal provisions" by state courts has woven layers of federal constitutional precedent into state court doctrines nationwide, reflecting a significant and far-reaching influence.[194]

The "federalization process" is often described as the evolution of federal rights through the ratification of the Fourteenth Amendment, the incorporation of the federal Bill of Rights, and the "Warren Court's revolutionary use of the equal protection clause to ensure equality."[195] The Supremacy Clause prevents state courts from protecting rights that fall below federal standards, but there is "no jurisprudential rule [that] requires the Court to ignore state court interpretations" as authoritative sources.[196]

It's true that the Supreme Court has been hesitant to nationalize new rights in the post-Warren Court era, and it seems unlikely that the Court will break from tradition to regularly borrow from state courts.[197] However, neither the principles of federalism nor the federal Supremacy Clause prohibit the Supreme Court from utilizing state doctrine, nor do they prevent state courts from drawing on federal constitutional doctrine.[198] While lower federal court rulings typically serve as the primary precedent for the Court when facing new or challenging constitutional questions, state courts also provide a valuable forum for exploration.[199]

Justice Brandeis famously introduced the concept of states as "laboratories of democracy." He was intrigued by the role states play in our dual sovereign system, noting that it is "one of the happy incidents... that a single courageous state may... serve as a laboratory, trying novel social and economic experiments."[200] The intent was to encourage states to create and implement their own policies and rules that provide greater protections beyond the federal baseline, all while avoiding harm on a national scale.[201]

While Brandeis primarily focused on state legislatures as these laboratories, state courts also have a crucial role in this process. They conduct their own doctrinal and jurisprudential experiments that contribute to the development of constitutional law without endangering national doctrines. State courts that forge their own independent constitutional paths may engage in trial-and-error methods, such as adopting new analytical tests or distinct tiers of scrutiny separate from those of the U.S. Supreme Court.[202]

However, despite the potential benefits of this judicial federalism, our dual sovereign system has increasingly taken on a hierarchical, top-down structure, overshadowed by federal constitutional law and the doctrines established by the Supreme Court. As Jeffrey Sutton points out, "[i]nstead of patiently allowing state courts to construe the same phrases . . . and instead of allowing winning and losing schools of thought to emerge [from state courts] over time, we tend to have a top-down model of judicial interpretation."[203] Federal constitutional law, along with the doctrines developed by the Supreme Court, has effectively become the default authority in our federalist system.[204]

One common consequence of this top-down approach is that when the Supreme Court issues a ruling, state supreme courts often adopt that ruling without critical examination. They may interpret the Court's reasoning in a similar or identical manner under corresponding state constitutional provisions, or they may choose to follow the federal doctrine exclusively, without considering or inquiring into state constitutional law.[205] While there are numerous examples of state courts applying rights independently under their own constitutions, a widespread pattern exists where state actors excessively "borrow[] wholesale from federal constitutional discourse."[206] The degree to which state courts adhere to federal constitutional law is notable, prompting scholars to investigate the underlying reasons for this inertia.[207] This top-down aspect of judicial dual sovereignty creates a framework where state courts may prioritize federal interpretations over their own constitutional principles.

The prevailing notion is that contemporary majority opinions and dissents from the United States Supreme Court dominate not only the terminology but also the broader agenda of constitutional litigation. This has unfortunately sidelined state courts and their own constitutions, leaving them "out in the cold" for reasons that often boil down to ignorance, fear, or a lack of initiative.[208]

Some scholars argue that there exists a gravitational pull from federal constitutional law that draws state courts into interpreting their own constitutions in alignment with the Supreme Court's interpretations of the federal Constitution.[209] State courts frequently adopt a "lockstep approach," meaning they routinely rely on the analysis provided by the United States Supreme Court rather than developing their own interpretations.[210] This tendency leads state courts to follow the doctrinal vocabulary used by the Supreme Court, as if they are submitting to the nationalization of constitutional discourse.

Indeed, there is a notable "relative infrequency" of state supreme courts issuing rulings based on state constitutional grounds. This infrequency can be attributed, in part, to a reluctance—perhaps even a hesitance—among these courts to focus on and decide cases based on their own state constitutions. Even when state constitutional issues are at play, many state supreme court opinions demonstrate a general avoidance of thorough analysis of the state constitution altogether. As a result of this behavior, many states lack a tradition of utilizing their state constitutions to offer greater rights or protections than those provided at the federal level, even though they have the authority to do so.

This morphing of the roles of state and federal courts leads state courts to "adopt federal constitutional law as their own," reflecting an assumed loyalty to federal law. Part of this dynamic stems from the perceived status of state constitutional law, which has often been criticized as "second-tier," lacking the prestige and authority that federal constitutional law enjoys. However, despite this encouragement, many lawyers and judges still default to federal constitutional law, largely due to the prevailing "second-tier" perception of state constitutions.

While some of this reliance can be attributed to the "second-tier" status of state constitutional law, much blame also falls on lawyers, who often neglect to utilize state constitutions as a foundation for addressing individual rights in their cases. In fact, some jurists have even suggested that a lawyer's exclusive reliance on federal constitutional law in state litigation could be grounds for legal malpractice. This habitual tendency to follow federal constitutional law can also be traced back to historical trends that have persisted over time. For instance, during the era of the Warren Court, the Supreme Court exerted such control over constitutional law that state judges often felt their role was merely to wait for the next landmark decision from the Court.

This historical context has shaped much of American constitutional jurisprudence, creating a dynamic where "state courts operate in the shadow of Supreme Court decision-making." Following the Warren Court, another trend emerged under Justice Brennan, who encouraged state courts to take a more active role in addressing individual rights through their own state constitutions. However, during the Burger Court era, the Supreme Court contracted "federal rights and remedies on grounds of federalism," further extending its shadow over state constitutional law. The Court has consistently overlooked state rulings and doctrines when constructing federal constitutional rules, even in instances where it has never established a corresponding rule or doctrine under the Constitution. As a result, state courts' excessive "construction of parallel federal provisions" under their own constitutions has fostered a paternalistic aspect within our federalism. This dynamic lures state courts into following federal constitutional law without a second thought, akin to children being guided by parental authority. Despite the encouragement for state courts to explore their constitutional frameworks, the gravitational pull of federal law continues to dominate, leading many state courts and practitioners to overlook the potential of their own state constitutions.

Part of this dynamic stems from federal court restrictions on reviewing decisions made by state supreme courts. The highest appellate courts in each state serve as the final arbiters of authority on questions related to state constitutional law. As a result, federal courts are generally unable to review these matters unless a clear federal question

is involved. In some instances, federal courts will wait until state claims and litigation have been fully exhausted before stepping in with any federal action.

Even when a state high court has ruled incorrectly on a federal question, if that ruling was also adequately decided on state constitutional grounds, federal courts—including the Supreme Court—typically do not intervene. This means that, while federal supremacy holds sway over the states, it does not necessarily diminish the role and significance of state courts within our dual sovereign system.

Justice Brennan notably called for the rights battle to be "waged on another front"—the states. Many states have responded to this call for a renewed emphasis on judicial federalism and state constitutionalism, focusing on protections for rights that are grounded in their own state constitutions. This push for state-centered rights protections highlights the ongoing relevance and importance of state courts in the broader landscape of American constitutional law.

In this context, some state courts see themselves as pioneers and laboratories for other states to emulate. They handle cases within their state boundaries, and while they do not have jurisdiction over federal districts, they can still influence the highest courts in other states as they develop their own legal doctrines. Although lower state courts may not directly impact national constitutional law due to their limited jurisdiction, "state supreme court decision-making increasingly defines the meaning of constitutional rights throughout the country."

Furthermore, state courts can establish "multiple avenues of relief " and offer "differing points of view" on constitutional rights, potentially serving as a safeguard for courts across the nation. Some state supreme courts develop reputations as innovators, which can encourage subsequent courts within the same state to continue this pioneering approach or persuade the highest courts of other states to adopt similar legal reasoning. However, there is arguably "little reason for state courts to affirmatively pursue national objectives when interpreting their constitutions." This reluctance is largely a result of federal supremacy and the limitations imposed on state courts within our dual sovereign system.

The Supremacy Clause mandates that states operate above the federal constitutional baseline regarding state matters. While some states provide greater protections than the federal minimum based on various interpretations of their state constitutions, this practice is relatively uncommon. Federal supremacy does not compel the Supreme Court to adopt, consult, or rely on state constitutional law. The Court has the discretion to study and apply state constitutional law if it chooses, but generally, it refrains from doing so. Instead, the Court often discourages engaging in "needless dissertations on [state] constitutional law." The prevailing stance from the Court is that states should be "left free and unfettered" to interpret their own constitutions without interference from the Supreme Court.

However, while the Supremacy Clause does not require the Court to adopt, consult, or rely on state constitutional law, it also does not necessitate that the Court ignore or entirely disregard state law. It doesn't have to be this way—and it certainly hasn't always been. While the inertia of federal supremacy often makes "federal following... rarer than state following," federal constitutional law doesn't always take the lead. There exists another, less understood dimension to judicial federalism. Occasionally, the Supreme Court is influenced by state court doctrine and decides to adopt similar principles under federal constitutional law. Indeed, there have been instances where federal constitutional law has relied on state doctrine.

If state courts consistently borrow from federal law, then, within our dual sovereignty system, it is entirely permissible for the U.S. Supreme Court to reciprocate by drawing upon state doctrine. State courts and their

constitutional interpretations can serve as "persuasive authority in federal cases" and help "define federal standard doctrine." When the Supreme Court faces federal constitutional controversies, it may look to the "expertise of state courts that have addressed parallel controversies under their own constitutions."

It is neither jurisdictionally nor jurisprudentially inappropriate for the U.S. Supreme Court to consider, study, and adopt "state developments" and "state innovations" as part of federal law. The Court has the capacity to utilize numerous state court doctrines to create new federal doctrines or enhance existing ones. This intranational dynamic positions state courts, in some cases, as influential players and national leaders in "articulating and protecting individual rights."

This state-level "market of judicial reasoning" encourages states to generate and develop "innovative legal claims," allowing the Supreme Court, if it chooses, to "profit from the contest of ideas." This process of "federalizing" state doctrines addresses unique or untested federal issues through a practice known as reverse borrowing. Instead of federal courts struggling with a legal question or doctrine in isolation, the Supreme Court can observe how state courts navigate similar constitutional issues, assess their experiences, and then decide how to tackle the federal issue by consulting those state court rulings.

Unlike the traditional top-down approach, this intranational practice respects a "ground-up approach to developing constitutional doctrine." It encourages the Supreme Court to learn from state doctrine and evolve federal constitutional law—at select moments and from the relevant cases—based on insights gained from state courts. The practice of state courts influencing federal constitutional law has been somewhat limited compared to other well-established areas of American law. However, while such influence is rare, it's important to note that "there are many areas in which the state courts have been leaders, not followers, in recognizing countermajoritarian rights." Indeed, few would dispute that state courts have often taken the initiative on many significant legal issues, making groundbreaking decisions within the framework of state doctrine and state constitutions.

This pioneering role could be further amplified if state courts could more directly influence the Supreme Court to adopt their doctrines. Some scholars contend that the Supreme Court "can and sometimes should" consult state constitutional law for guidance in areas where it lacks precedent or experience in resolving specific issues. Additionally, many federal constitutional questions are frequently present in both federal and state legal systems, highlighting the interconnectedness of these two realms of law.

Encouraging states to take the lead in "rights innovation" shifts the traditional dynamic of our top-down system of judicial federalism. It allows states to act as "leading change agents" and "initial innovators of constitutional doctrines." In this framework, the Supreme Court would have the opportunity to "pick and choose from the emerging" state doctrines. The Court could, if it wishes, lean on the "dominant majority position" established by state courts to guide its decisions. This approach to federalizing state constitutional law is based on the understanding that state constitutionalism is essential in shaping and evolving federal constitutional law.

Indeed, the practice of "federal constitutional borrowing of state constitutional law" is not a new concept, but it has often been overlooked and underappreciated. Just as state judges frequently borrow, copy, and mimic federal law when interpreting their state constitutions, the Supreme Court could adopt a similar approach by consistently looking to state supreme courts for guidance on interpreting specific individual rights or analytical frameworks. When there is "relatively uniform and well-developed jurisprudence" on a question that the federal courts have little or no experience with, it would be both reasonable and beneficial for the U.S. Supreme Court to consult state doctrine.

That said, the process of judicially federalizing state doctrine is a relatively rare phenomenon. There are limited examples of this practice, and it has received very little academic or judicial attention. However, the idea of federalization is not without precedent. The Supreme Court has, on rare occasions, vertically consulted and referenced state legislation—what I refer to as legislative federalization doctrine—more frequently than it has engaged in judicial federalization. The Court has also horizontally cited its past legislative federalization cases as sources of persuasive authority. Yet, similar to the judicial federalization doctrine, there remains a significant lack of scholarship on this subject.

The intranational judicial practice of borrowing from and consulting with state courts was "once dominant, then forgotten, [but] now reemerging" in a way that serves as a reminder to jurists and scholars that many constitutional rights originated not from the federal constitution or federal courts but from state constitutions and state supreme courts. Some scholars, such as Sutton, advocate for a "return to a world" where state actors take the lead and pave the way for rights innovation. This return would involve state supreme courts becoming active "path-breakers," with their rulings and the doctrines they establish carving out new directions for the Supreme Court to follow in order to expand or contract rights.

While a renewed focus on state constitutionalism has its advocates and opponents, there is at least some consensus that state courts remain an underutilized source for "change in the twenty-first century." Whether state courts should take on the role of "lead change agents going forward" is central to ongoing debates about the importance of state constitutionalism.

The relevance of state constitutional law underscores the American commitment to federalism, where federal courts can "learn from [state] lab experiments." The interpretations of both state and federal constitutions by state courts may sometimes hold more persuasive power than those from lower federal courts or even the Supreme Court. For instance, in cases involving takings, the Supreme Court has turned to the well-established jurisprudence of state courts due to its lack of relevant precedent or doctrine to address exactions.

However, there are limitations to relying on state courts and their rulings as primary sources and guides for federal constitutional law. The blending of state and federal constitutional law by the Supreme Court can lead to confusion and unintended resentment. Justice Stevens has pointed out that certain analyses are "best suited to facilitating the independent role of state constitutions and state courts in our federal system." There is concern that mixing state court-created doctrines with federal jurisprudence may undermine the "mutual trust" between federal and state courts.

Justice Ruth Bader Ginsburg has emphasized that state supreme courts possess a "unique vantage point" and the authority to provide greater relief under their state constitutions when the federal constitution falls short. However, this perspective may not always be relevant or beneficial to federal constitutional questions. In fact, the experiences of state supreme courts on similar constitutional issues could weaken the independence of both state doctrines and federal constitutional norms.

Justice Harry Blackmun has also remarked that states are "free as a matter of their own law to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards." Some argue that this independent source of state constitutional law should remain separate from federal constitutional analysis and should not influence the outcomes of federal cases or shape the broader contours of federal constitutional law.

Judicial federalization doctrine has, however, faced significant challenges due to the Supreme Court's reluctance to adopt it. Many arguments for and against this doctrine remain largely theoretical. The Court has become increasingly

“less apt to nationalize constitutional protections,” showing a growing aversion to utilizing state court doctrines and state constitutional law as a foundation for federal constitutional analysis. This trend diminishes the likelihood of successfully implementing judicial federalization doctrine.

From a scholarly perspective, an important question arises: Why not do the reverse? This approach is how other areas of law, such as tort, property, or contract law, typically develop. Embracing this reverse borrowing could foster a more robust dialogue between state and federal courts, allowing the Supreme Court to draw on the rich jurisprudential resources available at the state level to inform its interpretations and applications of constitutional law.

The concept of “judicial federalization doctrine” refers to the way certain aspects of federal constitutional law evolve from various well-documented areas, including exactions, racially motivated peremptory challenges, the exclusionary rule, same-sex sodomy, marriage rights, and freedom of speech and press. Interestingly, the origins and development of these federal doctrines are not purely federal in nature.

On rare occasions, the Supreme Court has created new federal jurisprudence by consulting and relying heavily on state court decisions when adopting novel federal doctrines. This blending of state legal principles into federal doctrine raises intriguing questions. While there is limited literature discussing the Court’s occasional practice of looking to state court rulings for guidance in crafting new federal doctrine, there is a notable lack of scholarly focus on why the Supreme Court has not similarly referenced or cited its own past rulings regarding the federalization of state doctrine. This gap highlights a significant area for exploration in understanding the dynamics between state and federal judicial interpretations.

Race-Based Strikes

The story of James Kirkland Batson serves as an illustration of the tension between local legal processes and the overarching federal principles that shape our justice system.[211] Batson’s journey through the courts began when he was convicted by a jury in Jefferson Circuit Court on two serious charges: second-degree burglary and receiving stolen property over $100.[212] His sentence—raised to twenty years based on his status as a second-degree persistent felony offender—reflected a common punitive escalation that state courts impose, particularly on those with previous convictions.[213] But beneath the surface of this legal process lies a larger story about how states apply constitutional protections and what it means for defendants like Batson who navigate these legal waters.[214]

In September 1981, Batson was accused of breaking into the home of Mrs. Henrietta Spencer and her husband. As Mrs. Spencer recounted, it started with a faint draft, a quiet but noticeable sound, and then a glimpse of a young Black man stooping in her doorway, reaching for her purses. Among the items missing after that encounter were three rings, valuable to the Spencers not only for their monetary worth but for their sentimental value. Later, Mrs. Spencer identified Batson as the man she saw, choosing his photo from a selection provided by the police. To further bolster the case, the Spencers’ neighbor, Regina Cornellius, recounted to the police that she had seen Batson loitering near the house that day, even running away from the back of the home after the burglary.

Batson’s story, though, introduced complexities. He brought in a public defender’s investigator, Lee Weese, who testified that months after the incident, Cornellius had told him she suspected there had been another person involved, standing at the front of the Spencers’ house with a chair. This hinted at the possibility of another actor—an ambiguity that should have been fully examined at trial.

Then came the question of the stolen property. Batson's conviction for receiving stolen goods arose after he and another man, Larry Macklin, visited a pawn shop. Batson pawned a watch, and Macklin pawned two rings, which Mrs. Spencer later identified as hers. Although charged as having acted alone or with Macklin, Batson faced the court alone in this appeal, underscoring the way legal narratives sometimes isolate defendants, disconnecting them from a broader context that might shift a jury's perception.

In his appeal, Batson raised multiple arguments. His first centered on the value of the property. Batson asserted that the trial court had erred by not instructing the jury on a lesser charge—receiving stolen property valued at less than $100. Kentucky case law requires that juries be instructed on lesser-included offenses when the evidence could reasonably support them.[215] The only evidence presented at trial on the rings' value came from Mrs. Spencer, who testified that one ring had a market value of $110, and from a pawnbroker, who estimated a replacement value exceeding $100. However, the pawnbroker had only offered $15 for each ring, revealing a stark gap between market worth and real-world exchanges. The court, however, deemed this irrelevant, arguing that the low pawn value did not contradict the rings' higher fair-market value. It reflects a tension common in the state courts: Even when multiple realities exist, courts often align with the version that suits their conclusions.

Batson's second argument highlighted a challenge that strikes at the core of equal justice under the law.[216] He argued that the trial court denied him a fair trial by refusing to provide a transcript of his first trial, which had ended in a mistrial.[217] Batson referenced *Britt v. North Carolina*, where the Supreme Court established that the state must provide indigent defendants with such transcripts if they are needed for an effective defense. In Batson's case, a transcript would have allowed his attorney to highlight discrepancies in witness testimony between the two trials, strengthening his defense. Yet when Batson's counsel asked the court reporter to read from the previous trial's notes, the request was denied; the court insisted any impeachment of the witness should have occurred during cross-examination, not during the defense's case-in-chief. While the trial court allowed Batson's attorney to access the court reporter's notes, it effectively limited the timing of their use, highlighting a subtle but significant constraint on the defense.

Through these layers of judicial procedure and legal interpretation, Batson's case underscores a broader thesis: State courts wield considerable discretion in how they apply constitutional principles, and this can profoundly shape outcomes for individuals like Batson.[218] His journey through the Kentucky courts reflects the interplay of state law and federal standards, illustrating how local judicial philosophies can impact the application of constitutional protections. For Batson, this meant grappling not only with the charges against him but also with the procedural limitations that constrained his ability to fully defend himself.

These stories of state-level criminal cases, in which defendants navigate complex webs of legal standards, showcase how our justice system operates not only from the top down but also from the bottom up. It's in these localized courtrooms—where judges interpret statutes, evaluate evidence, and make decisions that are profoundly shaped by their state's unique legal culture—that constitutional principles are continuously defined and redefined. Let's delve into the evolution of the doctrine surrounding racially motivated peremptory strikes through the lens of *Batson*, as informed by the state-level decisions that predated the U.S. Supreme Court's landmark ruling.

The Kentucky courts initially upheld Batson's conviction for burglary and receiving stolen property, despite his attorney's argument that peremptory strikes had systematically excluded all African American jurors from his trial. The trial court's position was in line with *Swain v. Alabama*, where the Supreme Court had previously ruled that, without concrete evidence of intentional, racially based exclusion across multiple cases, individual instances of

peremptory strikes did not infringe upon the Equal Protection Clause. The Kentucky courts were adhering to federal precedent while exercising a narrow view of the doctrine, emphasizing the autonomy of their court's evidentiary standards.

Despite this, Batson's case reflected a larger movement within state courts toward scrutinizing the potential for racial bias in jury selection. The Kentucky Supreme Court maintained that the peremptory strike's arbitrary nature was a well-established principle, but the decision faced growing critique as it highlighted a patchwork of state-level rulings on racial discrimination in jury selection. Other states, notably California and Massachusetts, were already moving in a direction that demonstrated a broader concern with ensuring fair cross-sections in juries—a view at odds with Kentucky's adherence to the federal *Swain* standard.

In particular, *People v. Wheeler* (California) and *Commonwealth v. Soares* (Massachusetts) carved out state constitutional protections against racially discriminatory strikes. These cases demonstrated a state-led, bottom-up approach to judicial protections, where the rights of individuals within the state were protected with more vigilance than federal precedent required. Indeed, what would become known as the *Wheeler-Soares* doctrine, some state courts began adopting the practice of barring racially peremptory strikes, referencing the experiences of sister state courts. Batson's Kentucky case emerged in this climate of evolving state jurisprudence, with various states beginning to view peremptory strikes through the lens of racial justice.

Ultimately, Kentucky's steadfast reliance on *Swain* underscored a critical tension in the judiciary between state sovereignty in procedural matters and the broader trend toward a federal standard. The Kentucky court's dismissal of *Batson's* claims set the stage for the Supreme Court's eventual intervention, acknowledging that while state courts could lead with innovative legal doctrines, there was also a compelling need for the federal courts to address systemic issues that transcended state lines. In this sense, Batson's case exemplified the way in which state-court rulings gradually influenced and informed a shift toward a more comprehensive federal stance on equal protection in jury selection, providing a fertile ground for what would become a major constitutional milestone.

This Kentucky decision serves as a reminder of the critical role that state courts play in shaping national legal doctrines. The evolution of the peremptory strike issue illustrates how local and state-level interpretations often bubble up to reshape federal constitutional protections, underscoring the power of state judiciaries to act as laboratories for the nation's constitutional values. Batson's case, viewed through this lens, becomes a story of local legal practices inspiring federal transformation, one that highlights the essential nature of a bottom-up constitutional structure where grassroots change can influence the highest courts in the land.

In the case of *Swain v. Alabama*, the Supreme Court declined to establish federal constitutional protections against race-based peremptory strikes.[219] This decision was viewed by some scholars and jurists as a failure to uphold the Court's responsibility.[220] In response, various state courts began to bypass federal precedent, opting instead to rely on their own state constitutions.[221]

Some courts indicated they might explore progressive doctrines related to peremptory challenges that were being used by sister states to address the persistent issue of state prosecutors striking Black jurors on racially motivated grounds.[222] Before the Supreme Court issued its landmark ruling in *Batson v. Kentucky*, the first pioneering states to prohibit the use of racially motivated peremptory strikes were California, with *People v. Wheeler*, and Massachusetts, with *Commonwealth v. Soares*.[223] The state doctrines arising from these cases became known as the "Wheeler-Soares" doctrines, as they concluded that a prosecutor's use of racially motivated peremptory strikes violated state

constitutional provisions analogous to the equal protection and right to a jury guarantees in the federal Fourteenth and Sixth Amendments.[224] In defiance of the Supreme Court's *Swain* precedent, many state courts proclaimed their intention not to be "shackled" by it.[225] As a result, these states began forging new paths to ensure fairness in jury selection.

For instance, the Florida Supreme Court recognized that it had "followed the adoption of similar standards" in other states and interpreted its own constitution to acknowledge protections against improper bias that "preceded, foreshadowed, and exceeded the current federal guarantees."[226] The New Jersey Supreme Court, known for its emphasis on state constitutionalism and federalism, determined that under the New Jersey Constitution, prosecutors had long been prohibited from using peremptory challenges to exclude jurors based on race.[227] The court emphasized that state courts are critical forums where issues like peremptory strikes can undergo "further study before they are addressed by the United States Supreme Court."[228] Similarly, the New Mexico Supreme Court embraced the rationale behind California's "*Wheeler* Doctrine" and its subsequent applications.[229]

In its analysis, the New Mexico Supreme Court referenced previous lower state court rulings, noting that some state courts function as laboratories of democracy where complex issues, such as peremptory strikes, can undergo further examination before being considered by the United States Supreme Court. The court highlighted the foundational role of state doctrines in prohibiting racially motivated peremptory strikes by directly citing California's *Wheeler* Doctrine and recognizing New Jersey's constitutional protections as persuasive authority.

The New Jersey Supreme Court, in particular, proudly acknowledged a lower New Jersey court that had acted as a "laboratory in federalism" by prohibiting race-based peremptory strikes on state constitutional grounds prior to the Supreme Court's *Batson* ruling.[230] The court affirmed that the New Jersey Constitution provided greater protections against discriminatory peremptory challenges than those established by the federal constitution.[231] This clear endorsement of state constitutionalism was complemented by an acknowledgment of other state courts that had forged a progressive path on the issue of peremptory strikes long before the Supreme Court's intervention in *Batson*.[232]

By the time the Supreme Court addressed the constitutionality of racially motivated peremptory strikes in *Batson*, it had access to a wealth of state court rules, decisions, and doctrines to consider.

In the briefs submitted in *Batson*, a clear narrative emerges of the states as laboratories for change, guiding the federal judiciary toward a more robust response to the insidious practice of racially discriminatory peremptory strikes. It's here, within the procedural maneuvers and courtroom strategies, that the bottom-up evolution of legal doctrine reveals its transformative potential.

Frank W. Heft, Jr., representing the petitioner, framed his argument squarely within this state-led evolution. He urged the Supreme Court to consider the progressive stances of states like California and Massachusetts, which, through *People v. Wheeler* and *Commonwealth v. Soares*, had already begun dismantling the structural racism embedded in peremptory strikes. Heft's argument was straightforward: These states recognized that excluding jurors based solely on race goes beyond simple prejudice. They understood that it undermines the constitutional promise of impartial justice. Heft suggested that when a clear pattern of racial exclusion is demonstrated, the state courts require justification. His strategy implied a federal adoption of these state principles, aligning the nation's highest court with a broader, community-based commitment to racial equity in jury selection.

This is precisely what the NAACP Legal Defense and Educational Fund and other civil rights organizations echoed in their amicus briefs. These organizations, champions of equal protection, called for a federal standard that would prohibit the systematic exclusion of minority jurors by embracing the approaches of the states. They pointed to decisions that grounded the exclusionary rule in the core values of fairness and impartiality, qualities critical to the very integrity of the judicial system. For these advocates, the states' existing frameworks offered more than precedent—they provided a moral and constitutional compass.

The National District Attorneys Association (NDAA) approached the issue from a different angle, yet still with an implicit recognition of the importance of state experience. Although the NDAA did not openly call for a federal adoption of state doctrines, it underscored the need for uniformity across jurisdictions. It's an acknowledgment that inconsistent jury selection practices across the states lead to fundamental disparities in federal due process. The NDAA's stance implicitly accepted that some states, like California, were already tackling racial biases within their courts. For the federal system, the NDAA's cautionary note served as a call to consider the implications of disparate practices on the broader legal landscape.

In another compelling line of argument, the petitioner's brief urged for a consistent, national standard, emphasizing that many states had already taken measures to address racial bias in jury selection. Heft contended that state-level decisions contribute positively to the representativeness of jury pools, ensuring that juries reflect the diversity of the communities they serve. Such state-level initiatives provided a framework, a model from which the federal system could benefit.

In these briefs, we witness the distinct influence of state doctrines in shaping a proposed federal standard. It's a testament to how local practices can collectively alter the course of national law, building from the ground up. This strategy of leveraging state experiences speaks to the very heart of *The Bottom-Up Constitution*, showing us how states can—and often do—lead the way in advancing racial justice within the judiciary. Here, the voices of local advocates, civil rights defenders, and cautious prosecutors converge, urging the Supreme Court to harness these tested doctrines as a means of creating a fairer, more equitable federal standard. Through this dialogue, the enduring legacy of state innovation in the realm of racial equity gains a foothold in the national discourse, setting the stage for a federal doctrine on peremptory strikes that would forever alter the landscape of American justice. The oral arguments at the Supreme Court on December 12, 1985, reveal a similar bottom-up conversation. The case's oral arguments reflect a broader trend, where Mr. Niehaus, representing Batson, draws heavily on the progressive standards set by states like California and Massachusetts to argue for a federal doctrine informed by these local precedents. Niehaus contends that the state-level rules developed through cases such as *People v. Wheeler* and *Commonwealth v. Soares* demonstrate effective frameworks that could serve as models for the federal system. Both of these states required prosecutors to justify peremptory strikes when a pattern of racial exclusion appeared, showing how state innovations have paved the way for a more equitable approach to jury selection.

The Justices, meanwhile, questioned the practical application of these state doctrines on a national scale. Justice Brennan raised concerns about the potential complications that might arise from requiring specific justifications for every peremptory challenge, which could add significant procedural burdens on federal courts. This concern underscores a core tension: While California and Massachusetts have managed these frameworks effectively within their jurisdictions, extending such rules nationwide would entail navigating diverse judicial practices. Yet, despite these concerns, Niehaus emphasized that these states' efforts to limit racial bias in jury selection reveal a viable path toward fairer trials under the federal system.

Justice Marshall, during the exchange, was notably critical of the existing federal standard set by *Swain v. Alabama*, which requires proof of a historical pattern of discrimination. Marshall observed that this threshold was often insurmountable, effectively allowing racial biases to persist in individual cases. He questioned whether a federal rule akin to California's and Massachusetts's approaches might offer a more immediate solution to the problem. By probing the successes of state-level doctrines, Marshall highlighted an evolving perspective within the judiciary, one that recognizes the need for a proactive response to systemic issues rather than waiting for entrenched patterns to emerge.

Throughout these discussions, the advocates and Justices addressed a recurring question: Should state-level innovations guide the creation of a federal standard? The Court wrestled with whether the decentralized development of exclusionary doctrines could inform a unified federal rule that would uphold equal protection in jury selection. Justice Brennan's inquiry on equal protection underscored a desire for uniformity, suggesting that a federal standard could alleviate the disparities that currently arise from state-specific rules. On the other hand, the oral arguments acknowledged the traditional autonomy states enjoy in matters like jury selection, illustrating the balance between state-led legal experiments and the constitutional mandate for equal treatment across all jurisdictions.

The exchanges within *Batson v. Kentucky* encapsulate a crucial moment where the bottom-up evolution of legal doctrine—spearheaded by state courts—began to influence the federal judiciary's understanding of racial justice in jury selection. The advocates' arguments for a federal rule informed by state experiences reflect a broader push for systemic fairness. These references to state precedents reveal how local courts have long served as testing grounds for doctrines that, over time, climb up the judicial ladder to shape national policies. Here, in The Bottom-Up Constitution, this narrative of state innovation influencing federal standards reinforces the idea that grassroots legal developments can indeed drive the broader pursuit of justice, particularly in addressing deeply rooted issues like racial discrimination in the legal system.

Acknowledging this practice of judicial federalization, one state court judge remarked, "[i]t was, after all, State courts independently construing their State Constitutions that ultimately led the Supreme Court in *Batson* to . . . follow 'the lead of [a] number of state courts construing their State's Constitution.'" This highlights the significant role that state courts played in shaping the legal landscape surrounding peremptory challenges, paving the way for federal scrutiny and reform.

In *Batson*, the Supreme Court ruled that the Fourteenth Amendment's Equal Protection Clause prohibits prosecutors from striking Black jurors solely based on their race.[233] This racially motivated practice had often been used by prosecutors to gain an unfair advantage during trials.[234] The Court was urged to consider decisions from other states in determining whether the federal Equal Protection Clause forbids such racially based peremptory strikes, and it indeed followed this advice.[235] It drew inspiration from several state courts, particularly those in California and Massachusetts, which had developed tests to address peremptory strikes under both state and federal constitutional law.[236]

This approach suggests that the Court was waiting for state courts to engage in the debate to see how the matter would unfold.[237] Through this process, the Court recognized a growing judicial passivity among state courts regarding protections against discrimination in peremptory strikes.[238] The California cases, known as the "Wheeler" doctrine and its subsequent rulings, clearly demonstrated that such judicial passivity in the face of racial discrimination was both unnecessary and unwise.[239] The petitioners in *Batson* argued that, since it was unlikely most states would adopt California's approach to discriminatory peremptory strikes, the Court needed to step in and

establish a federal prohibition as the sole legal and moral authority under the Constitution to safeguard the rights of the people.[240]

Unlike the *Nollan* and *Dolan* Courts, which leaned on the consensus of state courts, the *Batson* Court did not follow the lead of the majority of states.[241] The *Wheeler-Soares* doctrines had been adopted by only a minority of states, including Florida, Delaware, Massachusetts, New Jersey, and New Mexico.[242] Instead, the Court effectively aligned itself with this minority, interpreting their state constitutions as prohibiting race-based peremptory strikes against Black jurors.[243] In this case, the Court chose to nationalize protections against discriminatory peremptory strikes, not because there was a broad consensus among the states, but rather in response to the actions of a few states that had already made the significant step to adopt doctrines safeguarding civil rights. This approach, however, carried inherent risks. By acting on the decisions of a minority of states, the Court risked creating a legal landscape where protections varied widely, potentially leading to confusion and inconsistency in the application of civil rights across the nation.

The Supreme Court's decision to adopt state doctrines like *Wheeler* and *Soares* into a nationwide federal standard was a notable shift, as it was a practice the Court had rarely undertaken before.[244] The stakes were particularly high because the Court was choosing to endorse a doctrine that lacked support from the majority of states. This judicial federalization raised concerns about potential confusion and inconsistencies across the country, as it risked increasing litigation stemming from the nuances of these state doctrines.

Given that the *Wheeler* doctrine originated in California and the *Soares* doctrine in Massachusetts, critics pointed out that applying these state-specific rulings in other jurisdictions could lead to unforeseen consequences, both for racialized and non-racialized peremptory challenges. These doctrines had been developed within the context of their respective state judicial systems and were informed by local legal interpretations and practices, often at the trial level. This raised a critical question: How could the Court expect to impose these doctrines universally without generating disparate outcomes in different jurisdictions? Such a one-size-fits-all approach risked undermining the very principles of fairness and equity that the doctrines aimed to promote.

Despite the concerns raised about the potential for confusion and inconsistent application of state doctrines, the Supreme Court believed that the need to protect rights under the federal Equal Protection Clause outweighed these risks.[245] The Court suggested that relying solely on state courts to address these rights could hinder the effective administration of justice at both local and national levels. By not federalizing protections against racial discrimination in peremptory strikes, the Court indicated that it risked allowing the continued violation of constitutional rights across the majority of states.

In this sense, the Supreme Court positioned itself as a dual sovereign arbiter, monitoring the ongoing doctrinal debates among the states. When it became clear that further delay would only exacerbate the situation, the Court felt compelled to intervene and establish a uniform federal standard. As legal scholar Steven R. Shapiro noted, this extensive scholarly and judicial analysis not only highlighted the shortcomings of the earlier *Swain* decision but also demonstrated that state alternatives could provide a feasible and fair solution.

The *Wheeler* and *Soares* doctrines represented the logical and constitutionally necessary evolution of state constitutional law regarding peremptory challenges.[246] The success of these state-level developments further validated the Court's decision to adopt them, as evidenced by the experiences of the states that had already implemented these progressive rules. By taking this step, the Court aimed to ensure that the principles of equality and justice were upheld consistently across the nation.

The judicial federalization of state doctrines regarding racially motivated peremptory strikes in *Batson v. Kentucky* did not diminish the role of state courts.[247] Instead, the nationalization of this constitutional protection should not be seen as an invitation for "laboratories operated by leading state courts [to] now close up shop." The Supreme Court's opinion in *Batson* demonstrated a respect for judicial federalism, allowing state courts the flexibility to adapt to the newly federalized doctrine concerning peremptory strikes. The Court acknowledged that "States do have flexibility in formulating appropriate procedures to comply with *Batson*," and emphasized that the "variety of jury selection practices followed in our state trial courts" suggests that it would be unwise to dictate how state courts should implement the *Batson* ruling. Indeed, the states did not wait for the Supreme Court to catch up on the issue of peremptory challenges. Instead, they took the initiative to develop a robust body of law on their own, avoiding the uncertainty of being "held in suspense, case-by-case, over the next decade" as the Court worked to clarify the newly recognized minimum equal protection right that would apply nationwide. Ultimately, it was the "independent development of state law concerning peremptory challenges" that provided a foundation for the entire country when the Court decided to follow the lead of the states in crafting the *Batson* opinion. This proactive approach allowed the justices to "pick and choose from the emerging options" of peremptory challenge doctrines and, when appropriate, to "nationalize" a state doctrine, even though the *Wheeler-Soares* doctrines were not the dominant majority position among the states.

Exclusionary Rule

Dollree Mapp's life took a dramatic turn on a warm spring day in 1957. Living in a modest two-story brick house in Cleveland, Ohio, she likely didn't expect an ordinary afternoon to turn into a scene that would eventually reshape American law. Mapp was known around the neighborhood as a tough and determined woman. Just days earlier, a bomb had exploded at the home of Don King, a man notorious for his ties to the underworld of illegal gambling—a figure who would later become one of boxing's most controversial promoters. The police were hunting for a suspect in the bombing, a man named Virgil Ogletree, and they believed he was hiding out at Mapp's place. Officers from the Cleveland Bureau of Special Investigation arrived in force, surrounding her house and demanding entry.

Mapp was no stranger to tension with the police. She'd had enough run-ins with them to know her rights. Before letting anyone in, she called her lawyers, A.L. Kearns and Walter Greene, who told her to stand firm and refuse entry unless the officers could produce a warrant. That day, however, the police were after someone else—a fugitive connected to a bombing—and they had reason to believe he was hiding in her home. Around 1:30 p.m., Cleveland police officers knocked on her door, demanding entry. Mapp, trusting her lawyer's advice, stood her ground and refused to let them in without a warrant. Unfazed, the officers left, only to return shortly, now armed with a piece of paper they claimed was a warrant. Not one to be intimidated, Mapp grabbed the paper, stuffed it down her blouse, and insisted on her right to see her attorney. The officers responded by restraining her, eventually handcuffing her and leading her upstairs while they ransacked her home.

During their search, officers uncovered more than they had anticipated. In Mapp's bedroom, they found a stash of books and photos with titles like *The Affairs of the Troubadour* and *Memories of a Hotel Man*. The officers, clutching the so-called obscene materials, seemed intent on making an example out of Mapp. She shot back at one of them, saying, "Better not look at those; they might excite you." Her resistance and fiery remarks would later become as legendary as the case itself.

Yet, the search continued. They claimed to find other items—a penciled drawing and a small-caliber gun—as well as a trunk of betting slips in the basement, fueling suspicions that Mapp's home was more than just a refuge.

Though Mapp insisted that some of these items belonged to a former boarder, Morris Jones, her claims fell on deaf ears. She was arrested and later convicted on charges related to possessing obscene materials.

Mapp's case took on a life of its own as it climbed through the courts. By the time it reached the U.S. Supreme Court, the central issue had shifted from the obscenity of the materials to a far more significant constitutional question: Did the police have the right to search her home without a proper warrant? Her case, *Mapp v. Ohio*, would come to symbolize the struggle between individual rights and state authority, as the Supreme Court eventually ruled that evidence obtained through illegal searches was inadmissible in court. Through her defiance, Dollree Mapp left an indelible mark on the law, her story a testament to how one person's stand can influence the rights of millions. But Mapp's story and its road to the Supreme Court was grown from the ground up.

Dollree Mapp's battle in the Cuyahoga County Court of Common Pleas began with an argument that cut to the core of what it means to be free from government overreach. Her attorney, A.L. Kearns, had filed a Motion to Suppress, hoping to convince the court that the police had violated her rights when they barged into her home, waving a supposed search warrant that no one had ever seen. Kearns argued that Ohio's own Constitution should protect against this kind of unwarranted intrusion, that it was time for the state to adopt what had become known as the "exclusionary rule," a principle born out of *Weeks v. United States*. If the courts held that evidence obtained illegally could be used against citizens, then what was the Fourth Amendment for? But Judge Donald F. Lybarger wasn't moved. Citing *State v. Lindway*, he ruled that Ohio law did not yet recognize such a rule. And with that, Mapp's request to suppress the materials was denied. It set the tone for the rest of her trial, a trial that would be brief but unforgettable.

On September 3, 1958, the prosecution's star witness, Officer Michael Haney, took the stand, with Kearns ready to challenge him on the missing warrant. The exchange was intense. Kearns pressed Haney, asking again and again about the elusive document. Where was it? Who had it? What did it contain? Haney had no answers. He stumbled through each question, repeating that he didn't know. He could only say that Lieutenant White had supposedly secured it, but he couldn't say anything more. As Kearns questioned Haney, it was as if he was peeling back layers of a broken system, exposing the fragility of the rights that should have protected Mapp. Yet despite the holes in the story, the prosecution's evidence stood, and the trial pressed on. Mapp herself took the stand. Her testimony was a mix of defiance and frustration. She insisted that the books and pictures were not hers, that they belonged to a former boarder, a man who had left them behind. But the jury wasn't convinced. They didn't see a woman wronged by an overzealous police force; they saw a woman guilty of possessing obscene materials.

The verdict came swiftly. On September 4, the jury found Mapp guilty. Judge Lybarger sentenced her to up to seven years at the Ohio Reformatory for Women. Kearns immediately filed for a new trial, but the request was denied, and Mapp was left to face the consequences. Yet, even as the court doors closed on her case, Mapp's fight for justice was just beginning. This wasn't just about obscene books and photographs—it was about the power of the state to invade a person's private space, the quiet of their own home, without consequence. And Mapp, with her resilience and defiance, would soon take that question to the highest court in the land. Dollree Mapp's journey through the Ohio courts continued as her attorney, A.L. Kearns, filed an appeal with the Eighth District Court of Appeals of Ohio, Cuyahoga County, on September 16, 1958. Kearns laid out a series of bold arguments, each aimed at challenging the foundation of Mapp's conviction. He argued that the laws under which Mapp had been charged, Sections 2905.34 and 2905.35 of the Ohio Revised Code, were unconstitutional. But he didn't stop there. He contended that Mapp's rights to due process had been trampled upon by the actions of the police, who had unlawfully entered her home and seized evidence without a valid warrant.

In his brief, filed on November 12, 1958, Kearns argued that this unlawfully seized evidence should never have made it into the courtroom. He questioned the fairness of a system that would permit such intrusions, painting Mapp not as a criminal, but as a woman whose rights had been sacrificed in the state's rush to prosecute. He even took on the severity of Mapp's sentence, claiming it violated her constitutional protection against cruel and unusual punishment.

The response from the prosecution came quickly. Assistant Prosecutor Gertrude Bauer Mahon submitted her brief on December 16, defending the lower court's decision with equal vigor. She argued that Mapp had indeed possessed obscene materials and that the police actions were justified given the circumstances.

Kearns wasn't done, though. He submitted a reply brief on January 23, 1959, aiming to reinforce his points and underscore the rights violations he believed were glaringly evident in Mapp's case. Yet, on March 31, 1959, Judge Joy Seth Hurd of the appellate court issued his ruling: The conviction would stand. For Mapp, it was a blow, but one that would only strengthen her resolve as she prepared to carry her fight all the way to the United States Supreme Court. Her case had become about more than just the charges against her; it was a battle for fundamental rights and a challenge to the unchecked power of the state. Mapp's journey had started in a small Cleveland courtroom, but its impact would soon echo across the entire country.

The Ohio Supreme Court's decision in *State v. Mapp* was a complex one, blending questions of morality, constitutionality, and procedure.[248] Dollree Mapp stood accused not of committing a violent crime, but of simply possessing "lewd" materials—books and pictures that the police claimed to have discovered during their raid on her home. Her defense argued that these items weren't truly hers, as they belonged to a former boarder she had once rented a room to. Mapp explained that she had packed up the man's belongings, including the allegedly obscene materials, and was holding onto them until he came to retrieve them.

The Ohio Supreme Court wasn't particularly sympathetic to Mapp's explanation. They ruled that by knowingly storing these materials, she indeed had possession and control over them. The justices reasoned that even if her story was true, Mapp had taken the materials into her possession when she packed them up, meaning that she was responsible for them under the law. Moreover, the Court didn't view the method by which the police obtained the evidence—a search warrant that was never produced in court—as a significant issue. They cited a prior case, *State v. Lindway*, to uphold the notion that evidence obtained unlawfully could still be used in court, provided no "brutal or offensive force" was involved in its acquisition.

The decision of the Court of Appeals that preceded this ruling mirrored much of the same reasoning. They affirmed Mapp's conviction, emphasizing that her possession of the materials—whether intentional or not—was sufficient for guilt under Ohio's obscenity laws. To them, the way in which the evidence was gathered was a minor detail, especially since the U.S. Supreme Court, at the time, did not universally prohibit states from using unlawfully obtained evidence.

The Ohio Supreme Court's decision underscored a clash between procedural justice and perceived moral transgressions. For Mapp, this was not simply about the books and pictures found in her home; it was about her right to be free from unreasonable government intrusion. However, to the Ohio courts, the primary concern was enforcing the state's moral code, even if it meant overlooking potential violations of constitutional rights. This ruling set the stage for what would eventually become a transformative moment in constitutional law when the U.S. Supreme Court took up her case and extended the Fourth Amendment's exclusionary rule to the states in *Mapp v. Ohio*, fundamentally altering the landscape of American criminal procedure.

In the story of *Mapp v. Ohio*, the lawyers—Attorney Kearns and his colleagues—crafted arguments that didn't simply make a case for Dollree Mapp. Instead, they were urging the Supreme Court to pay close attention to what was already happening across the country in state supreme courts. They were pointing to states like California and Massachusetts as trailblazers, showing the way forward on privacy rights and the limits of police power.[249] For Mapp's legal team, it wasn't about creating something new; it was about following the lead of states that had already shown a path toward protecting individual liberties in the face of state power.[250]

The California Supreme Court's decision in *People v. Cahan* served as a beacon in their argument. California had taken the exclusionary rule into its own hands, interpreting both state and federal constitutional protections to demand that illegally seized evidence could not be used in court. It wasn't just an abstract legal rule—it was a clear statement about privacy, about the sanctity of one's home, and about the state's limits when it comes to invading that private space.[251] California argued that the exclusionary rule was necessary to uphold these rights. Through this precedent, Mapp's attorneys emphasized that state courts had found real, practical ways to implement this rule long before the federal courts considered imposing it nationwide.

Then there was Massachusetts. The briefs reminded the justices of the Massachusetts courts' strong stance on the exclusionary rule, not merely as a procedural safeguard, but as a defense against the creeping expansion of police power. Massachusetts, too, had chosen to adopt this rule independently, reinforcing the idea that states had the right to apply their own standards and maintain judicial independence. This was more than just a legal argument—it was a plea to recognize that states were capable of, and even responsible for, shaping their own criminal procedures. This wasn't just a single case, it was a movement that Mapp's lawyers were asking the Supreme Court to recognize and to join.[252]

The broader narrative woven through the appellate briefs was one of federalism and respect for state sovereignty. Mapp's defense team argued that the Supreme Court should respect these state-led innovations. The states weren't just following federal cues; they were developing doctrines that were well suited to their unique legal and social landscapes.[253] They presented a "common policy shared by many states," urging the Court to see this as a model rather than enforcing a top-down standard.[254] They drew on Justice Frankfurter's view from *Wolf v. Colorado*, where he argued that the Supreme Court should not "brush aside the experience of the States."[255] Frankfurter recognized that states were not just passive recipients of federal law but active contributors to the evolving landscape of rights and protections.[256]

The California Attorney General even highlighted the confusion that could arise if federal courts imposed a uniform rule without considering state contexts. California's own experience with *People v. Cahan* was instructive; the state had found a way to implement the exclusionary rule that balanced both privacy rights and effective law enforcement.[257] The briefs from Mapp's legal team echoed this, emphasizing that states had already laid down a roadmap. The federal courts didn't need to invent something new; they could draw on the states' accumulated wisdom to craft a more nuanced, adaptable rule.[258]

In making their case, Mapp's lawyers weren't just advocating for a legal technicality. They were urging the Court to adopt a vision of the Constitution that rose from the ground up, rooted in the diverse experiences and hard-won lessons of the states. This was a prime example of what I call the Bottom-Up Constitution—a constitution shaped not only by the lofty ideals of federal courts but by the everyday battles fought in state courts, by the voices of local advocates, and by the principles tested in towns and cities across America. The exclusionary rule wasn't imposed by a distant Supreme Court; it was born out of the states' practical encounters with the real consequences of unchecked police power.

This case, *Mapp v. Ohio*, stood as a testament to how state court doctrines could shape federal constitutional law. Here, Mapp's lawyers weren't asking the Court to be the sole architect of rights; they were asking it to be a collaborator with the states. They were arguing for a judicial federalism that respected the states as partners in the constitutional enterprise, as innovators in the evolving landscape of American rights. And in that argument, they were making a broader claim: that the states, with all their unique approaches and diverse perspectives, had already done much of the work of building a Constitution that truly belonged to the people.

In the *Mapp v. Ohio* oral arguments, the debate over whether the Supreme Court should adopt a federal exclusionary rule or defer to states' doctrines vividly illustrates a bottom-up approach in constitutional law. This case reveals the potential power of state courts to lead in shaping constitutional protections, as well as the limitations of a fragmented approach to rights enforcement.

Mr. Kearns, representing Mapp, sharply critiques Ohio's approach under the *Lindway* rule, which allows illegally obtained evidence to be admitted in court. He underscores the broader implications: Ohioans, he argues, are deprived of their Fourth Amendment protections because the state court's doctrine does not align with federal constitutional ideals. In his view, a foundational principle is at stake—evidence obtained through illegal searches should be excluded to preserve constitutional rights. Kearns' argument exemplifies the bottom-up tension of this case; he is advocating for a broader, federal standard that aligns with state courts like California's, which had adopted an exclusionary rule to protect individual rights.

Justice Frankfurter delves into this federal-state dynamic, emphasizing that *Wolf v. Colorado* left the matter of evidence admissibility to individual states. He questions Ohio's reliance on *Lindway*, suggesting that the Ohio rule might prioritize the collection of evidence over the protection of constitutional rights. Frankfurter's inquiry highlights a core concern about state flexibility in interpreting Fourth Amendment safeguards, subtly questioning if a universal federal rule would better enforce these protections. His remarks reflect a cautious stance, recognizing both the benefits and challenges of leaving states to develop their own doctrines.

As counsel for the ACLU, Mr. Berkman takes a strong stance for a federal rule. He argues that *Wolf v. Colorado* needs to be revisited to prevent states from disregarding the Fourth Amendment by allowing illegally obtained evidence in court. Berkman advocates for a more uniform due process standard, emphasizing that the absence of a federal exclusionary rule weakens constitutional protections. His perspective is a reminder that while states have the autonomy to innovate in areas of criminal procedure, this autonomy should not come at the expense of constitutional consistency.

Justice Brennan presses Ohio's attorney, Mrs. Mahon, on whether the Court should adopt a rule that would ensure the exclusion of illegally obtained evidence across all jurisdictions. His line of questioning suggests concern over the patchwork of protections that could emerge if states individually determine admissibility standards. Brennan points to the inconsistencies such an approach can create, framing his questions within a larger narrative of equal rights and protections under the law—a principle he implies could be jeopardized if the Court allows such significant divergence.

The oral arguments also delve into state-specific approaches, particularly California's adoption of the exclusionary rule in *People v. Cahan*. Here, the California Supreme Court extended Fourth Amendment protections by enforcing the exclusion of illegally obtained evidence, showing that a state could adopt a doctrine parallel to federal ideals without undermining law enforcement. This instance illustrates how a state court led the way, not by federal

mandate but by its own constitutional reasoning. California's approach is portrayed as a potential model, a bottom-up influence shaping the debate at the federal level.

In contrast, Ohio's stance, defined in the *Lindway* case, offers a markedly different path. Ohio allows civil remedies for unconstitutional searches but still permits the evidence to be used in criminal trials. This approach emphasizes how states can tailor their criminal procedures to local needs and preferences, reflecting a key component of federalism. In this way, Mapp showcases the idea of state "laboratories" experimenting with doctrines that balance constitutional rights with pragmatic criminal justice needs.

Throughout the arguments, there is an acknowledgment that the Constitution allows states the latitude to define and protect rights based on their own interpretations. This deference is both a strength and a limitation, as it permits innovation but risks inconsistency. The concept of "laboratory federalism"—that states can trial different legal doctrines to discover what best serves their citizens—emerges as a vital theme. While Ohio's exclusionary rule doctrine differs from California's, each approach underscores state autonomy in developing policies that reflect their unique social and judicial landscapes.

Several Justices and attorneys reflect on other states' varied practices with the exclusionary rule. Massachusetts, like California, is noted for adopting exclusionary practices to curb police overreach, balancing local interests with a robust defense of individual rights. This diversity in state responses hints at a broader legal evolution, suggesting that federal adoption of an exclusionary rule could be informed by state-level innovations. Advocates for a uniform federal standard point to this evolving consensus as evidence that states like California and Massachusetts have already paved the way, setting precedents that highlight the value of protecting civil liberties through consistent exclusionary policies.

In the end, the *Mapp* oral arguments reveal a fundamental question of *The Bottom-Up Constitution*: Should federal standards emerge organically from state-level practices, or must they be uniformly imposed to ensure consistent protection of constitutional rights? Or perhaps, must federal jurisprudence be routed through lower federal courts, rather than, say, state supreme or state lower courts. This tension—between the autonomy of state courts to define their doctrines and the role of federal oversight—epitomizes the delicate balance of federalism. *Mapp* exemplifies how state-led legal developments can influence and perhaps even compel the Supreme Court to consider adopting practices that originated in the state courts, reinforcing the bottom-up flow of constitutional ideas.

The Judicial Conference for *Mapp v. Ohio* took place on March 31, 1960, just days after the oral arguments. The Justices came together with a shared purpose: to overturn Ohio's anti-obscenity statute. Yet, while they agreed on the outcome, they found themselves divided on the reasoning behind it. Attorneys Kearns and Berkman had laid their groundwork on the Fourth and Fourteenth Amendments, arguing the search of Mapp's home violated her rights. But during the conference, the Justices shifted focus, drawn to the broad overreach of the Ohio statute itself, seeing it as an infringement on Mapp's First Amendment rights. Mere possession, they argued, wasn't enough to justify restricting someone's freedom of expression. Possessing a few books, regardless of their content, should not equate to an assault on a person's beliefs. Justice John Harlan's words lingered over the discussion, likening Ohio's statute to a tool of thought control.

Amid the broader discussion, Justice Douglas suggested that this might be the time to revisit *Wolf v. Colorado*, a case that had held the exclusionary rule didn't apply to the states. Justices Brennan and Warren seemed open to the

idea, though the issue didn't gather enough traction at that moment. It's rumored that Justice Frankfurter, the original author of *Wolf*, may have been hesitant to see it overturned. Chief Justice Warren ultimately assigned the majority opinion to Justice Tom Clark, a decision that would lead to some unexpected twists and turns.

As soon as the conference ended, Justices Clark, Black, and Brennan found themselves together in an elevator, discussing a bold idea: use *Mapp* as a vehicle to overturn Wolf and extend the exclusionary rule nationwide. With Black on board, they could potentially gather the votes needed to reshape the legal landscape on search and seizure. Over the following months, Clark drafted multiple versions of the opinion, sometimes reflecting an inner conflict about whether to dismantle *Wolf*. The stakes were high, and the implications were significant.

It wasn't until June 19, 1961, more than a year after the conference, that the Court handed down its decision. Clark's majority opinion reversed the Ohio Supreme Court's ruling, securing concurrences from Justices Black and Douglas. In the final analysis, the Court's words resonated with an unshakable commitment to individual rights. They declared that the Fourth Amendment's promise of privacy could no longer be an empty one. If it was to mean anything, the states had to enforce it just as the federal government did. "We can no longer permit that right to remain an empty promise," Clark wrote, "revocable at the whim of any police officer."

With a stroke of the pen, *Mapp* became a landmark decision, one that imposed the exclusionary rule on nearly half of the states in an instant. It was a turning point in the Warren Court's criminal due process revolution, signaling a new era where the guarantees of the Bill of Rights would apply uniformly across the nation. While some feared the ruling would handcuff law enforcement, others saw it as a necessary check against the unchecked power of the state. The decision continues to spark debate, raising questions about the balance between protecting public safety and preserving individual liberties. For Dollree Mapp, and for countless others, it affirmed a simple yet profound idea: that the Constitution's promises belong to everyone, and they are not to be dismissed by mere circumstance or convenience.

Before the Supreme Court decided to incorporate the Fourth Amendment's exclusionary rule through the Fourteenth Amendment in *Mapp v. Ohio*, there was significant disagreement among the states regarding this issue. The Court was encouraged not to disregard the experiences of individual states when making its ruling. At that time, more than half of the states had already adopted some form of an exclusionary rule, raising the question of whether this federal standard should apply to the states as well and whether unconstitutionally seized evidence should be inadmissible in state courts.

In *Mapp v. Ohio*, the U.S. Supreme Court ruled that evidence obtained through illegal searches couldn't be used in court, a principle known as the exclusionary rule. This decision was influenced by how the California Supreme Court had already been applying this rule under its own state constitution. Essentially, the U.S. Supreme Court took notice of California's approach and saw value in using it as a model for federal law.[259]

This borrowing of ideas from state courts wasn't new. In fact, when the Fourth Amendment—the part of the Constitution that protects against unreasonable searches and seizures—was originally drafted, it closely mirrored state-level protections that already existed. Delegate John Holmes from Massachusetts pointed out that the framers of his state's constitution were careful to prevent their government from issuing warrants without solid evidence first.[260] Holmes questioned why the new federal Congress should be trusted with powers that were considered too risky for his own state's legislature. So, when the federal Constitution was being created, the Framers didn't start from scratch. They relied on existing state laws and experiences to shape federal protections, drawing

inspiration from state documents and the ways those laws had been interpreted locally. This connection between state and federal law is a recurring theme in how American constitutional law has developed, with states often serving as testing grounds for ideas that later become part of federal law.

Before the Supreme Court's decision in *Mapp v. Ohio*, the country saw a "contrariety of views of the States" on whether illegally obtained evidence should be admissible in court. The Supreme Court was urged not to "brush aside the experience of States" as it prepared to hear *Mapp*, a case that would bring this question front and center.[261] By then, over half the states had already adopted some form of the exclusionary rule, which bars illegally seized evidence from being used in court. Although most states hadn't developed an extensive body of law on search and seizure, the legal landscape was shifting as state courts began to reflect "changing norms objectively" when it came to exclusionary rules. As the justices pondered their role, they saw that this wasn't about the Court being "the key rights innovator in" criminal procedure; instead, it was about the states' experiences creating a roadmap for the federal judiciary.[262]

Leading the charge was California. In *People v. Cahan*, the California Supreme Court emphasized that both state and federal constitutions "make it emphatically clear" that "the right of privacy guaranteed by these constitutional provisions be respected," thus supporting the inadmissibility of illegally obtained evidence. In adopting its own exclusionary rule, California's highest court recognized that the federal government's approach—lacking a uniform rule across the states—had created "needless confusion." The court was clear that even if the federal rule was not yet applicable to the states, California had every reason to enforce its own.

When the Supreme Court ruled in *Mapp*, it held that unlawfully obtained evidence could not be used in court under the Fourteenth Amendment. In doing so, the Court effectively enforced the Fourth Amendment's right to privacy at the state level through incorporation. Justice Clark, writing for the majority, echoed California's sentiments. He noted that, without the exclusionary rule, the states were left with "worthless" and "futile" remedies under the Fourth Amendment.[263] He argued that the states had had "adequate opportunity to adopt or reject the [federal] rule" over the years, and it was time to evaluate the results of that state-level experimentation. By then, the movement towards a unified exclusionary rule had gained "inexorable" momentum, and Clark found the impact of this shift "impressive" as more states embraced a standard similar to the federal rule.

The decision in *Mapp* was thus largely informed by what the states had already established. Justice Clark pointed out that the conflicting state and federal rules on exclusionary practices created a "senseless and needless conflict" between courts, where state and federal judges disagreed over the admissibility of evidence. The Supreme Court found itself "deeply influenced" by the "emerging consensus" across the states, whose courts had, by then, thoroughly considered and found a strong need for exclusionary rules to prevent unconstitutional searches and seizures.[264]

While some scholars celebrated *Mapp* as a "federal constitutionalization of criminal procedure," the decision didn't fully "nationalize" search and seizure laws. Instead, it forced states to reevaluate their own rules on evidence, particularly in cases where state practices diverged from those in federal court. The path to *Mapp* followed a unique course, as state court innovations gradually led the way, rather than the federal courts imposing the change from above. By the time *Mapp* came to the Court, many states had already adopted the rule on their own, creating "a common policy [increasingly] shared by [many] states." In making its decision, the Court drew on these state-level ideas, benefiting from the "contest of ideas" across state jurisdictions. This cross-state experimentation allowed the

Court to "choose whether to federalize the issue after learning the strengths and weaknesses of the competing ways of addressing the problem." Ultimately, *Mapp* was the product of "States' experiences," which had given the Court the foundation it needed to craft a federal rule that now applied to every state. Through the judicial federalization of the exclusionary rule, state-led doctrines served as the "key mechanism for prospectively shaping federal constitutional law."

Conclusion

In the end, *The Bottom-Up Constitution: States and the Evolution of American Constitutional Law* challenges conventional narratives by reframing our understanding of where constitutional meaning originates. Rather than viewing the U.S. Constitution as the product of a singular, top-down federal authority—dominated by the U.S. Supreme Court— this work uncovers a deeper, more textured story: one in which the states have long been architects of constitutional innovation. From the earliest moments of the founding, state constitutions and practices supplied the scaffolding for federal structures, and over time, state courts and legislatures have continued to drive doctrinal development from below.

The chapters excerpted here illustrate this bottom-up dynamic in action. They show how, first, the framers drew heavily from the states to design a new federal order, and how, later, state courts became engines of constitutional change—crafting legal principles that not only reflected local values but also laid the groundwork for federal constitutional rights. Together, these accounts offer more than a revisionist history; they offer a new interpretive lens, one that elevates the states as enduring partners in shaping constitutional law. By foregrounding the role of state institutions, this book invites scholars, judges, and advocates to rethink the directionality of constitutional development. The Constitution is not merely a document enforced from above. It is a living, evolving body of law—one forged just as powerfully from below.

Notes

1 *See* Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 681 (2023) [hereinafter Dickinson, *Takings Federalization*]; Gerald S. Dickinson, *Judicial Federalization Doctrine*, 75 BAYLOR L. REV. 85, 108, 139 (2023) [hereinafter Dickinson, *Judicial Federalization Doctrine*]; Gerald S. Dickinson, *Takings Doctrinalization*, 81 WASH. & LEE L. REV. 2095 (2025) [hereinafter *Takings Doctrinalization*]; *Abortion Rights from the Bottom-Up*, 2026 UTAH L. REV. _ (forthcoming 2026) [hereinafter *Abortion Rights from Bottom-Up*]; *Revisiting Rucho's Dissent: Summoning the Supreme Court to Follow the State Courts*, 99 N.Y.U.L. REV. 344 (2024) [hereinafter Rucho's Dissent]; Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICK. L. REV. 1 (2023)[hereinafter *A Theory of Federalization Doctrine*]; *See* Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139 (2018) [hereinafter *Federalism, Convergence, and Divergence in Constitutional Property*].

2 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 108.

3 Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 21 (2018) [hereinafter Sutton, 51 Imperfect Solutions].

4 Dickinson, *Takings Federalization*, *supra* note 1, at 682 ("State courts have mimicked, or even copy and pasted, the language of tests, interpretive methodologies, standards, and doctrines used by the federal judiciary.").

5 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 87 ("Federal constitutional law exerts an outsized influence over state constitutional law, with state courts often adopting or mimicking federal constitutional standards.").

6 Dickinson, *Takings Federalization*, *supra* note 1, at 682 ("State courts frequently rely on federal constitutional precedents when resolving state constitutional disputes."); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 710 (2016) ("State courts often interpret their constitutional provisions in lockstep with federal jurisprudence."); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 354 (2011) ("State constitutional law is diminished when courts uncritically mirror federal doctrines.") [hereinafter *Reverse Incorporation*].

7 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 87 (2023).

8 James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1037–38 (2003) (observing that federal courts have 'effectively relegated' state constitutional jurisprudence to second-tier status); Blocher, *Reverse Incorporation*, *supra* note 6, at 354 (explaining how state courts too frequently mirror federal interpretations, making them less independent sources of constitutional authority).

9 Dickinson, *Takings Federalization*, *supra* note 1, at 682–84 ("State courts have mimicked, or even copy and pasted, the language of tests, interpretive methodologies, standards, and doctrines used by the federal judiciary.").

10 *Id*.

11 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 87 ("State legislatures, like state courts, frequently mirror federal law in their enactments, incorporating federal frameworks into their statutes and regulations.").

12 Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, *supra* note 1, at 149–50 ("Federal law exerts a certain force that lures states into governing, regulating, and administering laws using federal law as the blueprint.").

13 *Id*. at 152–53 ("State legislatures have enacted statutes that conform to the Court's doctrine and state courts have applied the Court's doctrinal tests.").

14 *Id*. at 150 ("Federal statutes and judicial interpretations deeply influence state laws, with state legislatures interpreting their statutes in light of federal precedents.").

15 *Id*. at 154 ("State legislatures mimic or incorporate Supreme Court doctrines into their laws, borrowing tests, standards, and reasoning.").

16 *Id*. at 150–52 ("State actors draft statutes and rules that mirror the language, concepts, and precedents articulated by the Court.").

17 *Id*. at 155 ("State legislative adoption of takings provisions is heavily influenced by federal precedents like *Mahon* and *Lucas*."); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 218–20 (2004) ("State legislatures frequently follow Supreme Court takings jurisprudence, incorporating federal tests into state law.").

18 *Id*. at 157 ("State legislatures have enacted takings assessment statutes and compensation statutes aligned with *Penn Central* and other federal precedents."); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 567–68 (1984) ("State lawmakers routinely borrow federal regulatory takings frameworks for their own statutory schemes.").

19 *Id*. at 149–50 ("Federal judicial decisions influence state legislation not only in property law but in employment, education, and civil rights contexts.").

20 *Id*.

21 *Id*. at 152–53 ("State legislatures often incorporate Supreme Court burdens of proof and frameworks, particularly in employment and civil rights contexts."); William R. Corbett, *The Fall from Grace of the Burden-Shifting Framework in Employment Discrimination Law*, 47 VILL. L. REV. 939, 942–43 (2002) (describing how the Supreme Court's burden-shifting framework in *McDonnell Douglas Corp. v. Green* influenced state employment statutes).

22 *Id*. at 153 ("State statutes are amended to align with changes in federal judicial frameworks, reflecting evolving Supreme Court interpretations."); Corbett, *supra*, at 943–44 ("State legislative responses to shifts in federal employment law, such as the burden of production in Title VII cases, demonstrate the close mirroring of federal judicial standards.").

23 *Id*. at 150–51 (2018) ("State rules of evidence often incorporate federal standards, reflecting a tendency to harmonize with federal rules."); Paul F. Rothstein, *The Federal Rules of Evidence and the States: A History*, 44 ARIZ. L. REV. 57, 68–70 (2002) ("Many state legislatures have adopted federal rules of evidence, either in whole or in part, based on the Supreme Court's interpretations.").

24 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 133 (noting the Supreme Court's consistent reliance on its own and lower federal court precedents to resolve constitutional issues); Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 91 (discussing how the Supreme Court traditionally draws on federal precedent to address complex or ambiguous constitutional questions).

25 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 90–91 (observing the underutilized potential of state courts and legislatures as sources for federal constitutional interpretation).

26 *Id*. at 90 (emphasizing the untapped potential of state constitutional law and legislative enactments in shaping federal constitutional jurisprudence).

27 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 100 (explaining how the Supremacy Clause requires state actors to adhere to federal constitutional baselines while allowing for greater protections).

28 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 102–03 (observing the possibility of the Supreme Court borrowing state doctrines for federal purposes).

29 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 91 (highlighting how state law could guide federal courts as a primary source).

30 Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, *supra* note 1, at 152 (2018) (advocating for borrowing from state jurisprudence when federal precedent is lacking).

31 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 91 (noting that state courts often present a cohesive body of law that can inform federal decisions).

32 Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, *supra* note 1, at 153 (discussing the potential influence of minority state decisions on federal doctrine).

33 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 137 (highlighting cases where federal constitutional law followed state innovations).

34 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 85 (noting that state courts frequently innovate under their own constitutions, creating doctrines that can influence federal constitutional law).

35 Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, *supra* note 1, at 150–51 (describing how state legislatures enact rights-protecting statutes in areas unaddressed by federal courts).

36 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 102 (discussing how state courts develop innovative legal claims that federal courts can adapt); Dickinson, *Takings Federalization*, *supra* note 1, at 695 (highlighting the Supreme Court's ability to profit from innovative state doctrines in constitutional contexts).

37 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 91–92 (explaining how the Supreme Court borrows state doctrines to shape federal constitutional law).

38 *Id*. at 90 (describing the iterative process of state-level lawmaking and adjudication that informs federal constitutional law).

39 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 105 (emphasizing the bottom-up approach where state courts influence federal constitutional law).

40 *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (Justice Brennan borrowing state court doctrines to craft the "actual malice" standard under the First Amendment); Mapp v. Ohio, 367 U.S. 643, 651 (1961) (Justice Clark adopting state court rationale to nationalize the exclusionary rule); Batson v. Kentucky, 476 U.S. 79, 83–85 (1986) (Justice Powell crafting federal standards for peremptory challenges based on state-level doctrines); Nollan v. California Coastal Commission, 483 U.S. 825, 839 (1987) (Justice Scalia relying on state exactions jurisprudence to develop federal standards); Dolan v. City of Tigard, 512 U.S. 374, 389–91 (1994) (Chief Justice Rehnquist consulting state court decisions and doctrines to create the dual rationality test); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (Justice Kennedy drawing on state court rulings to expand substantive due process protections); Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (Justice Kennedy acknowledging state court contributions in recognizing same-sex marriage rights); Moore v. Harper, 143 S. Ct. 2065, 2080–81 (2023) (Roberts, C.J., relying on pre-Republic state court rulings invalidating legislative enactments under state constitutions to conclude that the Elections Clause does not insulate state legislatures from judicial review). Many of these Justices have also relied heavily upon state legislation as a source for finding meaning in the federal Constitution. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–17 (2002) (Stevens, J.) (relying on state legislative enactments prohibiting the death penalty for mentally disabled individuals to establish a national consensus under the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 567–69 (2005) (Kennedy, J.) (referencing state legislative bans on executing juveniles to support an Eighth Amendment prohibition); Graham v. Florid*a*, 560 U.S. 48, 62–67 (2010) (Kennedy, J.) (using state laws to conclude life imprisonment without parole for juvenile non-homicide offenses violates the Eighth Amendment); Obergefell v. Hodges, 576 U.S. 644, 663–65 (2015) (Kennedy, J.) (drawing on state legislative and judicial recognition of same-sex marriage to inform substantive due process and equal protection analysis under the Fourteenth Amendment); Lawrence v. Texas, 539 U.S. 558, 571–73 (2003) (Kennedy, J.) (relying on state legislative repeals of anti- sodomy laws to reinforce evolving privacy protections under the Fourteenth Amendment); Burch v. Louisiana, 441 U.S. 130, 134–36 (1979) (Rehnquist, J., dissenting) (acknowledging state legislative practices regarding jury unanimity under the Sixth Amendment); Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (White, J.) (incorporating the Sixth Amendment jury trial guarantee to the states by examining state practices); United States v. Watson, 423 U.S. 411, 415–16 (1976) (White, J.) (citing state laws permitting warrantless felony arrests to inform Fourth Amendment reasonableness standards); Payton v. New York, 445 U.S. 573, 589–90 (1980) (Stevens, J.) (considering state legislative trends on warrantless home arrests in Fourth Amendment analysis). And one Justice, Antonin Scalia, once creatively used a variety of elements of bottom-up constitutionalism, such as state court doctrines, laws and constitutions to define federal constitutional rights. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (Scalia, J.) (analyzing "legal documents of the founding era, particularly individual-rights provisions of state constitutions," to determine the original understanding of the Second Amendment); *id.* at 592–95 (reviewing colonial and post-revolutionary state laws regulating militias and firearms to frame the scope of the Second Amendment); *id.* at 600–03 (examining state court decisions to support the interpretation of the right to bear arms as an individual right); Dickinson, *supra* note 3, at 86 (noting Scalia's use of state constitutions and state legal frameworks in crafting the Court's Second Amendment jurisprudence).

41 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 87 (arguing that state courts have historically influenced the development of federal judicial review).

42 *Moore v. Harper*, 600 U.S. _, 143 S. Ct. 2065 (2023) (holding that state courts retain the authority to review state legislative actions concerning federal elections).

43 *Moore*, 143 S. Ct. at 2070 (describing the factual background of the gerrymandering dispute following the 2020 census); Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 141– 42 (noting the challenges brought against the North Carolina General Assembly's maps for extreme partisan gerrymandering).

44 U.S. Const. art. I, § 4, cl. 1 (the Elections Clause); *Moore*, 143 S. Ct. at 2074 (explaining the legislature's reliance on the Elections Clause to assert exclusive authority over federal elections); William Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 471 (2005) (describing historical debates about the Elections Clause and state court oversight).

45 *Moore*, 143 S. Ct. at 2072 (summarizing the North Carolina Supreme Court's decision to invalidate the gerrymandered maps based on the state constitution); Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 142 (2023) (highlighting the judicial-legislative conflict in Moore).

46 *Moore*, 143 S. Ct. at 2077 (critiquing the independent state legislature theory for its implications on state-federal balance); Treanor, *supra* note 44, at 463–64 (discussing the historical origins and limitations of the independent state legislature theory).

47 *Id*. at 456 (arguing that state courts established the practice of judicial review before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

48 *Id*. at 455–56 (noting that judicial review originated in state courts during the 1780s); *Moore*, 143 S. Ct. at 2079 n.15 (referencing historical sources on judicial review in amicus briefs).

49 *Id*. at 460 (discussing *Holmes v. Walton*, 4 N.J.L. 32 (1780)).

50 *Id*. at 460 (analyzing *Holmes* and its impact on state judicial review practices).

51 *Id*. at 461–62 (explaining how state precedents like *Holmes* informed the development of judicial review in *Marbury*).

52 *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7–8 (1787) (holding that a law barring loyalists from contesting property seizures violated constitutional rights). *Id*. at 463–64 (describing *Bayard* as one of the earliest and most significant cases of judicial review in the United States).

53 Treanor *supra* note 44, at 464–65 (discussing Elizabeth Bayard's argument and its constitutional implications in the early development of judicial review).

54 *Bayard*, 1 N.C. (Mart.) at 8 (invalidating the legislative act as inconsistent with constitutional principles).

55 Treanor *supra* note 44, at 465 (highlighting Iredell's articulation of the limits of legislative power and its foundational importance to judicial review). Dickinson, supra, at 111 (emphasizing Iredell's contributions to constitutional theory in the context of judicial review); *See also* James Iredell, *To the Public,* in 2 *Life and Correspondence of James Iredell* 145 (Griffith J. McRee ed., 1858) (arguing that legislative authority must adhere to constitutional limits).

56 *Bayard*, 1 N.C. (Mart.) at 8 (establishing judicial review as a check on legislative overreach). Treanor *supra* note 44, at 466–67 (arguing that *Bayard* was a landmark case that set the stage for federal judicial review).

57 Treanor, *supra* note 44, at 463 (noting that cases such as *Holmes v. Walton* and *Bayard v. Singleton* were central to the evolution of judicial review). *Holmes v. Walton*, 4 N.J.L. 32 (1780) (striking down a statute as unconstitutional, an early example of judicial review).

58 *Id*. at 467–68 (explaining how early state court decisions influenced the federal judiciary's adoption of judicial review).

59 *Id*. at 460 (discussing the influence of state court rulings on the Framers' design of the federal judiciary).

60 *Id*. at 459–60 (noting Madison's reliance on state court precedents to support the principle of judicial review); James Madison, *The Federalist No. 44*, in *The Federalist Papers* 282 (Clinton Rossiter ed., 1961) (asserting that laws violating the Constitution are "null and void").

61 *Trevett v. Weeden*, 2 U.S. (1 Dall.) 292 (R.I. Super. Ct. 1786) (striking down a law imposing penalties for refusing paper currency); *Id*. at 462–63 (discussing *Trevett* and its implications for the doctrine of judicial review).

62 Treanor, *supra* note 44, at 463 (analyzing *Trevett* as an early assertion of constitutional protections for due process and property rights).

63 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 119 (discussing the reliance on state court rulings by Convention delegates to inform federal constitutional debates); Alexander Hamilton, *The Federalist No. 78*, in *The Federalist Papers* 464, 467 (Clinton Rossiter ed., 1961) (advocating for judicial review and emphasizing its foundation in constitutional supremacy).

64 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 120 (2023) (describing Hamilton's role in shaping judicial review during the Convention debates); Rutgers v. Waddington, 1 City-Hall Recorder 1, 13 (N.Y. Mayor's Ct. 1784) (recognizing the primacy of treaties over conflicting state laws under the Supremacy Clause).

65 Alexander Hamilton, *The Federalist No. 78*, in *The Federalist Papers* 464, 467 (Clinton Rossiter ed., 1961) (asserting the judiciary's responsibility to invalidate unconstitutional laws); Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 120 (analyzing Hamilton's arguments in *The Federalist Papers* as foundational to judicial review).

66 Holmes v. Walton, N.J. L. Rep. (1780) (landmark state case asserting judicial review over unconstitutional legislative acts); Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 121 (highlighting Gouverneur Morris's advocacy for judicial review based on prior state practices).

67 Elbridge Gerry, Remarks at the Constitutional Convention (1787), in *Journal of the Federal Convention Kept By James Madison* 101 (E.H. Scott ed., special ed. 1898) (citing state court rulings to support judicial review).

68 Patrick Henry, Debate at the Virginia Ratifying Convention (1788), in *3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 451 (Jonathan Elliot ed., 2d ed. 1836).

69 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 123 (2023) (explaining the historical continuity of judicial review from state to federal systems); Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 899–902 (2003) (tracing judicial review to early state court practices like *Holmes v. Walton*).

70 *Moore v. Harper*, 600 U.S. __, 143 S. Ct. 2065, 2073–74 (2023) (rejecting the independent state legislature theory and holding that state courts may review legislative actions related to federal elections under the Elections Clause).

71 Treanor, *supra* note 44, at 459–61 (tracing the origins of judicial review to state court cases like *Holmes v. Walton* and *Bayard v. Singleton*).

72 *Moore*, 143 S. Ct. at 2078 (emphasizing the foundational role of state courts in developing judicial review); Treanor, *supra* note 44, at 462–63 (discussing key state cases like *Holmes v. Walton*, 4 N.J.L. 32 (1780), and *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7–8 (1787), as early examples of judicial review).

73 *Moore*, 143 S. Ct. at 2079 (connecting state judicial review practices to the Constitutional Convention debates).

74 *Id.* (noting how Madison, Hamilton, and Gerry relied on state precedents); Alexander Hamilton, *The Federalist No. 78*, in *The Federalist Papers* 464, 467 (Clinton Rossiter ed., 1961) (advocating for judicial review to ensure legislative compliance with constitutional principles); Dickinson, *supra*, at 124 (discussing the influence of state court experiences on federal judicial review).

75 *Moore*, 143 S. Ct. at 2079–80 (emphasizing the Framers' understanding of judicial review and reliance on state court practices); Treanor, *supra* note 44, at 466–67 (arguing that state courts influenced the Framers' views on limiting legislative power through judicial review).

76 *Moore*, 143 S. Ct. at 2080 (tracing the historical development of judicial review from state courts).

77 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 128–29 (defining federalization as the Supreme Court's reliance on state practices to inform federal constitutional doctrines).

78 *Id*. at 129 (explaining dual federalization as involving both historical and contemporary reliance on state court practices).

79 *Moore*, 143 S. Ct. at 2078–79 (rejecting the independent state legislature theory and emphasizing the historical authority of state courts to check legislatures).

80 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 118–19 (discussing the influence of state constitutions on the formation of the U.S. Constitution).

81 *Id*. at 120 (noting the parallels between state constitutional provisions and the federal Bill of Rights).

82 *Id*. at 119–20 (analyzing the "positive modeling" of state constitutional frameworks on the federal Constitution).

83 *Id*. at 121 (emphasizing the foundational role of state constitutions).

84 *Id*. at 121 (noting the overlap between state constitutional protections and the federal Bill of Rights).

85 *Id*. at 122 (stating that the federal Bill of Rights incorporated existing state guarantees rather than creating new ones)

86 *Id*. at 122–23 (arguing that state-based governance left a lasting legacy on federal constitutional law).

87 *Id*. at 123–24 (explaining that the federal Bill of Rights drew directly from early state constitutional protections).

88 *Id*. at 124 (discussing the "bottom-up" influence of state precedents on the Framers).

89 *Id*. at 125 (arguing that the Supreme Court's referencing of state rulings reflects a continuation of historical practices); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (emphasizing the relevance of state courts in informing federal constitutional interpretation).

90 Patrick T. Conley & John P. Kaminski, *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* 3 (1988) ("Not only was the role of the state central in framing, ratifying, and revising the Constitution, but the new federal Constitution was permeated with the influence of state constitutions and local precedents.").

91 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 82 (describing how state constitutional governance informed federal constitutional principles in a bottom-up fashion).

92 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

93 John Adams, *Letter to Richard Price* (Feb. 16, 1787), in 9 The Works of John Adams 568, 572 (Charles Francis Adams ed., 1854) ("I made a Constitution for Massachusetts, which finally made the Constitution of the United States.").

94 Dickinson, *supra*, at 85 (analyzing state-level experimentation and its influence on the federal Constitution); Main, *supra*, at 113 (noting that state constitutions served as testing grounds for institutional frameworks).

95 *Id*. at 90–92 (discussing the role of state declarations of rights in shaping the federal Bill of Rights).

96 *Id*. at 91 (emphasizing the foundational influence of state constitutional provisions).

97 *Id*. at 91–92 (explaining the structural influences of state governance on federal principles).

98 *Id*. at 92–93 (emphasizing Pennsylvania's pivotal role during the Constitutional Convention).

99 *Id*. at 93 (highlighting the influence of Pennsylvania's constitutional debates on federal governance).

100 Robert N.C. Nix Jr., *The Influence of Pennsylvania's Constitution on the U.S. Constitution*, 83 PA. B. ASS'N Q. 235, 237 (2012) (emphasizing the influence of Pennsylvania's constitutional history on federal constitutional thought).

101 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 80 (2023) (highlighting Pennsylvania's influence on the federal Constitution as a testing ground for foundational principles).

102 *Id*. at 81 (emphasizing the significance of Pennsylvania's constitutional history as a foundational reference point).

103 Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 152–53 (1977) (detailing Madison's critiques of state protections).

104 Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, *supra* note 1, at 145–46 (2018) (discussing how state constitutional provisions for individual rights influenced the federal Constitution).

105 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 81–82 (clarifying the primacy of state constitutions over federal counterparts in many instances).

106 *Id*. at 81 (noting the Framers' reliance on state constitutions for drafting federal rights).

107 *Id*. at 80–81 (exploring pre-ratification state constitutional experiments).

108 *Id*. at 82 (expounding on the continued influence of state constitutions on federal legal developments).

109 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 91 (illustrating how state constitutions predated federal rights in recognizing protections).

110 James Harvey Robinson, *The Development of Modern Europe: An Introduction to the Study of Current History* 67–68 (1907) (highlighting state contributions to the federal framework).

111 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 83 (discussing the concept of constitution-borrowing and its foundational role in federalization).

112 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 91–92 (contextualizing early constitution-making practices).

113 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 78–79 (exploring the influence of state constitutions on the crafting and ratification of the federal Constitution).

114 James Madison, *Notes of Debates in the Federal Convention of 1787* 89–91 (Adrienne Koch ed., 1966) (documenting how state constitutions informed the drafting of federal constitutional provisions).

115 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 112–15 (highlighting frequent references to state constitutions during the Constitutional Convention debates).

116 *Id*. at 78–79 (emphasizing the frequent references to states in the federal Constitution).

117 *Id*. at 87–88 (noting the parallels between early state constitutional protections and modern judicial interpretations).

118 *Id*. at 81 (describing the Framers' method of constitution-borrowing as a synthesis of state practices).

119 *Id*. at 81–82 (discussing parallels between modern legislative federalization and the Framers' reliance on state constitutional consensus).

120 John Adams, *Thoughts on Government* 16 (1776) (referencing Maryland's influence on legislative design).

121 James Madison, *The Federalist No. 52*, in *The Federalist Papers* 327 (Clinton Rossiter ed., 1961) (analyzing election practices borrowed from Maryland and New York).

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122 Akhil Reed Amar, *America's Constitution: A Biography* 107 (2005) (tracing the Necessary and Proper Clause to state constitutional language).

123 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 126 (discussing how the Massachusetts and New York Constitutions provided models for census-based representation and the concept of a qualified veto).

124 *Id*. at 127 (explaining how New York's 1777 Constitution inspired the President's appointment powers in the federal Constitution).

125 *Id*. (highlighting Gouverneur Morris's reliance on New York and Connecticut's electoral systems during the Constitutional Convention debates).

126 *Id*. at 128 (noting that the Vice Presidency was modeled after New York's Lieutenant Governor structure).

127 *Id*. at 128–29 (describing how the state constitutions informed the structure of the federal judiciary).

128 *Id*. (explaining how Nathanial Gorham's proposal for judicial appointments was derived from the Massachusetts Constitution).

129 *Id*. at 79 (2023) (noting the state origins of the Bill of Rights and its influence on the federal Constitution).

130 *Id*. at 81 (explaining that federal provisions mirrored state-level protections rather than the reverse).

131 *Id*. at 81–82 (discussing the extensive rights provisions in state constitutions predating the federal Bill of Rights).

132 Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 13 (1977) (highlighting the foundational role of state rights in shaping the federal Bill of Rights).

133 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 81 (emphasizing the foundational role of state protections).

134 *Id*. at 83 (describing the Massachusetts Body of Liberties as a precursor to federal rights protections).

135 *See* Va. Declaration of Rights § 1 (1776) ("That all men are by nature equally free and independent, and have certain inherent rights, ..."); Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 54 (1977) (describing the Virginia Declaration as a foundation for the federal Bill of Rights).

136 Va. Declaration of Rights §§ 8, 12, 13 (1776) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also Schwartz, supra, at 56–58 (noting the inclusion of these protections as groundbreaking).

137 *See* Donald S. Lutz, *The Origins of American Constitutionalism* 116–20 (1988) (discussing how the Virginia Declaration influenced subsequent state constitutions).

138 Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 23 (2018) (noting the independent judicial interpretations of state bills of rights).

139 G. Alan Tarr, *Understanding State Constitutions* 73 (1998) (highlighting the broad consensus on rights by the time of the Philadelphia Convention).

140 U.S. Const. art. I, § 9, cl. 3 (prohibiting bills of attainder and ex post facto laws); see also Akhil Reed Amar, *America's Constitution: A Biography* 327–30 (2005) (discussing how individual liberties were embedded in the original Constitution).

141 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 135–36 (noting the "direct relation" between Pennsylvania's proposed amendments and the federal Bill of Rights)

142 *Id* at. 136 (2023) (arguing that the Massachusetts Bill of Rights could serve as a model for the federal Bill of Rights).

143 *Id*. (suggesting the Massachusetts Bill of Rights as a guide for drafting the federal Bill of Rights).

144 *Id*. (observing that the federal amendments omitted protections found in the Massachusetts declaration of rights).

145 *Id*. (comparing the Virginia Ratifying Convention's approach to modern federalization doctrine).

146 *Id*. (describing Virginia's ratification approach as a parallel to modern federal courts' use of state precedents).

147 *Id*. at 136–37 (2023) (quoting Schwartz on Virginia delegates' role in drafting the Declaration of Rights).

148 *Id*. (noting concerns raised by Virginia delegates about the absence of a federal bill of rights).

149 *Id*. (describing Virginia delegates' insistence on including state-level protections in the federal Bill of Rights).

150 *Id*. at 137 (highlighting the adoption of Virginia's proposed amendments into the federal Bill of Rights).

151 *Id*. (quoting Patrick Henry on the popularity of a bill of rights among Virginians and other states).

152 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 96 (exploring the role of state courts in fostering constitutional experimentation within a dual sovereign framework).

153 *Id*. at 108 (documenting the shift in state court reliance on state constitutions as independent sources of rights protections).

154 *Id*. at 134 (discussing the implications and scholarly debates regarding state courts' use of state constitutions to expand rights beyond federal baselines).

155 William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (advocating for state courts to interpret state constitutions independently to expand individual rights).

156 *Id*. at 502 (emphasizing the rediscovery of state constitutions as sources of broader individual rights protections).

157 Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 261, 262 (2023) (arguing that state courts act as laboratories for rights-based jurisprudence under state constitutions).

158 Brennan, *supra* note 155, at 493 (predicting that state courts would increasingly rely on state constitutions to expand individual rights).

159 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 137 (describing the role of state courts as active participants in the evolution of constitutional law).

160 Brennan, *supra* note 155, at 489 (calling for state courts to lead in defining expansive rights under state constitutions).

161 Dickinson, *The New Laboratories of Democracy*, *supra* note 157, at 264 (highlighting state courts' role as innovators in constitutional law).

162 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 96 (describing Justice Brennan's view of state courts as laboratories for expanding rights protections).

163 *Id.* at 97 (observing the renewed attention state constitutions have received in extending rights protections beyond federal baselines).

164 *Id.* at 98 (noting the Supreme Court's reluctance to expand rights has created space for state courts to act).

165 *Id.* at 99 (arguing that state courts have increasingly filled gaps in rights protections left by the Supreme Court's restrictive interpretations).

166 *Id.* at 100 (highlighting Justice Brennan's consistent advocacy for state courts to act as leaders in expanding constitutional rights).

167 *Id.* at 123 (discussing Michigan v. Mosley, 423 U.S. 96, 104 (1975), which upheld limited police re-questioning practices).

168 *Id.* at 124 (quoting Justice Brennan's dissent encouraging states to enforce higher standards under state constitutional law).

169 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 126 (quoting Justice Liu's perspective on state courts as laboratories of constitutional innovation).

170 *Id.* at 127 (referencing Justice Barry Albin's view that New Jersey courts maintain independence in interpreting constitutional rights).

171 *Id.* at 128 (noting Justice Robert Utter's critique of federal uniformity as limiting state-level experimentation).

172 *Id.* at 98 (2023) (noting state courts' increasing role in shaping constitutional rights through independent interpretations).

173 *Id.* at 101 (discussing state courts' responses to the Supreme Court's decision in Swain v. Alabama, 380 U.S. 202 (1965)).

174 *Id.* at 103 (examining the development of the Wheeler-Soares doctrine in state courts).

175 *Id.* at 120 (noting state courts' role in refining takings and eminent domain doctrines).

176 *Id.* at 125 (describing state court responses to *Kelo v. City of New London*, 545 U.S. 469 (2005)).

177 *Id.* at 130 (highlighting South Dakota's restrictions on eminent domain for economic development under state law).

178 *Id.* at 132 (noting the Ohio Supreme Court's reliance on Kelo dissenters to define public use under the state constitution).

179 *Id.* at 135 (emphasizing the experimental nature of state courts in constitutional interpretation).

180 *Id.* at 140 (documenting state court experimentation with regulatory takings standards).

181 *Id.* at 143 (analyzing how state courts set regulatory takings standards before the Supreme Court's intervention).

182 *Id.* at 145 (discussing state-level adoption of exclusionary rules preceding federal requirements).

183 *Id.* at 147 (exploring the California Supreme Court's decision in *People v. Cahan*, 282 P.2d 905 (Cal. 1955)).

184 *Id.* at 150 (examining state court leadership in expanding First Amendment protections).

185 *Id.* at 151 (describing judicial federalism as a mechanism for state courts to expand constitutional protections).

186 *Id.* at 160 (noting Justice Brennan's influence and the potential for state courts to innovate beyond constitutional rights).

187 *Id*. at 86–87 (describing how federal constitutional law's top-down influence shapes state court doctrines and state constitutions).

188 *Id*. at 89 (discussing the influence of Supreme Court rulings on state courts).

189 *Id*. at 86.

190 Dickinson, *Takings Federalization*, *supra* note 1, at 684 (analyzing the dominance of federal takings law).

191 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1 at 80-82 (examining judicial federalization trends during the New Deal and Warren Court eras).

192 Dickinson, *Judicial Federalization Doctrine*, *supra* note at 87–88 (describing the influence of federal decisions on state courts).

193 *Id.* at 89

194 *Id.* at 90–91.

195 Dickinson, *Takings Federalization*, *supra* note 1, at 683-84 (analyzing the historical progression of federalization)

196 Dickinson, *Judicial Federalization Doctrine*, *supra* note at 92 (discussing the consultative potential of state court rulings)

197 *Id.* at 93.

198 *Id.* at 94–95.

199 *Id.*

200 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 80 (2023) (discussing the concept of judicial laboratories and their role in constitutional development).

201 *Id.* at 82.

202 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 88-90 (exploring the experimental roles of state courts in constitutional development).

203 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 80 (citing Jeffrey Sutton on hierarchical judicial interpretation).

204 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 92–93 (discussing the dominance of federal doctrines).

205 *Id.* at 94.

206 *Id.* at 95.

207 *See* Elizabeth Bentley*, State Court Adherence to Decisions Incorporating Federal Constitutional Law,* 110 Ia. L. Rev. 1013 (2025).

208 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 96–97 (describing the marginalization of state courts in constitutional discourse).

209 *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 708 (2016) (exploring the influence of federal constitutional law on state courts).

210 Dickinson, *A Theory of Federalization Doctrine*, *supra* note 1, at 87–88 (discussing the lockstep methodology in state court interpretation).

211 Batson v. Kentucky, 476 U.S. 79, 81 (1986) (introducing the case of James Kirkland Batson).

212 *Batson*, 476 U.S. at 81 (detailing Batson's charges and conviction in Jefferson Circuit Court).

213 *Id.* at 81 n.1 (noting Batson's sentence enhancement under Kentucky's persistent felony offender statute).

214 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 116 (discussing the role of state courts in shaping constitutional protections for defendants).

215 Smith v. Commonwealth, 599 S.W.2d 900, 902 (Ky. 1980) (stating Kentucky's rule on lesser-included offense instructions).

216 *Batson*, 476 U.S. at 83 (outlining Batson's procedural due process argument).

217 *Id.* at 83; *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (holding that indigent defendants are entitled to trial transcripts for an effective defense).

218 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 117 (analyzing the role of state court discretion in applying constitutional principles).

219 Swain v. Alabama, 380 U.S. 202, 223–24 (1965) (upholding prosecutors' use of peremptory strikes and declining to provide federal protections against their discriminatory use).

220 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 122 (analyzing critiques of the Supreme Court's role in *Swain*).

221 People v. Wheeler, 22 Cal. 3d 258, 280 (1978) (rejecting *Swain* in favor of state constitutional grounds); Commonwealth v. Soares, 377 Mass. 461, 488 (1979) (similarly rejecting *Swain*).

222 *Wheeler*, 22 Cal. 3d at 280 (establishing state-level protections against race-based peremptory strikes); *Soares*, 377 Mass. at 488 (doing the same).

223 *Id. Soares*, 377 Mass. at 488; *Batson v. Kentucky*, 476 U.S. 79 (1986) (noting state precedents).

224 *Wheeler*, 22 Cal. 3d at 280–81; *Soares*, 377 Mass. at 488; U.S. CONST. amends. VI, XIV.

225 *Wheeler*, 22 Cal. 3d at 280 (rejecting the limitations of *Swain*); *Soares*, 377 Mass. at 488 (noting state courts' divergence from *Swain*).

226 State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (interpreting Florida's constitution to provide greater protections against racially motivated peremptory strikes).

227 State v. Gilmore, 103 N.J. 508, 519–20 (1986) (establishing state constitutional protections against race-based peremptory challenges).

228 *Id.* at 520 (noting the importance of state courts in developing legal standards).

229 State v. Sandoval, 105 N.M. 696, 697 (1987) (adopting California's rationale to address race- based peremptory strikes).

230 *Gilmore*, 103 N.J. at 519–20 (citing lower court decisions as laboratories of democracy).

231 *Id.* at 520–21 (noting the broader protections under the New Jersey Constitution).

232 *Id.* at 521 (referencing other state courts' contributions to the development of jury selection standards).

233 Batson v. Kentucky, 476 U.S. 79, 84 (1986) (holding that the Equal Protection Clause forbids race-based peremptory strikes)

234 *Id.* at 85 (describing the discriminatory use of peremptory strikes to manipulate trial outcomes).

235 *Id.* at 85–86 (acknowledging state court doctrines as influential); *People v. Wheeler*, 22 Cal. 3d 258, 280 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 488 (1979).

236 *Batson*, 476 U.S. at 85–86; *Wheeler*, 22 Cal. 3d at 280; *Soares*, 377 Mass. at 488.

237 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 137 (2023) (discussing the Supreme Court's observation of state court developments).

238 *Batson*, 476 U.S. at 84–85 (noting the absence of robust protections against discriminatory strikes in many states).

239 *Wheeler*, 22 Cal. 3d at 280 (prohibiting race-based peremptory challenges under California law).

240 *Batson*, 476 U.S. at 85–86 (summarizing petitioners' arguments for federal intervention).

241 Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); *Batson*, 476 U.S. at 86.

242 *Wheeler*, 22 Cal. 3d at 280; *Soares*, 377 Mass. at 488; *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984); *State v. Gilmore*, 103 N.J. 508, 519 (1986); *State v. Sandoval*, 105 N.M. 696, 697 (1987).

243 *Batson*, 476 U.S. at 85–86; *Wheeler*, 22 Cal. 3d at 280; *Soares*, 377 Mass. at 488.

244 *Batson*, 476 U.S. at 85–86 Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 137 (analyzing the Court's reliance on minority state doctrines).

245 *Batson*, 476 U.S. at 87 (acknowledging and addressing concerns about uniformity).

246 *Wheeler*, 22 Cal. 3d at 280; *Soares*, 377 Mass. at 488; *Batson*, 476 U.S. at 85.

247 *Batson*, 476 U.S. at 88 (noting the complementary role of state courts in advancing equal protection).

248 State v. Mapp, 170 Ohio St. 427, 432, 166 N.E.2d 387, 391 (1960) (discussing morality, constitutionality, and procedural issues in the case).

249 Mapp v. Ohio, 367 U.S. 643, 651–52 (1961) (emphasizing the Supreme Court's consideration of state court trends and practices when adopting the exclusionary rule).

250 People v. Cahan, 282 P.2d 905, 911–12 (Cal. 1955) (establishing the exclusionary rule under state constitutional protections).

251 *Id*. at 910–11 (holding that the exclusionary rule was necessary to protect privacy and the sanctity of the home).

252 *Mapp*, 367 U.S. at 656 (acknowledging the influence of state courts in shaping criminal procedure through the exclusionary rule).

253 *Mapp*, 367 U.S. at 651–52 (noting the influence of state-level developments in crafting the exclusionary rule).

254 Wolf v. Colorado, 338 U.S. 25, 29 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961) (acknowledging the states' collective movement toward adopting the exclusionary rule).

255 *Id*. at 29 (Frankfurter, J.) (emphasizing the importance of considering state experiences in shaping constitutional protections).

256 *Id.* (highlighting Justice Frankfurter's belief in the states' role as contributors to constitutional evolution).

257 People v. Cahan, 282 P.2d 905, 911–12 (Cal. 1955) (holding that the exclusionary rule was necessary to protect privacy while allowing effective law enforcement).

258 Mapp v. Ohio, 367 U.S. 643, 651–53 (1961) (relying on state-level adoption of the exclusionary rule as a foundation for its decision).

259 Mapp v. Ohio, 367 U.S. 643, 648–49 (1961) (holding that the exclusionary rule applies to the states through the Fourteenth Amendment); People v. Cahan, 282 P.2d 905, 911–12 (Cal. 1955) (adopting the exclusionary rule under the California Constitution to protect privacy rights).

260 Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787*, at 155–56 (1986) (discussing Delegate John Holmes's contributions to the drafting of constitutional protections against unwarranted searches).

261 Wolf v. Colorado, 338 U.S. 25, 29 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961) (referencing state court experimentation with exclusionary rules).

262 *Mapp*, 367 U.S. at 651–52 (noting the adoption of the exclusionary rule by a majority of state courts).

263 *Mapp*, 367 U.S. at 652 (arguing that remedies without exclusionary rules were inadequate to protect Fourth Amendment rights).

264 *Id*. at 660 (noting the growing consensus among state courts in favor of exclusionary rules and their influence on the Court's decision).

Oral Remarks of Dean Dickinson

I want to say thanks so much to NCJI for the invitation to speak here. This year is my first conference. I want to thank the panelists as well for taking the time to read the piece and offer commentary, and special thanks to Mary Collishaw and Professor Marcus Gadson for helping to organize this event.

I said to Mary last night that this is one of the most organized law conferences that I have ever been to, so it's really an impressive opportunity to bring so many distinguished jurists together to have this really important conversation about state courts and the influence of state law and state constitutional law, specifically on federal constitutional law, as my paper presents. And so, this is, as Peggy mentioned, an opportunity to take several excerpts, several chapters from the book and present them here in a consolidated manner.

The book, *The Bottom-Up Constitution: States and the Evolution of American Constitutional Law*, is really an opportunity to talk about the dialogue between state and federal courts historically as well as in the modern era.

Let's take a step back to September of 1981 and pretend we're in Louisville, Kentucky. Someone breaks into the home of another person and steals two purses. A witness, who is there on the scene, identifies and offers a description to police. The witness sees this man fleeing, and based on that description the police arrest a 28-year-old Black man named James Kirkland Batson. The defendant was charged with second degree burglary and receipt of stolen goods, and about a year later at a trial in 1982, the prosecutors did something that is common practice. They struck four prospective jurors.

What ended up happening was that Batson had effectively an all-white jury. The four jurors that were struck by the prosecutor were all Black.

Now, Batson's attorney, of course, objected to this and said it was unconstitutional, a violation of the Sixth Amendment's guarantee to a fair trial, but that didn't matter. The state courts in Kentucky and the Kentucky State Supreme Court were going to follow Supreme Court precedent; that is, *Swain v. Alabama*,[1] which made it almost impossible for Batson to show racial motivation around the peremptory strikes. So, the story goes, the top-down story of constitutional laws, the Supreme Court hands down the decision, and the states follow suit from there. That's *Batson*. I'll come back to that in a moment.

Let's take another step back, this time to 1957. In Cleveland, Ohio, the police show up at Dollree Mapp's home. A day earlier, a bomb had gone off in Cleveland and law enforcement suspected that the bomb suspect was hiding in the basement of Dollree Mapp.

In the book, I talk about this from a very humanized perspective. Dollree is known in the neighborhood as a tough person. She has had run-ins with the police, and so she knows her rights. She tells the police officers who want to enter her home to look for a bomb suspect, "No. If you don't have a warrant, you're not coming in."

They argue for about an hour and then finally the police barge into her home and are looking for this suspected bomb suspect. They don't find anything. But they do find obscene, lewd material, videos, and they confiscate that evidence, and prosecutors later bring charges against Dollree Mapp for possession of that illegal material.

Mapp is tried and convicted for possessing these obscene materials. The U.S. Supreme Court had said in *Wolfe v. Colorado*[2] that the Fourteenth Amendment's exclusionary rule applied to federal courts but not the states. This meant that state prosecutors and the state courts could effectively admit this illegally seized evidence and bring it into trial as part of a prosecution.

Batson and *Mapp* both reveal how innovation in state courts influences the development of federal law. The journey to the final outcome in both cases began many years before they were decided. In *Batson*, the Court held that the Fourteenth Amendment's Equal Protection Clause forbids peremptory strikes based on race discrimination. The Court considered what the state supreme courts had done in the years prior in justifying the decision. In particular, it pointed to the California State Supreme Court and the Massachusetts Supreme Judicial Court, which had interpreted their own state constitutions to find that prosecutors were not permitted to strike jurors based on race. In other words, these courts were the trailblazers amongst state courts in finding a new progressive way to look at racially preemptory strikes. Florida, New Jersey, Delaware, and New Mexico promptly followed suit, laying the groundwork for the U.S. Supreme Court.

Batson and *Mapp* both reveal how innovation in state courts influences the development of federal law.

Mapp involved a similar process. In the years leading up to *Mapp*, state supreme courts were also looking at this issue of the exclusionary rule and interpreting their own state constitutions to find that, indeed, the state-level variation of the exclusionary rule was permissible under their state constitutions, and therefore, as a result, illegally obtained evidence as part of illegal searches and seizures would not be permitted in trials.

By that point in the *Mapp* decision, a majority of state supreme courts had moved in that direction, demonstrating an emerging consensus for the U.S. Supreme Court to draw on. *Batson* involved a minority of state courts.

In *Mapp*, Justice Tom Clark explained that the patchwork of state rules made for a senseless conflict. The Court was persuaded and deeply influenced by the emerging consensus amongst the state supreme courts across the country. As a result, the Court incorporated the Fourth Amendment Exclusionary Rule against states through the Fourteenth Amendment by specifically borrowing and adopting from state supreme courts that had already carved out and crafted their own exclusionary rule doctrine.

Same thing with *Batson*. Justice Lewis Powell's decision again takes a small minority of state supreme court decisions and adopts their framework as a new federal standard for the entire nation. He wrote that the Fourteenth Amendment's Equal Protection Clause prohibited prosecutors from relying solely on racial motivations to strike Black jurors, but in doing so, again, relied heavily on the work that state supreme courts had already done.

This bottom-up dynamic, where state innovations shape federal constitutional law, extends far beyond just *Batson* and *Mapp*. The Supreme Court has repeatedly done this, engaged in what I call bottom-up constitutionalism, by following the lead of the states in some of the most significant rulings in various areas. Again, this sort of tests the thesis that in top-down constitutional law, the Supreme Court hands down a decision and the rest of the country follows in lockstep. That is certainly a dominant story, but there is this other story of the bottom-up nature of state supreme courts and state legislatures, influencing how the Supreme Court interprets the federal Constitution.

The Supreme Court has repeatedly done this, engaged in what I call bottom-up constitutionalism, by following the lead of the states in some of the most significant rulings in various areas.

I'll name a few other areas of the Constitution that have been framed by state supreme court decisions like this. In takings cases, the relevant federal test now in use was essentially adopted and borrowed directly from state supreme courts that had already considered the issue for thirty years. Justice Rehnquist, in *Dolan v. City of Tigard*,[3] literally just borrowed directly from the state supreme courts and said they got it right.

The First Amendment illustrates a similar phenomenon. The actual malice test standard from *New York Times v. Sullivan*[4] was lifted directly from the Kansas State Supreme Court decision in *Coleman v. MacLennan*.[5] There, Justice William Brennan essentially says Kansas got it right in his opinion. The Court adopted the actual malice standard that the Kansas State Supreme Court had established as a framework to apply the First Amendment.

The *Heller*[6] decision [in the context of the Second Amendment] in 2008 is another example. Again, Justice Scalia was looking to state constitutions, looking to state court rulings and documents, even state court rulings from before the U.S. Constitution was drafted, to answer the question of whether or not the Constitution does indeed provide for an individual's right to bear arms. And it is not just on the state court doctrine side of things; it's not always the case that the Supreme Court is looking at state supreme court doctrine as a way of borrowing or adopting; the Supreme Court has also done this on the legislative side. The Supreme Court has a long history of looking towards the content of state legislation and the number of states that have moved in the direction of passing certain laws to inform and influence federal constitutional law.

If you look at the cruel and unusual punishment doctrine of the Eighth Amendment, in *Atkins v. Virginia*[7] or *Roper v. Simmons*,[8] the Court identified a national consensus by looking at the consistency of the direction of the states and state laws banning certain types of executions, the content of the laws, and found them a helpful resource in interpreting the Eighth Amendment. Again, looking not necessarily just to state courts, but to state laws and state legislatures as well.

The right to a jury trial, Sixth Amendment. *Duncan v. Louisiana*[9] is another example. Again, this is a Supreme Court decision that was guided by a near-universal acceptance of the right in the laws of every single state. We see it in the Fourth Amendment context as well. In *United States v. Watson*, the Court upheld warrantless felony arrests.[10] In doing so, it pointed to the near-universal codification of state statutes that permitted such warrantless felony arrests.

Conversely, in *Payton v. New York*,[11] it banned warrantless home arrests influenced by a declining trend of state laws that permitted them. So here the Supreme Court is looking not just to state doctrine but to state law to help inform this.

Now, this bottom-up constitutionalism is not new. In fact, it's as old as the republic and the nation itself. We often learn about judicial review, the power of courts to strike down unconstitutional laws, as being born in 1803 *Marbury v. Madison*, but that is a foundational myth. The true story of judicial review is a bottom-up story. It began in the states.

In the 1780s, three state courts were already grappling with this question of legislative overreach. In New Jersey, for example, *Holmes v. Walton* saw the court strike down a law that violated the right to a proper jury trial. In North Carolina, *Bayard v. Singleton*[12] established that the legislature could not simply seize private property in violation of the state's constitution. So, prior to *Marbury*, state courts were already engaging in judicial review in a way that was really not that novel.

Now we see this bottom-up constitutionalism story even in recent Supreme Court decisions. Most recently, in 2023, in *Moore v. Harper*.[13] *Moore v. Harper* concerned partisan gerrymandering in North Carolina, and independent state legislature theory. How did Chief Justice Roberts, writing for the majority, partially reject this theory? He reached back into our history and told a bottom-up story. What was that story?

He explicitly stated in his opinion that judicial review was not fashioned out of whole cloth in Marbury. He looked to the states before the U.S. Constitution was ratified. He said the origins of judicial review in those early state court opinions in *Holmes* and *Bayard* are relevant for understanding whether or not a state court has judicial review over state legislatures' actions over federal elections, for example. In other words, he affirmed a 200-year-old tradition of bottom-up constitutionalism in his decision in *Moore*.

But he even goes further. Roberts even surveys the constitutional convention where a handful of delegates argued for a strong federal judiciary, and they specifically cited these pre-U.S. Constitution state court rulings invalidating state law as examples of why the federal judiciary itself should also have strong power. He used this bottom-up practice to reason that state courts do indeed have the power of judicial review over legislative actions regarding federal elections. He used the bottom-up story of constitutional law to reason his way to a decision.

The stories of *Batson* and *Mapp* tell us the same thing. Our Constitution is not just a static monument built only by federal hands; it is a living document constantly being shaped, refined, and revitalized by the actions of state courts and state legislatures. We must recognize these state institutions for what they are; not just junior partners in the constitutional project but co-authors in our constitutional republic.

I think the dominant top-down narrative, of course, is incomplete. We have lots of literature out there on the top-down nature of the supremacy clause and how the Supreme Court hands down and really influences a vast majority of American constitutional law, and the literature is replete with a lot of information and literature on state courts and the horizontal dynamic of how constitutional law evolves within the states. But we have missed this bottom-up story. We have missed how state supreme courts and state legislatures have had to play such a significant role in how American constitutional law is formed, shaped, and developed throughout history. And constitutional meaning is forged every day in courtrooms and state houses across the country from the bottom up.

But of course, my book and paper also raise questions for the readers. Should the Supreme Court adopt a more robust, explicit bottom-up constitutionalism? Is this something that should be more formalized in its jurisprudence? Should this become a standard jurisprudence and interpretive practice, and if so, why? These are important questions that need to be answered, and I am happy to bring them to light in my book and my paper, and I certainly look forward to your comments as well. Thank you.

Comments by Panelists

Professor Miriam Seifter, University of Wisconsin Law School

I want to thank Dean Dickinson for such an excellent book project and article. It gives us a lot of important things to think about, and it's a very important time to be thinking about the ways that our law is developed, often from the bottom up, and the ways that your work provides material for part of a pool of ideas that could help advance our national constitutional dialogue.

This sort of bottom-up phenomenon is something that is known to the few people who teach state constitutional law but is way overlooked in wider legal circles, and I think he really does an important service by bringing it to light.

I just want to use my time to complement the paper with two additional points. The first is that, while bottom-up is certainly one important direction in which constitutional law develops, national constitutional law proceeds in multiple directions. It develops from the bottom up, from the top down, and it repeats itself. States' decisions spread to other states, and those go from the bottom up and then back down. And all of these pathways matter because they can contribute productively to national constitutional dialogue, and they can be a source of strength and a source of checks and balances, especially at times when the rule of law may seem imperiled.

The second point is that the bottom-up constitutional law is understandably focused on the development of national constitutional law—that's Dean Dickinson's topic—but we should be mindful, particularly in this room, that state constitutional law matters for its own sake, on its own terms, and shouldn't only be measured for its value in contributing to U.S. constitutional law.

Let me elaborate briefly on these two points. The first point I will call "up, down, and all around." Bottom-up constitutional development is one important variant, but I think a fuller account would appreciate the ways that, first of all, law is very top-down. And just to take a brief example of that that came up at lunch when Dean Chemerinsky was talking about campaign finance, the First Amendment is experienced in a top-down way. *Citizens United v. FEC*[14] is a decision of the U.S. Supreme Court that state supreme courts can't do much about.

As some of you may know, the Montana Supreme Court tried. They issued an opinion[15] holding, based on Montana constitutional law and history, that the state's campaign finance regulation was valid, and the U.S. Supreme Court summarily reversed. It just must be recognized that, at some moments, some aspects of law are top-down.

But other times, I think more frequently, state constitutional law and national constitutional law develop together through a sort of back-and-forth process. The example I want to give of this multidimensional lawmaking has to do with reapportionment and redistricting. Think about how many times this ping-pong ball goes back and forth. First, in one sense, states were there first in terms of thinking about equal districting. And well before the 1960s, a number of state constitutions provided for apportionment based on population.

But other states, it is well known, deviated from that model, and many refused to apportion their legislatures at all, and it was the federal case, *Reynolds v. Sims*[16] in 1964, that rejected state malapportionment and held that the Fourteenth Amendment requires districting based on population. In other words, there were these state seeds of an idea, but *Reynolds* was a watershed top-down moment, a sweeping holding that brought states into a new era.

Now, the federal courts remained the primary movers on redistricting for decades. Beyond insisting on equally populated districts, they developed a racial gerrymandering doctrine through the *Shaw v. Reno*[17] line of cases, and they created at least the possibility, the impression, or the expectation that there might be federal constitutional checks on partisan gerrymandering. But then, as has already come up today, in 2019, in *Rucho v. Common Cause*,[18] the Supreme Court of the United States rejected the idea of federalizing partisan gerrymandering claims, leaving an abyss.

Now the ping-pong ball goes back, and states are now filling that abyss through what might eventually look like a bottom-up process. Over a dozen state courts have weighed in on partisan gerrymandering under state

constitutions. Several states have also amended their state constitutions to address partisan gerrymandering directly or adopt independent redistricting commissions.

And I will just take this 10-second interlude to let you know that, in addition to the other website I mentioned this morning, my center runs a website called 50constitutions.org that has the constitutional text of all 50 constitutions. The website is searchable, and you can track state constitutional history through it. So, if you're curious how many states have addressed redistricting through their state constitutions, that's a place where you can go search.

Back to our story about redistricting. We were maybe in a bottom-up moment, but then, as Jerry mentioned, we got *Moore v. Harper*, and it seemed like the development of constitutional law might become top-down. And then the people who were worried about that outcome breathed a partial sigh of relief because the Supreme Court partially rejected the independent state legislature theory. But the ghost of that theory threatens the possibility that the law could once again become top-down on the issue of partisan gerrymandering, at least as it applies to congressional elections.

So, all of this messy back-and-forth interplay is the stuff of national constitutional development. State courts play a role, federal courts play a role, and the law often emerges through that interplay.

I will add just one more recent example to make things even messier and more complicated and just to illustrate how many players have an opportunity to engage in this development. It is not only the high courts of the states and the federal government.

Many of you here are from North Carolina, and many of you are probably familiar with the controversy that arose over North Carolina's recent judicial elections. And this, too, is an example of state and federal systems engaged in an interplay that helped develop, in some sense, national constitutional law.

What happened is that after an extremely close election that Justice Allison Riggs won by just over 700 votes, Judge Jefferson Griffin challenged the election results. The substance of the challenge is something we probably don't have time to get into, but it was based on the theory that the rules in place at the time of the election were problematic. The case was not alleging election fraud, but rather that voters followed rules that were problematic. A North Carolina appellate court sided with Judge Griffin, and the North Carolina Supreme Court affirmed in part, and these were questions of state law relying on state precedent.

But there was also a federal suit. A different set of plaintiffs filed suit in federal court, and a federal district court judge ordered the election to be certified for Justice Riggs and ruled that under the federal Constitution's principles of due process and equal protection, a state cannot alter the rules of an election after the fact. And after that, Judge Griffin conceded.

There was no U.S. Supreme Court involvement. This was a conflict that played out with other constitutional developers—lower and higher state courts, the court of public opinion, and a federal district court under the principles of both state and federal constitutional law.

Although Dean Dickinson is absolutely right in what I take to be his implicit message that we should not treat federal courts as permanent heroes and state courts as permanent villains, this was a case in which it was the state courts that were presenting a threat to democracy.

To wrap up this first point, "up, down, and all around," constitutional law does develop from the bottom up but also from the top down, and it's often sweeping in a wide variety of actors who have an opportunity to participate over time. And that multiplicity, not a solely bottom-up system and not a solely top-down system, can add strength and built-in checks to our legal system.

My second point, more briefly, is just to think about state constitutional law for its own sake. I just finished writing a case book on state constitutional law, *State Constitutional Law: Cases and Principles*. It's available through the Foundation Press, and I'm happy to talk more about it if you would like.

One of the striking features of putting together a book and seeing it physically is how many aspects of a book on state constitutional law have nothing to do with the national Constitution. We often think of the value or worth of state constitutional law as whether it goes further than or goes less far than the federal Constitution, but there are entire chapters of a book on state constitutional law that are about things like fiscal provisions. When states amended their constitutions to restrict the government's power to borrow because governments entered into bad deals with railroads, they left a legacy that limits states' ability to build infrastructure, which we need.

To phrase this observation as a question: Is New York State allowed to create a thruway authority that has permission to borrow so that the state can have a thruway system? The New York Court of Appeals said the answer to that question is "yes." But that's the kind of question that develops as a matter of state constitutional law and has nothing to do with the national Constitution.

Another example that came up in some of the discussion groups I visited today is home rule, the question of intrastate relations. If a state has a minimum wage law, can a city raise the minimum wage higher? That is a question on which states represented in this room have diverged, but it is very important to the people of the state.

In addition, there are state constitutional rights that have no federal analog. When we determine what it means for a state to provide an adequate or uniform or general education, we are not asking what that says about the federal constitutional right to education, which doesn't exist; we're asking what it means for the education of children in that state.

The final example I'll give is the separation of powers. I thought the morning panel did a wonderful job of reminding us that state structure is different. State governments are structured differently, and so they have different separation of powers rules.

Here are just a few kinds of questions that your colleagues across the country have had to confront recently. Can the state legislature in Wisconsin give legislative committees the power to veto executive branch spending or executive branch rules? Can a state legislature in Kentucky dictate the venue rules of state courts to influence which sets of judges hear certain kinds of claims? Can the state legislature in Idaho burden the initiative and referendum process in ways that make it very hard to use?

These are all real cases in which state courts have had to deliver real answers, not in a way that furthers or contracts federal constitutional rights, but in a way that really does matter to how and whether state courts can deliver for their residents.

In sum, Dean Dickinson's work is a wonderful contribution that gives us much to think about in a really important time to be thinking about it. And just to complement his contribution and get us thinking about bottom-up constitutionalism, I would urge us to think about the multiple pathways and players that shape national

constitutional development, and the fact that state constitutions matter not just for what they can do for our national Constitution but also what they mean on their own terms. Thank you very much.

Honorable Todd Eddins, Supreme Court of Hawai’i

Aloha. I am delighted and honored to participate in this conversation. Thank you to everyone from NCJI. I am going to talk about Hawai'i's fidelity to our dual sovereignty structure. I’m going to talk about how Dean Dickinson nicely spotlights how the original federal Constitution was really shaped by state constitutions. I’m going to talk about how and why I think the U.S. Supreme Court will reject the bottom-up concept. And I’m going to talk about the importance of sideways and horizontal state-to-state dialogue to preserve a pluralistic, inclusive society that protects the rights of everybody.

When I think of state constitutionalism, I think of presidential nominating conventions where people are proud of their states and behave accordingly. They are ready to really jump up and honor their state traditions, cultures, values, and geography. It’s really on full display at these nominating conventions.

I submit that our state constitutions are really flavored by the same sentiments and the same excitement, and I hope you feel the excitement when you’re looking at your state constitutions and analyzing them and looking at them and looking at your own unique states and how they have operated throughout their history.

The sub-national constitutional structure really demands independent interpretation. For my state, the youngest state, 1959, from its inception, our justices and the people who sat in our seats before us really understood the importance of independent interpretation of our state constitution. From statehood, we were not lockstepping.

Justice Brennan, in his famous 1977 article[19] about state constitutions, praised our court because we were immediately doing it. He highlighted a couple of our cases. So, we have had no hesitation at all to extend the protections of the Hawai'i constitution beyond those of the textually parallel federal counterparts.

When I think of bottom-up aspects, too, I also look at our marriage equality case, *Baehr v. Lewin*.[20] *Obergefell*[21] didn’t cite it, but that case really helped catalyze the legal and cultural shifts around marriage equality. I think that’s a really good example of sort of the bottom-up constitutionalism Dean Dickinson describes and what our courts can do to aid the federal courts.

One of the groups I popped into was talking about how their state considers state constitutional issues before federal constitutional issues. In other words, the thinking was that state court judges don’t need to get to the federal Constitution if the state constitution covers an issue. And I think you are absolutely honoring our federalism principles by doing that. Why even get into the federal Constitution? Why talk about the federal Constitution? The litigants raised both areas. If you can decide the case under state constitutional grounds, there is absolutely no need to get to the federal Constitution.

I really enjoyed how Dean Dickinson’s piece described the excitement in the late 1700s as the colonies drafted their own constitutions, preparing the way for our national government. Then, when it came to ratifying the U.S. Constitution, there was an uproar. Where are textual guarantees for our liberties? There was a suspicion that the federalists would do away with those universal principles of liberty that they just fought the war for, and that the federalist push for a strong central government would come at the expense of personal freedoms and undermine state sovereignty. We might have come full circle on that.

Now, Massachusetts, Virginia, and New York ratified the Constitution only under the condition that the Bill of Rights would be included. The framers of the U.S. Constitution then basically copied and pasted from the state constitutions, and we had our amendments.

One interesting thing, when I was listening to Dean Dickinson talk about *Batson*, we lockstepped there, as probably everybody would. Our *Batson* case is also *State v. Batson*.[22] With an amazing coincidence, William Batson from Honolulu was the subject of racially motivated conduct, so that was interesting.

Why do I think the U.S. Supreme Court might not respect the states' laboratories? I suspect it will be reluctant to allow state court decisions to stand when those decisions reject the U.S. Supreme Court's originalist framework. It is acceptable for the U.S. Supreme Court and state supreme courts to use differing interpretive methodologies. But I have serious questions about how the U.S. Supreme Court is doing its history-and-tradition analysis. Specifically, which history does the Court value, and how does it decide?

I do think that even if originalism is the correct way to interpret the U.S. Constitution, the U.S. Supreme Court has erred in *how* it does originalist analysis and has been inconsistent in using the methodology. Sometimes, I have observed the Court ignore history, or I have watched it rely on history from biased sources.

When I first saw the article and its title, I thought of Don Ho. Probably many of your family relatives came home with Bottoms Up shot glasses [associated with] Ho as souvenirs. But I think the shot glass is empty. I don't mean to be Mr. Pessimistic here, but I will be. I worry that the current Supreme Court will be skeptical of state court decisions unless they apply the same interpretive methodology and reach the same outcomes as the Supreme Court would.

Why do I say that? The missteps of the current Court as pointed out by some passionate dissents. The U.S. Supreme Court has failed to adequately defend district courts. It has not shown sufficient respect for Congress. I believe the cumulative effect of many of the Chief Justice's decisions has been to rewrite the Voting Rights Act. The Court has frequently broken from precedent, calling into question how much they respect the justices who came before them.

I do think that their belief that so many hall of fame justices got it wrong is unique in our nation's judicial history. I think they have a disdain for federalism and sovereignty, federalism principles, and dual sovereignty. *Bruen*[23] illustrates how the Court accords insufficient deference to democratically enacted laws.

And the same thing has happened with the Establishment Clause. Thirty-seven state constitutions bar public funding for private religious schools.[24] But the Supreme Court has disregarded this part of America's constitutional tradition and required states to provide the funding.

The dissents have suggested dissatisfaction with the Court's current direction. Justice Kagan has called it a law-free zone. Justice Brown Jackson says the Court's textualism is too malleable, and her concerns resonate with me. I have grave reservations about the Court's presidential immunity decision.

I think the Court has erred in how it approaches factual development. *Kennedy*,[25] *Rucho*, and *Students For Fair Admissions*[26] are examples. There were also underdeveloped factual records in *303 Creative*[27] and *Mahmoud v. Taylor*.[28] This pattern does not demonstrate the respect for other actors in the judiciary that they deserve.

I live in Hawai'i, life is good, we all have wonderful jobs. My wonderful colleague gave me this lei. Go back to the conventions. The great State of Hawai'i, the Aloha State! Home of the hula, surfing, leis, poke bowls, and the most beautiful supreme court building in the nation. If you're ever out in Hawai'i, please stop by.

I'm optimistic about the horizontal, sideways dialogue that we're having and that we had in our various groups. I think it's really important for us to listen to each other, to pay attention to what our states are doing in each of these cases. I really enjoy reading all of your cases. I think it really informs my mind. We have a lot to learn from each other.

The Brennan Center State Court Reporter is a really useful aid for seeing what's happening in our courts. If you do have the opportunity to teach or get your law schools to teach state constitution law, I really think that is important and absolutely vital to get the new generation thinking about these state issues, whether it's the parallel federal principle, parallel provisions, or your own positive rights in your various state constitutions.

The Aloha Spirit is kindness, compassion, humility, and respect for human dignity. May the Aloha Spirit be with you.

Steve Hirsch, Complex Appellate Litigation Group

Wow! Justice Eddins just made my job so much easier. I'm so pleased to be addressing this group of distinguished jurists, but before I do I need to say at the outset that my comments do not represent the views of the Complex Appellate Litigation Group with which I now am affiliated, nor are they the views of a legal scholar, a judge, or even a corporate defense lawyer, which is probably what NCJI was looking for when they mistakenly invited me here. Rather, my comments represent the views of an inflamed, alarmed, and slightly hysterical San Francisco liberal.

Dean Dickinson's excellent article makes two main points. First, when recognizing or refining federal constitutional rights, the U.S. Supreme Court historically has drawn upon state judicial decisions and legislation that recognized or refined state constitutional rights. And second, the U.S. Supreme Court and the states should continue to engage, perhaps even more intensively than before, in this process of bottom-up constitutional development.

It is hard to argue with either proposition, but it's also hard to see how either one addresses the extraordinary situation in which we now find ourselves.

Indeed, as I read Dean Dickinson's article, I felt the looming presence of an elephant in the room; namely, as Justice Eddins pointed out, we do not have a U.S. Supreme Court right now that has any interest in plumbing the depths of state constitutional law to discover new individual rights or new principles for constraining and channeling governmental power. Instead, we have a U.S. Supreme Court whose shadow-docket rulings have radically undermined settled federal constitutional rights and constraints on executive power by allowing the Administration to continue engaging in highly concerning conduct immediately and for potentially lengthy periods of time, sometimes in open defiance of lower-court injunctions.

These emergency rulings have caused irreparable harm to litigants,[29] potentially resulting, for example, in the removal of persons without notice or any due process to unrelated third countries where they may face torture or even death,[30] or even to the removal of persons born on American soil and previously thought to possess the most ironclad form of American citizenship—birthright citizenship.[31]

Likewise, some of the Court's merit rulings have conferred unprecedented power and legal impunity on the President. [32] And if you put these two developments together, they possess a dangerous synergy permitting arguably illegal conduct that causes irreparable harm to many, to continue without any hope that the President ever will be called to account for it.

And no inventory of the recent Supreme Court rulings will be complete without mentioning that, under the rubric of the unitary-executive theory, we are likely very soon to see the effective demise of administrative-agency independence, with the possible exception of the Federal Reserve Board, which even this Court is afraid to tinker with.

This is fundamentally not a court that is interested in bottom-up constitutionalism. Instead, it is going its own way and doing so at an alarmingly rapid clip. And state courts, for their part, lack authority to repair any harm that the Court may have done to previously settled federal rights and principles. But state courts should do whatever they can to compensate for the erosion of federal rights and principles; and with that in mind, I have a proposal for one thing that they could do sometimes, a thing that is entirely consistent with the tradition of bottom-up constitutional development.

In appropriate cases, state courts could issue decisions that explicitly link federal and state constitutional developments. I will call this proposed type of decision a "linking decision." These decisions will push back boldly and explicitly against the collapse of the rule of law in the United States.

The central characteristic of a linking decision is that it will take the time and trouble to explain two things. First, it will explain why relevant developments in federal constitutional law provoke legitimate concern for the health of our democracy and our fundamental liberties. Second, a linking decision will explain how these concerns about the erosion of federal law are addressed, avoided, or ameliorated by the state constitution as the state court interprets it.

Linking decisions should target legal domains in which federal constitutional rights and principles recently have receded or collapsed. As Dean Dickinson points out, this project is not entirely novel. State constitutions have long provided broader rights than the federal Constitution in the domains of privacy, education, equal protection, and search and seizure, for example. To this list we can now add agency independence.

At present, in at least three domains, recent U.S. Supreme Court rulings have made state-court linking decisions desirable; namely, protections against unlawful arrest and detention, protections for data privacy, and protections for agency independence. As those protections erode or disappear at the federal level, state courts could issue linking decisions that criticize federal developments while explaining how their interpretations of the state constitution compensate for the erosion of federal law.

State courts also can set an example for federal courts with respect to channeling and constraining executive power, ensuring access to the courts, and providing effective judicial remedies for rights violations.

As an example of what a linking decision might look like, California courts have consistently interpreted the express privacy clause of the California constitution to provide more robust privacy protections than the current federal constitutional framework, particularly in areas involving government surveillance, reproductive autonomy, and informational privacy. A linking decision concerning informational privacy rights under the California Constitution might usefully compare and contrast California privacy law with a deficient federal legal regime.

For example, this hypothetical linking decision could discuss and criticize the fact that the U.S. Supreme Court recently allowed the Social Security Administration to hand over the sensitive data of millions of Americans to powerful private parties masquerading as a government agency. I'm referring, of course, to the so-called Department of Government Efficiency. The linking decision could go on to explain why nothing like that ever could or should happen in the California government.

It may be objected that the types of comparisons and criticisms that would characterize a linking decision are inappropriate. For one thing, these comparisons and criticisms often will constitute *dicta* because you don't have to comment on the wisdom of federal law in order to reach a state constitutional holding. And perhaps it will seem impertinent or at least out of place for a state court to criticize federal law as reflected in the work product of the nation's highest court. And some will find this project to be too overtly political or ideological.

Whether such criticisms are persuasive to you depends on just how radical you find the U.S. Supreme Court's recent shadow-docket and merits rulings and just how alarmed you are about the possible impact those rulings are having on our democracy. My own view is that desperate times call for desperate state-court measures. Moreover, using federal law as a bad example may help to illuminate and justify the need for broader state-constitutional rights.

I want to mention that the two articles under discussion point in somewhat opposite directions, one arguing that state-constitutional decisions should diverge from federal ones in recognition of the fact that state constitutions promote popular accountability, whereas Dean Dickinson argues for more convergence between state and federal constitutional law with the former inspiring bottom-up provisions.

Linking decisions are both Marshfeldian and Dickinsonian in the sense that they call for state constitutional decisions to diverge expressly from recent federal constitutional decisions; but also, they seek federal and state convergence sometime in the future when we have a U.S. Supreme Court that cares more than the current one does about democracy and the rule of law. Linking decisions thus would serve as a sort of time capsule, a repository of sound constitutional advice to be opened by federal courts at a later date. Even if the full influence of state-court linking decisions is not felt immediately in federal law, such decisions may in time come to represent a valuable and historic contribution to the American tradition of bottom-up constitutional development.

Elizabeth Cabraser, Lieff Cabraser Heimann & Bernstein, LLP

You all in this room certainly know more about your respective state constitutions than I do. I learned a lot in the discussion groups earlier today about the differences among state constitutions, state processes, and the way they have been informed by the history of your respective states. And that is really where I want to start, because I read the two articles today with just unalloyed delight.

I was enraptured by Dean Dickinson's article. It resonated with me on a very deep level by discussing what I believe has been a missing piece of our legal history, of our legal education, and our legal discourse in this country to our detriment; and it is one of the many reasons why we find ourselves in this moment of existential crisis.

I was not the best law student in the world and certainly not at my school, but when I was going to law school at Berkeley, I used to haunt the many old bookstores in the Bay Area. Most of them are gone. But in the heyday of these bookstores, you could find whole sections of old legal books. These were books that would-be lawyers, apprentice lawyers, and practicing lawyers had brought with them across the country to to California. Many of

them were originally from the seventeenth and eighteenth century.. They were well used, and sometimes abused. There was marginalia. These were the tools of the trade.

These battered volumes were books that people had used, and loved, and committed to memory, because if you were coming to California from the East Coast in the nineteenth century in a wagon or on a ship and you were a lawyer, the only books you could bring, if you could bring any, were the essentials: probably Blackstone. I confess I have twenty sets of Blackstone, in various editions.

By the way, Blackstone talks admiringly and braggingly about birthright citizenship, which appears to have been borrowed for use in the Fourteenth Amendment from Blackstone, 1st Edition, 1763. He was bragging about how much better the English were than the French. You couldn't be a French citizen if your parents came from elsewhere. You could in Britain. Once on British soil, you were a Brit.

In addition to all my sets of Blackstone, the book that I treasure, and in which I have found the most solace, was a book published in 1783 in London titled *The Constitutions of the Several Independent States of America* —not the United States. That didn't exist. This book was printed four years before the Constitutional Convention. It included the Declaration of Independence, the Articles of Confederation, and the constitutions of the original thirteen colonies: the newly-minted American states.

The constitutions of these new independent American states were mostly written in the 1770s, when no one knew there would be a United States. But they did know that they needed charters to protect the rights and liberties of the citizens of each of the colonies who wanted their independence, often from each other as much as they wanted it from England. These constitutions are important not simply because, as Dean Dickinson demonstrates, they are the source material for the federal Constitution, but because whole passages are borrowed wholesale from those state constitution precursors. This is plagiarism in the best sense, although I should say that it was selective plagiarism.

What endured in the Federal Constitution, and in the Bill of Rights, were the provisions of these state constitutions that were not mere afterthoughts. For example—and this is one of the examples that Dean Dickinson gives—in the Pennsylvania Constitution, the Declaration of Rights is not an afterthought, it is not an amendment: It is Chapter 1, a declaration of the rights of the inhabitants of the State of Pennsylvania. One is a citizen of the state by living there. That is something to remember when you think about state citizenship. As far as I know, states don't deport their citizens.

The first sentence of that Pennsylvania Declaration is that all men are born equally free and independent and have certain natural, inherent, and inalienable rights, amongst which are the enjoying and defending of life and liberty; acquiring, protecting, and possessing property; and pursuing and obtaining happiness and safety. Freedom of religion, the right to worship, and, of course, the sacred right to a trial by jury. These key passages are repeated nearly verbatim in a number of these constitutions.

As a young student in the midst of the uproar of the time—the late 1960s, early 1970s—I think my first response to this book, which was old then and is older now, should probably have been one of alienation, because most of the people in this room today, myself included, aren't included in these declarations of rights. They weren't about us. They were about some white guys in knee breeches and wigs.

But because these rights were declared in these ways, limited then, but capable of flexible interpretation, they became components of the developing common law. The story of our country is one of inclusive progress, at least

in part, and in my mind its most encouraging part. The process is one of ongoing laborious, slow, nonlinear, and often back-tracking, strides toward increased inclusion. It is a journey toward the fulfilment of a promise, or at least an aspiration, born in these infant state constitutions. This promise predates our federal Constitution, and lives on in our state constitutions today.

So, I just want to say this. Although there is no general federal common law, the common law is the heritage, the property, the duty, the obligation, and the right of the states to continue to develop. This will occur, I hope, in ways that are ever more inclusive, humane, fair, and enlightened. It is, I believe, still the mission of the state courts, in interpreting and enforcing their respective constitutions, now more than ever.

In San Francisco, we had a beloved FM disc jockey, whom some will remember: Scoop Nisker. He would give his (unique) take on the news in the midst of playing whole album-sides of Grateful Dead and other such music. At the end of his news reports, Scoop would sign off with, "If you don't like the news, go out and make some of your own." State courts under state constitutions and state laws can do just that. If you don't like the law, go out and make some of your own.

Now is a discouraging moment, despite some of the good things state courts are doing. I take solace that, while the United States of America does not have an official national rock song, the State of Ohio does: "Hang on, Sloopy." May we all hang on.

Response by Dean Dickinson

Thanks so much to the panelists for such enlightening and thought-provoking comments. I was taking diligent notes on everyone's comments, and I want to make sure I respond to as many as I can.

First, a couple of points I want to make. Miriam's idea of "top-down, bottom-up, and all around" certainly makes sense. I might even borrow it for a future law review article. State and federal courts are all taking part in the same conversation: American constitutional law. In the course of participating in that discussion, state and federal courts naturally engage in a back-and-forth where they converge at some times and diverge at others.

I think the data provides a useful way to think about this idea. In my empirical research, I have found about ten instances when the U.S. Supreme Court has done the sort of bottom-up constitutionalism I describe; it is very rare. However, the top-down dynamic where the Supreme Court does not mention or does not consult state court doctrine is replete with many, many examples.

So, there's a disproportionate amount of Supreme Court doctrine that really does take into consideration the top-down approach. And I think bringing to light this bottom-up phenomenon is important for us to at least think about where and how the Supreme Court could potentially go in that direction.

I also want to note that Miriam raises a really fascinating question about *Rucho*, and the political question around partisan gerrymandering. In one of the last chapters of the book I discuss *Rucho* specifically. I wrote an article in NYU's Law Review looking at Justice Kagan's dissent, and concluding that she is effectively ahead of the game. She has the foresight to understand that state supreme courts are going to continue reviewing claims of partisan gerrymandering and craft new standards to do so. Inevitably, the U.S. Supreme Court decades from now is not going to look like the U.S. Supreme Court of today. We don't know what that Supreme Court is going to do.

But if partisan gerrymandering comes back to the Supreme Court in the future as a question it is going to have a rich source of case law from the states, and if it does decide to take on and open up the federal courts to partisan gerrymandering claims, then it's going to have state supreme court rulings and standards and frameworks to essentially borrow from and adopt.

Also, in one of the final chapters of the book, I talk about abortion rights from the bottom up. Right now, we're seeing that dynamic play out. *Dobbs* comes down, and the question of abortion is handed to the states, state legislatures, or even Congress. As we speak, state supreme courts are working through different frameworks under state constitutional law to evaluate the issue, such as strict scrutiny, undue burden, and equal protection. They are laboratories testing different approaches.

And again, we don't know what the U.S. Supreme Court is going to look like decades from now. It could look very different. And that U.S. Supreme Court may take up the question of federal constitutional protections to abortion again, and what will they have available? They will have a rich source of case law amongst the states, not just state legislatures, but state courts, which have dealt with this question at the state level. They may borrow, adopt, and engage in bottom-up constitutionalism.

I also want to talk about Justice Eddins's and Steve's comments about the current court as to whether or not this current court would be open to engaging. We do know that in 2023, Chief Justice Roberts paid homage to state supreme courts and state constitutions in *Moore*. But the broader point I want to make is that I'm writing this article for the ages, not just for this Supreme Court. I am not here to convince this Supreme Court that it should and could engage in bottom-up constitutionalism.

When you look at the history of bottom-up constitutionalism, you can see that New Deal Court justices, Warren Court justices, Berger Court justices, and Rehnquist Court justices, who came from all across the political spectrum, have engaged in bottom-up constitutionalism. While this Supreme Court may or may not be in a position to take up this question or this practice—and I think some justices would—that doesn't mean that in the future, other courts wouldn't have the opportunity to engage in this bottom-up constitutionalism. In many ways, the question becomes if it does, is it going to create a more robust framework as to when and why it engages in this practice.

The one thing that my book notes here is, in *Mapp*, *Batson*, *Sullivan*, and the takings cases, the U.S. Supreme Court's opinions suggest that it is using a bottom-up constitutionalist framework as a one-off. It doesn't actually acknowledge that it has used a bottom-up constitutionalist framework before or defend the decision to do so for the present case. I therefore think the Supreme Court would certainly have to look into how it would frame such a constitutional interpretive method as a result of that history.

Justice Eddins's comment on marriage equality is correct. I address his very important point in the book. In *Obergefell*, Justice Kennedy essentially engages in bottom-up constitutionalism. He explicitly consults the state courts that had already, under their state constitutions, found a constitutional right to same-sex marriage. He is engaging in bottom-up constitutionalism, and he looks to Massachusetts, Hawai'i, and a number of other state supreme courts that had already answered that question at the state level.

Another part I want to note here is that there was a discussion about originalism and textualism, and here is why I think the arguments about this court not engaging in bottom-up constitutionalism have some merit. That

is because many originalists and textualists are not supportive of bottom-up constitutionalism. Textualists are going to say, "We're going to look at the text of the federal Constitution; we don't care about how a state court has interpreted the text of their own state constitution from the federal standpoint." So textualists probably would say, "That is just not what I want to do as an interpretive practice."

Originalists may also say to themselves, "Why would we look to state supreme courts and their decisions on their own constitutions, which were drafted at a different time than the U.S. Constitution?" And so, originalists and textualists may not be in a position to engage with bottom-up constitutionalism. But that being said, we have plenty of examples of Justice Scalia in takings cases and in *Heller* engaging in bottom-up constitutionalism.

A few other points I want to make as well on these wonderful comments that we had here. The discussion about linking decisions is fascinating to me. That could be a law review article in and of itself. When we get to thinking about linking, it makes me think about Miriam's conversation about bottom-up, top-down, and all around. At the end of the day, I think this is a collaborative, ongoing dialogue between state and federal courts in how we understand the federal Constitution. I think that sort of dynamic is really important.

Finally, I want to situate bottom-up constitutionalism in the context of debates about laboratories of democracy. On one end, you have Justice Brennan, who sees state courts as laboratories of rights. On the other hand, you have Brandeis, who talks about the state legislatures as laboratories of democracy. I think the bottom-up constitutionalism concept that I built here pays homage to federalism principles and respects federalism principles, and that, in many ways, we should see the Supreme Court periodically look to the state supreme courts to help interpret federal constitutional law.

Is that going to be all the time? No. But I think there's a humility in the Supreme Court saying we don't have the precedent or the case law to answer this important constitutional question. The lower federal courts may not have an answer to this, or case law. And as a result, from the humility standpoint, we are going to look to the state supreme courts or state appellate courts to help answer this question. It's a rich source of material that can be utilized in some way, shape, or form. So, hats off to that dynamic of federalism and judicial federalism as well.

I could go on and on and on, but I would much prefer to stop talking and hear questions from all of you. That being said, thank you again to all the panelists.

Questions from Participants

Honorable Christopher Yates, Michigan Court of Appeals: I'm wondering what you think the best use of *Michigan v. Long*[33] is, because it has always seemed to me that the safest course for us is to be crystal clear about adequate and independent state grounds when we render a decision. That's antithetical to the whole concept of linking decisions. The idea behind this doctrine is to get our decisions to be insulated from Supreme Court review. Do you have any thoughts on that?

Dean Dickinson: That's a great comment. I think specificity and explicitness are important all around, so I totally agree with that. But I also understand the dynamic of insulation from the Supreme Court.

One thing I will say is that, increasingly over the last ten years, I believe the number of decisions that the Supreme Court has taken up from final decisions by state supreme courts has declined. The vast majority of

decisions coming down from the Supreme Court are either emergency docket cases, which we already discussed, or merit decisions from appeals of the federal courts of appeals. I think that dynamic has certainly played a role in making it less likely that the Court would engage in bottom-up constitutionalism.

That being said, you look at cases like New Jersey's *Mount Laurel*[34] decision on housing, where the state supreme court effectively said that exclusionary zoning was unconstitutional and explicitly stated that they were essentially hiding the decision away from the Supreme Court because they knew the Supreme Court would likely reverse.

But again, I think a big part of this is that the Supreme Court is just taking fewer cases from state supreme courts, and *Long* is playing a role in that as well.

Honorable William Montgomery, Arizona Supreme Court: A couple of observations. One, for those of us who lament the degree of respect or lack thereof for state constitutional development, I don't know if bottom-up constitutionalism really helps. I look at it more as parallel constitutional development, because state courts are equally capable of interpreting the federal Constitution.

I was rather struck by the ability to go back and look at the history around the founding of the understanding of the scope of judicial power, both with *Marbury v. Madison*[35] and *Moore v. Harper*, which I think actually gives weight to an original meaning approach to constitutional interpretation, whether or not judicial review was meaningful at that period in time.

And related to that, your paper—which is very thought-provoking; I enjoyed reading it—identifies a number of times that the same people who took part in the Constitutional Convention also took part in drafting their own state constitutions. In that regard, I think we could see the drafters of the federal Constitution as borrowing from a generally understood and shared corpus of law about the need to protect rights and the appropriate role of government.

Dean Dickinson: Great comment. In fact, while *Batson* was grounded primarily in state constitutional law, there was layered on top of that a discussion about the Sixth Amendment of the federal Constitution.

I think you are correct that state supreme courts and state courts can and do interpret federal constitutional law in many of the cases they deal with. The rare circumstances where the U.S. Supreme Court adapts and borrows from state constitutional law are fascinating.

On the Convention and the judicial review, what's interesting with *Marbury v. Madison*—and Justice Marshall probably didn't have access to Westlaw or LexisNexis at the time—is that he didn't footnote, cite, or reference any of those pre-republic state court decisions at all in the decision. And he's a judicial master of sorts, and so he wrote an opinion that was extraordinary and looked like he was a genius—and he was—but he could have made reference to and paid homage to the state supreme courts that had already gotten there before.

So again, whether LexisNexis and Westlaw weren't working at the time, I think that's important to note as well.

Participant: Just a comment. That follows up on the *Michigan v. Long* question and whether or not state courts should also address the federal Constitution after ruling on independent and adequate state law grounds.

One thing we might want to think about is 42 U.S.C. §1983 and *Pearson v. Callahan*.[36] The U.S. Supreme Court has said that you can look at state supreme court opinions on interpreting federal constitutional law. After

Pearson, many federal district courts are not addressing whether there was a federal constitutional violation because there was no clearly established law.

Therefore, I do think we should consider the impact of not addressing federal constitutional issues because of the impact they have on citizens of our states. If we say there was a state constitutional violation, we should probably go ahead and address the federal constitutional violation also, although I'm unsure as to whether doing so would just be an advisory opinion.

Also, I think we need to consider whether or not there might be a collateral *estoppel* effect if the federal question was fully litigated, but we don't address it in the state appellate opinions.

Notes

1 380 U.S. 202 (1965).
2 338 U.S. 25 (1949).
3 512 U.S. 374 (1994).
4 376 U.S. 254 (1964).
5 78 Kan. 711 (1908).
6 554 U.S. 570 (2008).
7 536 U.S. 304 (2002).
8 543 U.S. 551 (2005).
9 391 U.S. 145 (1968).
10 423 U.S. 411 (1976).
11 445 U.S. 573 (1980).
12 1 N.C. 5 (1787).
13 600 U.S. 1 (2023).
14 558 U.S. 310 (2010).
15 Western Tradition Partnership, Inc. v. Attorney General of State, 363 Mont. 220 (2011).
16 377 U.S. 533 (1964).
17 509 U.S. 630 (1993).
18 588 U.S. 684 (2019).
19 William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).
20 74 Haw. 530 (1999).
21 Obergefell v. Hodges, 576 U.S. 644 (2015).
22 788 P.2d 841 (1990).
23 New York State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1 (2022).
24 *What are Blaine Amendments?* Institute for Justice.
25 Kennedy v. Bremerton School Dist. 597 U.S. 507 (2022).
26 Students For Fair Admissions v. Harvard, 600 U.S. 181 (2023).
27 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
28 606 U.S. __ (2025).

29 *See* Social Sec. Admin. v. AFSCME, No. 24A1063 (granting stay that allows SSA to give DOGE sensitive data of millions of Americans); United States v. Shilling, No. 24A1030 (U.S. May 6, 2025) (granting stay that allows transgender people to be removed from service in armed forces pending litigation of their challenge to EO); Trump v. Wilcox, No. 24A966 (U.S. May 6, 2025) (granting stay that allowed immediate removal without cause of members of agencies previously thought to be "independent").

30 *See* Dep't of Homeland Sec. v. D.V.D., No. 24A1153 (U.S. June 23, 2025) (granting stay that allows removal of aliens without notice to third countries to which they have no connection and where they may face torture or death).

31 Trump v. CASA, Inc., No. 24A884 (U.S. June 27, 2025) (granting government's applications for partial stay of judicial order granting nationwide injunction against enforcement of Executive Order purporting to restrict birthright citizenship, and observing that Congress likely has not granted federal courts the ability to enter such injunctions); Executive Order 14160 (*Protecting the Meaning and Value of American Citizenship*), 90 Fed. Reg. 8449 (Jan. 20, 2025) (Executive Order purporting to end birthright citizenship for persons who supposedly are "not subject to the jurisdiction of" the United States within the meaning of the Fourteenth Amendment, either because, at the time of birth, (1) their mother was unlawfully present in the United States and their father was not a United States citizen or lawful permanent resident, or (2) the mother's presence in the United States was lawful but temporary and the father was not a United States citizen or lawful permanent resident).

32 *See, e.g.,* Trump v. United States, 603 U.S. 593 (2024) (holding that a former President is absolutely immune from criminal prosecution for actions within his conclusive and preclusive constitutional authority and at least presumptively immune from prosecution for all his official acts, but not immune for unofficial acts); *Seila Law v. CFPB*, 591 U.S. 197 (2020) (strongly endorsing "unitary-executive theory" when striking down statute providing that independent agency's single director may be removed only "for cause").

33 463 U.S. 1032 (1983).

34 Southern Burlington Cnty. NAACP et. al., v. Mount Laurel, 92 N.J. 158 (1983).

35 5 U.S. 137 (1803).

36 555 U.S. 223 (2009).

Closing General Session

Professor Marshfield: I mostly just want to say thank you to everybody who has been involved and to all of you for engaging with the ideas in my paper for your feedback and your ideas.

I participated as a commentator in an event like this about six years ago, and in walking around through the different groups, I was talking about state constitutional amendment procedures and the fact that we should take them seriously, and it was in the course of moving around through the different groups that several judges really challenged me and said, "Well, that sounds great but that sounds like the sort of thing voters should take seriously. I don't know exactly what it is that I, as a judge, am supposed to do about amendments—how does that intersect with what I do as a judge?"

And it was really from that point forward, six or seven years ago, that I have been trying to understand what that relationship is and was really sort of the germ that has led to some of what you see in this paper today. And all of that is just to say that my thank you is truly heartfelt. Your feedback, your thoughts, your experiences that I have been able to listen in on have been really informative for me, and they give me a window into the justice system that I don't ever really get to have, so it's incredibly valuable, and I take it to heart, and I will be thinking about it.

Two things I heard from you a lot are that the rule of law and popular accountability need to somehow fit together; it can't be that popular accountability is going to displace the rule of law, and that is an important connection that needs to be addressed. And also, significantly, that the popular accountability ideas that I'm suggesting need to be connected to the courts' role in protecting minority rights, and that that is something that courts and you all take incredibly seriously and is important for our system, and it needs to be worked out through this idea.

So those two thoughts are things that are top of my mind from talking with you. I am very, very grateful again, so thank you for your engagement.

Dean Dickinson: Thank you so much, Peggy, Mary, Marcus, and NCJI for inviting me. It is my first time at a Forum, and I've had a wonderful experience. I am going to make sure that there are at least five Pennsylvania judges here next year.

I am meeting with a Pennsylvania State Trial Court Conference next week in Hershey, Pennsylvania, and they will certainly be hearing about this.

But I really appreciate the opportunity to have such a robust discussion with illustrious judges like all of you, a really important opportunity to talk about my paper and my book. I really appreciated the thorough conversation and comments that were made, and I look forward to actually hopefully incorporating these comments into the book. But also highlighting again the important part and the important role that state court jurisprudence and state legislation has played in forming federal constitutional law in our country.

I am really looking forward to continuing the conversation, of course, and certainly coming back next year with a cohort of Pennsylvania judges. Thank you so much.

Peggy Wedgworth: Marcus, you read the papers, you heard the comments, you have listened to moderators and group discussions. Wrap it up for us.

Professor Marcus Gadson: First of all, thank you for coming, everybody, and I want to recognize that you all are really at the front lines of American democracy, so wherever you stand on the political or ideological spectrum, the work you do is so important, and we're grateful that we had a chance to hear your insights and talk to you. Thank you for coming.

> I want to recognize that you all are at the front lines of American democracy, so wherever you stand on the political or ideological spectrum, the work you do is so important.

What I would like to do is talk about some areas where I saw a great deal of agreement in terms of how you processed the papers, and then I also want us to acknowledge some areas where there was disagreement or people saw things differently, and that's okay. In fact, that is healthy for us to have some different reactions so that we can all learn and we can all hopefully grow.

In terms of what we agreed upon, the first thing that stands out is, Jerry and Jon, everybody really loved your papers. People found that these were highly informative. It was common for people to say that they learned things from you two that they had never learned in law school, hadn't learned from litigants, and so I think that is really a tribute to the fantastic job that both of you did. And I will just say that I wish every state court judge had an opportunity to read what you guys have written. I think everybody would profit from it.

Another point of agreement that I was a little bit surprised by, perhaps, but that I think makes a lot of sense, is that there was a lot of hesitation around reflexive lockstepping. Lockstepping is the idea that state courts are going to interpret their state constitutions to mean the same thing as the federal Constitution. So many of you focused on the fact that your state constitutions were sometimes written at different times by different people with different goals in mind, and so it would make little sense for you just to reflexively adopt a federal interpretation.

For instance, the Georgia contingent has a state constitution from 1983, and so even if you were a card-carrying originalist, it's far from clear that you would necessarily adopt a 1787 view of judicial power or something like that. And so many of you were focused on the idea that you just don't think it makes sense to reflexively defer to federal court interpretations; you are eager for lawyers to press state constitutional arguments to pay careful attention to local text and local history.

That did come with a couple of caveats. Several of you mentioned in your comments that lawyers are not always raising state constitutional arguments, and the sense is that that creates a vicious cycle. The lawyers don't raise quality state constitutional arguments, then the judges defer to the federal courts because that's what they can do to decide today's case, and now there is no state constitutional precedent, so that future lawyers doing research don't feel like they have a body of case law to build upon, and so on and on we go.

Many of you are very clear that you hope lawyers will pay more attention to state constitutions and that you feel like they play a big role in whether or not you will be forced to lockstep or whether or not refusing to lockstep will be a realistic possibility.

The other caveat—and I believe this was mentioned in one of the papers—is that so much of the time when we think about constitutions, we think about constitutional interpretation, but at the state level, that is really only

part of the puzzle. Another big piece is drafting. State constitutions are frequently amended, and most of them are longer than the U.S. Constitution. I don't know if we have anybody from Alabama here, but your state constitution is extremely long, and it's actually several times longer than the U.S. Constitution, and that is true of many other state constitutions.

In many of those state constitutional texts, there are times when they actually tell you to lockstep with federal precedent. Florida is an example of that with search and seizure. They actually said that you should lockstep with the U.S. Supreme Court. Therefore, some of you said as a caveat that your hands are literally tied in the sense that voters in your state have said that they want you to lockstep.

And of course, that is always interesting because it's a particular moment in time when they tell you to lockstep. People told Florida courts to lockstep back in the 1980s, I believe, and I don't know in 2025 if they would still want you to lockstep with the U.S. Supreme Court, and yet, that is in the text, and so you have to take that seriously.

A third point of agreement is that many of you mentioned that you thought it was extremely beneficial to have dialogue, not just among federal and state courts, but state courts amongst each other, and that you felt like you could learn a great deal from what other state courts do because many times they are dealing with similar guarantees.

Take education, for instance. There is no federal right to education, as Miriam mentioned during her remarks, and yet every state constitution that I am aware of mentions education in some way, and in some cases, they actually frame it as a right in the same sense as your right to a jury trial, or to practice a religion. And so, you find it helpful when other states have thought about what counts as a constitutionally adequate education.

One thing I will note with that is, if you look at it, many times students like to copy each other's work after they have seen what's successful in one class, and lawyers will copy from other lawyers. It turns out state constitutional drafters have also copied from other state constitutions. That is a very common phenomenon where the California Constitution, for instance, borrows heavily from the New York Constitution and other situations like that. So, it makes sense that, if in drafting you heavily imitated another state's constitution, you will be very interested in the court interpretations that they have given you.

Finally, as a rather depressing point of convergence, you all agree that state constitutions just do not get the respect that you would like them to receive, and that was repeated throughout the comments. You just do not feel that you get the limelight that the federal Constitution gets, and you see that people just are not traditionally paying as much attention.

Now, that is starting to change. I think, especially in the past ten years or so, there has been much more scholarly interest in these areas, and I think you guys are starting to see some of the fruits of that, which are that you have panels like this where you have very distinguished scholars like Jon and Dean Dickinson and Miriam and Quinn, who are writing about these issues. So, I think that hopefully this scholarship is going to contribute to an increased level of respect.

Let's talk a little bit about where you disagreed. One of the hottest areas of contention was to what extent you guys feel like the state and federal constitutions should change or should imitate each other. Many of you look at the federal Constitution, and you think that it is a model in terms of judicial appointment. You feel that the federal appointment process is something that more states should imitate, and others of you feel very strongly that you don't love the federal process, and you prefer to have some sort of different state process.

And your reasoning is varied. Some of you believe that the federal appointment process leads to less direct political pressure as you make decisions. Others of you feel like state elections actually open the doors to people to become judges who might not be noticed to become federal judges. So, there's a disagreement on that.

Another area of disagreement about states and the federal Constitution and how they should imitate each other is on amendment processes. Some of you think that your constitutions are too easy to amend and that they are overly cluttered. I am not going to call any particular state out to avoid causing a ruckus here, but there are some state constitutions that do have provisions where you wonder if they really belong in the state constitution or not.

Others of you think that it is actually valuable to have an easily amended state constitution where voters are able to more regularly update the constitution to reflect modern values and modern norms, so that is an area where there is just a philosophical difference of opinion about constitution drafting.

It's really the same question we have had since the founding, which is how the people should be able to go about changing their constitution. Some people at the founding thought it should be very difficult, some people thought it should be comparatively easy, and some people thought it was somewhere in the middle, and that's the same in 2025.

One final thing I will just note in terms of this that I think is very interesting from some of the research I have done and some of the research other scholars have done is that some of you think that having a single subject clause at the federal level would be beneficial. For those of you who don't know, if you are in one of the seven states without a single subject clause, forty-three states or so have a provision that says something like, every piece of legislation must have a clear title, and it must be about a single subject or have a clear object, or something like that.

That language is conspicuously missing in the federal Constitution, and some of you thought that that would be a way to rein in some of these huge omnibus bills, and some of you indicated that you have had it up to here with clear title and single-subject clause litigation; we don't want the federal Constitution to be embroiled in that.

Again, I think that some of that just boils down to how you see the role of the legislature, what tools they should have to confront challenges, so it's natural that you all would see those provisions in different lights.

I found it fascinating to see such a spread in terms of how judicial selection methods affect your behavior on the bench. Several of you were adamant that it has no effect or very little effect, and I can understand that. I think where you're coming from is that you say, "I ran to become a judge because I really care about protecting the constitution, and I really care about making sure the legal system is fair. I didn't do it to advance a party interest." And even for those of you who ran as members of parties because your states have partisan elections, I think many of you still have this ideal in the back of your minds that you are doing something bigger than just playing for the red or blue team. And so, several of you said, "It just does not affect my behavior, and I take very seriously the idea that I am supposed to interpret the text that's before me and not bring in my personal views."

Others of you said that you felt like it might have a subconscious effect. You really try to put aside the fact that you have people who donate money to campaigns or people who are out supporting you, or you have a political party that's behind you, and you try to put that to the side, but you feel like, subconsciously, when you're making decisions, that may be somewhere at the back of your mind.

I would just note very briefly on that point; I think that some version of that always exists until you get on the U.S. Supreme Court. If you're on a federal district court or a federal circuit court of appeals, those have life tenure and you're appointed by the President, but you know that if you want to move up to a higher court, political actors must support you. So even if we got rid of elections tomorrow and political parties tomorrow, there still would be some of you, I think, worried in the back of your mind that there are outside influences.

I would also say that I'm proud of the judges who said that they try to actively acknowledge that and then work against it. I think that actually shows a conscientious judge who acknowledges that there is that risk and actively works to mitigate that risk.

Some of you said that, yes, this is just a reality of twenty-first century legal decision-making. If somebody is up for election, that might affect the sorts of cases that they're assigned or the ways that they write decisions, so that is just a reality for people to be aware of. From my own scholarship, there is no perfect way to select judges. Every way that you select judges comes with some downside, but several of you were grappling with what you took to be the downsides of the ways that many states do it.

Overall, I'm hearing that there was just a lot of energy and discussion in these rooms, and people were excited to take this time off to be able to talk to follow judges about these issues. And I was really impressed as I came around to hear the level of rigor and level of thought that you put into this, so I will just reiterate what I said at the beginning, which is thank you so much, state court judges, for your very important work and it is so critical, and at NCJI we are incredibly grateful that we get to do whatever we can to try to help you do your jobs.

The Judges' Comments

During the discussion groups, judges considered the issues raised by the paper presenters and the panels. Remarks made by judges during the discussions are excerpted below and arranged according to the discussion subjects. These remarks have been edited for clarity and concision. Conversational exchanges among judges are indicated with dashes (—). These excerpts are individual remarks, not statements of consensus. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

When is Lockstepping Appropriate?

In my state, we're not required to interpret our constitution in lockstep with the federal Constitution. Even when the language is identical, we can—and often do—interpret it differently, particularly with respect to individual rights. In many cases, we provide broader protections than the federal baseline.

My state has a long history of interpreting its constitution independently—a provision in the 1970s even formalized this principle. I teach state constitutional law, and one thing I emphasize is that my state's departures from the federal Constitution often reflect the political and social context of the time.

For example, in the 1980s, my state's supreme court deviated from federal precedents after the U.S. Supreme Court overturned earlier decisions the state had followed. An election that decade, when three justices were removed, likely prompted some retrenchment. Today, my state's supreme court generally requires a clear justification to diverge from federal law and has become more cautious.

My state has not adopted the U.S. Supreme Court's approach to interpreting legislation and legislative history. We continue to consider the legislative history of a law or constitutional provision, rather than relying solely on the text, as the U.S. Supreme Court increasingly does. Our approach to statutory and constitutional interpretation remains grounded in this broader analysis, rather than following the newer federal methods.

How Politics Affects the Judicial Process

In the view of many, these practices have gone too far. Considerable emphasis is placed on public confidence in the judiciary, along with an expectation that courts will intervene to ensure that laws or governmental actions perceived as unconstitutional are appropriately addressed. However, this expectation is often accompanied by an incomplete understanding of the rule of law.

What is critically important is greater uniformity among the states, particularly given that state judicial systems are intended to function within, and not apart from, the framework of the United States Constitution. Instead, there remains significant confusion. My state is one of a small number of states that continues to select its judiciary through partisan elections, a system that raises legitimate concerns. I know of one state supreme court that has held that it is unconstitutional for judges to raise funds during their campaigns, while in my state, such

fundraising is regarded as a necessary, though problematic, aspect of judicial elections. This disparity only contributes to public uncertainty and risks undermining confidence in the judiciary.

—What stood out to me most was the underlying tension identified during the panel discussion—the tension between popular accountability and the obligation of judges to ensure that such considerations do not influence their decision-making.

Stringent ballot access requirements in my state have turned judicial races into a kind of "Hunger Games," with candidates routinely challenging each other's eligibility. I've already ruled on many of these cases, and it's only a matter of time before supreme court candidates are similarly affected. Our interpretation—arguably incorrect—treats even a single paperwork mistake as fatal, with no opportunity to amend. As a result, a race that begins with six candidates can quickly be reduced to one, which is deeply problematic.

Recently, in my state, a newly drawn supreme court district—created as a minority district—had three candidates qualify for the seat. Two of those candidates were challenged. The disputes moved back and forth between the appellate court and the supreme court itself. In the end, the supreme court affirmed the removal of one candidate and reversed the inclusion of another, leaving only a single candidate on the ballot. That individual was ultimately elected to the supreme court unopposed, based on decisions made by the very court whose future colleague was at issue.

Do you have partisan judicial elections in your state? Because I think that's really the thread running through all of this—the growing partisanship surrounding the judiciary. The courts are increasingly being treated like a political football rather than remaining above the fray. I don't pretend to have an easy answer, but I don't believe partisanship belongs in the judiciary at all.

In many states now, judicial elections are partisan at the supreme court and appellate levels, even though trial court judges appear on the ballot without party labels. In my state, the legislature is currently fighting over how appellate court districts are drawn, precisely because changing the districts can change the composition of the courts. That kind of maneuvering does nothing to reinforce public confidence in the judiciary.

—Absolutely, and in our situation, those concerns were only heightened. Long before the case was resolved, there was already talk about which candidate the supreme court wanted to see elevated. That is ultimately who ended up on the court. Even though all three candidates were Democrats, the one selected was viewed as more conservative than the others. Whether that perception is fair or not, it undermines trust and confidence in the institution.

What concerns me most about my state is how easy our constitution is to amend. The legislature not only controls what goes on the ballot, but also when—whether during a primary or a general election—based on which voters they believe will turn out. That kind of strategic timing is deeply problematic. Voters are often given only a brief, vague description of proposed amendments. In fact, several amendments were recently passed largely because there was no organized effort to explain what they actually did. When proposals fail, it's usually because interested groups step in to educate the public.

Because lawmakers control the language, the timing, and need only a simple majority, the constitution can be reshaped to suit whoever is in power. That should concern anyone who cares about the integrity of the system.

I have a question, if I may. Before joining the bench, I worked in the legislature and spent a lot of time trying to build a stronger relationship between the legislative and judicial branches. Through my state's judges' association, we created a program where judges spend a day at the legislature shadowing lawmakers, and legislators are invited to come shadow us in return. The goal is education.

Having worked on both sides, I know there's a real misunderstanding within the legislature about what courts actually do. Legislators operate in an environment where, in a single day, fifteen different people may tell them fifteen different things about one bill. Because that's their experience, they sometimes assume judges operate the same way—meeting privately, cutting deals, responding to outside pressure. That simply isn't how courts function.

—I think educating legislators about the judicial role is essential to reinforcing the separation of powers. In our case, the courts are physically close to the legislature—we were even in the same building at one point—which made collaboration easier. Even so, it's been difficult to get legislators to truly reciprocate.

—We have tried something similar. Judges will go to my state capitol and sit in on legislative meetings, which can be eye-opening. And I often think, if lawmakers truly believed judges worked the same way legislators do, that would be a very troubling assumption. Of course, when they ask what it means to shadow an appellate judge, the answer is usually: "You can watch me read briefs."

Differences Between State and Federal Constitutions

I would note that there are meaningful historical differences in the adoption of state constitutions, particularly as one moves further west and later in time, where the context of the constitutional conventions was quite distinct. The argument that these differences should inform how state constitutions are interpreted is an appealing one. However, it is not entirely consistent with the jurisprudence of many of those states, which have largely chosen to follow federal constitutional doctrine notwithstanding differences in historical context.

With respect to popular accountability, I was struck while reading the article by a recent example from my state. As recently as this past March, several constitutional amendments appeared on the statewide ballot. It prompted me to reflect on the fact that my state's current constitution, adopted in the latter part of the twentieth century, has been amended more than 200 times in roughly fifty years. By comparison, the United States Constitution—including the first ten amendments—has been amended only twenty-seven times over more than two centuries. That contrast was difficult to ignore and underscored the point in a particularly vivid way. I'd like to offer a brief pitch on that point.

Last semester, I began teaching state constitutional law at one of our local law schools that previously did not offer the course. It was an opportunity for me to deepen my own understanding of the field, and the school was genuinely enthusiastic about adding it—they simply did not have anyone available to teach it before. If any of you are interested in teaching at your local law schools, there is a strong chance that they likewise do not currently offer a state constitutional law course. Teaching it provides an excellent opportunity to help train practicing lawyers and future members of the bar. In fact, I recently hired a law clerk directly from that class.

There are significant professional benefits to taking on this role, and the logistical barriers are much lower than they once were. There are now, I believe, at least three strong casebooks available, so you do not have to design the course from scratch.

—That's brilliant.

—That's my pitch. That is, let's get it in every law school, and then you have better clerks who will come to you with that knowledge.

I've been reflecting on this issue because, in my home state, the constitution has been amended quite frequently, and the amendment process itself has increasingly been used in a partisan manner. As a result, many of these amendments are relatively recent and politically contested.

As cases interpreting those newer provisions begin to make their way through the courts, it raises an interesting set of questions. In particular, how should courts evaluate constitutional amendments that were adopted following highly polarized campaigns, in which proponents and opponents often offered sharply different—and sometimes competing—understandings of how the amendment would operate if enacted? And to what extent, if at all, should those campaign representations inform judicial interpretation?

This interpretive challenge is quite different from construing provisions adopted at the founding of the state constitution in the mid-nineteenth century, where the historical context, expectations, and political dynamics are fundamentally distinct from those surrounding amendments adopted only in the past few years.

Our constitution also requires a vote at periodic intervals on whether to call a new constitutional convention, and that concerns me. Given today's political climate, it's difficult to imagine what such a convention would look like. The last time voters approved one was the early 1960s, and the result was a thoughtful, measured constitutional revision. I'm not confident we would see anything like that today.

I would add, briefly, that state constitutions contain far more *positive* rights than the federal Constitution. Many provisions do not simply limit what the government may do, but instead require the state to act—such as guaranteeing a right to a clean environment or affirmatively providing the right to counsel. Several state constitutions, for example, require the state to establish some form of public defense system.

Enforcing those kinds of rights inevitably involves policy judgments. It is impossible to evaluate whether the state has met its constitutional obligation without engaging, at least to some extent, with questions of adequacy and priority. Yet courts are often reluctant to do so. Anglo-American jurisprudence has long been uncomfortable with positive rights and with directing government action. But when a constitution expressly imposes those obligations, treating them as merely aspirational—or reading them out altogether—risks a serious dereliction of judicial duty. The fact that such rights do not fit neatly within the federal framework does not make them superfluous.

Directly related to your question, one important feature of my state constitution is its detailed treatment of the judiciary's role and authority—particularly our rulemaking power. Unlike the federal system, where Congress must approve rule changes, my state's courts retain control over their own rules. We, of course, amend them to conform with statutory changes when necessary, but I would be deeply concerned if we were to lose that authority. In my view, rulemaking power is central to judicial independence. It allows courts to function

effectively and free from political interference, and I believe the federal courts would be stronger if they possessed similar authority.

My state constitution includes a single-subject requirement, which has no federal analogue. During COVID, the legislature passed a large end-of-session omnibus bill containing numerous unrelated provisions. When one of those provisions was challenged, we invalidated it not on policy grounds, but because it violated the single-subject rule—illustrating how that requirement functions as a democratic safeguard, ensuring that legislation must stand on its own merits rather than being embedded in must-pass bills.

That issue arose again in a COVID-era immunity case, where the central question ultimately became the constitutional right to a jury trial. The plaintiff's claim had no connection to COVID care, and separating the immunity from its asserted emergency justification clarified what was really at stake. For me, that reflects how state courts routinely engage in practical, context-driven constitutional analysis. The article is valuable because it helps formalize that analytical process and prompts us to examine our assumptions about federalism and the role of state courts.

My state's history of our state constitutional system is deeply shaped by a longstanding skepticism of elites. Historically, my state was relatively poor, and that distrust has influenced not only the judiciary but the structure of state government more broadly. For many years, for example, governors served only two-year terms, reflecting concerns about the concentration of political power.

My state has also repeatedly rewritten its constitution. We are currently operating under a constitution from the late twentieth century, after having discarded several prior versions. That ongoing process of constitutional revision reflects the persistent tensions of populism that you referenced earlier. In my view, those tensions are rooted in a deep-seated wariness of both federal authority and perceived political elites, a dynamic that continues to shape our state's constitutional development today.

I would say that my state reflects that same dynamic quite strongly. What we see in many state constitutions is a deliberate fragmentation of power. In my state, executive authority is distributed across numerous independently elected offices. This ensures that no single official, even within the executive branch, can consolidate authority. That skepticism toward concentrated power is also evident in our constitutional history.

I come from a state with a strong tradition of direct democracy. Perhaps I appreciate it even more now that I enjoy the job security of an appellate justice, but I genuinely believe our electorate is well-informed.

The panel raised an interesting concern about whether judges or policymakers sometimes underestimate the public's capacity to understand complex issues. Yet when one reads my state's ballot propositions—along with the official arguments for and against—it is clear that voters are presented with substantial and thoughtful information. Even as an educated voter, I may not grasp every detail of every measure, but I generally understand what I am voting on, and I believe most voters feel the same way.

This reflects a fundamental difference in democratic philosophy. The framers of the federal Constitution were deeply skeptical of direct popular participation. In contrast, my state has chosen to place trust in its voters. That trust is reinforced by our efforts to maximize participation through vote-by-mail, expanded polling access, and extended voting hours. Together, these features reflect how deeply my state values and embraces its initiative and constitutional amendment processes.

The Challenges of Direct Democracy Processes

Having worked in our state legislature for several sessions, I bring that experience to this discussion from my state, a state with a strong tradition of progressive governance and robust direct democracy. In my view, the challenge lies in how the initiative and referendum process can be used strategically, and at times weaponized. Measures referred by the legislature are often crafted deliberately—an observation echoed by one of the panelists—to mobilize particular segments of the electorate. In that sense, controversial proposals may be placed on the ballot not solely for policy reasons but to influence electoral outcomes by driving turnout among specific voters.

What has been particularly notable, however, is that this strategy has at times backfired. My state's voters are discerning. I have seen them repeatedly reject measures intended to entrench or politicize the judiciary, including a significant proposal just this past year, which was defeated by a wide margin. While this pattern speaks to the electorate's judgment, it also highlights the inherent difficulty of balancing popular accountability with the protection of judicial independence.

In my state, there are no legislative limits on what can be placed on the ballot. Essentially, anyone with sufficient financial resources to gather the required signatures can qualify an initiative.

—It's really just a matter of meeting the signature requirement.

—In practice, this means that, with enough funding, virtually any proposal can make it onto the ballot.

The downside, however, is that these measures are not always carefully drafted. Unlike legislation prepared by professional lawmakers and legal staff, many initiatives are written by individuals without legal training. As a result, judges often face the difficult task of interpreting initiatives that are, at times, nearly impenetrable in their language or intent. This creates a degree of uncertainty and complexity in understanding what the measure is actually trying to accomplish.

Because the signature threshold is relatively low, the system tends to favor well-funded interests. Companies and organizations with substantial resources can hire professional signature-gathering firms, which have become a significant industry in my state. This means that financial capacity—not necessarily popular support—can determine which measures appear on the ballot. For example, companies have in the past invested heavily to qualify initiatives for the ballot. While voters ultimately rejected some of these measures, the companies were nonetheless able to secure their place on the ballot simply because they had the resources to do so.

It's fascinating because the framers of the U.S. Constitution anticipated that they would be amended significantly and frequently, and that just hasn't happened. And I think state constitutions have gone exactly the opposite way. I mean, we have a constitutional convention every thirty or forty years, it seems. And so we're constantly rewriting our constitution. And of course, we have the same problem that you do. So much can be accomplished now by initiative. And we have many really messy initiatives on the ballot in 2026, and if they all pass, the state's going to be ungovernable.

We devote substantial attention to the mechanics of the vote itself, including extensive litigation over ballot titles and initiative descriptions—particularly because, as is often noted, a "yes" vote can sometimes function

as a "no," and vice versa. This is especially true in the budget and initiative context, where voters are frequently presented with only a single sentence summarizing a complex measure.

By way of example, we once considered a proposition that would have reduced the required approval threshold for school bonds from 66.6% to 55%. The attorney general's initial description stated that change directly, and the proposition failed. When the measure was later returned to the ballot—this time as a legislative amendment—the revised explanation instead emphasized that it preserved the existing 66.6% requirement, and the measure passed. The substance had not changed, but the framing had.

This illustrates a central reality of direct democracy: Voters often engage with only a very limited amount of information. While broader public debate may occur, what many voters ultimately see—and rely upon—is the title itself. And that title alone can determine whether a measure succeeds or fails.

Regarding judicial review and direct democracy, in my state, we're seeing significant pushback on citizen-initiated measures. For example, the legislature passed a law requiring that any proposed initiative be written at an eighth-grade reading level. In practice, if the measure aligns with political leadership, it passes that test; if not, it often doesn't.

There are also cases where voters approve an initiative, only for the legislature to pass contradictory legislation that is upheld by the state supreme court, or for the governor to sign a bill effectively overturning the people's measure. Across many states, citizens attempting to use direct democracy are encountering repeated obstacles—efforts are being blocked or undermined, and some are giving up. This is the pattern we are seeing in my state.

Why State Constitutions Are Less Respected Than the U.S. Constitution

At a basic level, our civics education often teaches that the U.S. Supreme Court is supreme and the states are simply subject to it. That isn't misinformation, but it is incomplete—and that misunderstanding remains widespread. One solution is greater community engagement: educating citizens about the nuances of federalism and the distinct responsibilities of state and federal governments.

In many ways, we're our own worst enemies. When state constitutions mirror federal language, we reflexively defer to U.S. Supreme Court interpretations. It's easy but unnecessary. If we choose to make state rights merely coextensive with federal rights, we should at least explain why.

—I agree completely. My state's constitution is materially different from the federal Constitution, yet we repeatedly claim to interpret it in lockstep with federal law—even though, today, the opposite is often true.

One reason state constitutions may receive less respect is that they're easier to amend. That flexibility can make them seem less stable and more responsive to short-term political pressures.

At the founding, people identified first with their states and only secondarily as Americans. Today, legally speaking, that's reversed. When people think about rights like free speech, they immediately invoke the First Amendment. Mobility and cultural change have shifted how we understand constitutional authority.

Historically, state constitutions likely mattered more to people than they do now. That shift may simply reflect the era we're living in—and it's unclear whether it will persist.

Do any of your states require instruction in state history or constitutional law? In my state, students pledge allegiance to both the U.S. and state constitutions, and state history is mandatory in high school and public universities. I'm curious whether other states do something similar.

—We require a government course in the senior year of high school, but I think that's too late. Through our work with the judicial branch, we're encouraging schools to introduce civics much earlier, including at the elementary level. Some schools are already doing impressive work—so much so that I've helped review award applications from elementary students—but the effort is uneven and far from universal.

—My state has long required state history and civics—at least when my children went through the system eight to ten years ago. State history was taught in eighth grade and civics in ninth, though much depended on the instructor. I had an excellent civics teacher and learned a great deal. Years later, when I taught American government at the university level, I gave a basic quiz at the start of the semester: How many U.S. Senators represent each state, how many representatives my state has, and even how many states there are. Many college freshmen and sophomores couldn't answer. That was twenty—really closer to thirty—years ago, and I suspect the problem has only grown.

—I recently saw a statistic that nearly half of American adults can't name the three branches of government.

—That decline is astonishing. My state used to require the study of both the U.S. and state constitutions in seventh and eighth grade. I recently learned that the requirement no longer exists. Civics is now folded into a general history course, with no standalone constitutional instruction required to advance to ninth grade.

—Even in law school, state constitutions often receive little attention. Because students move frequently and may not practice where they study, schools tend to emphasize national law. I went to law school in the Northeast and never learned about the state constitution. Federal law becomes the default because it's seen as universally applicable.

Legal education tends to marginalize state constitutional law. Part of that is structural—the U.S. Supreme Court sits at the top of the hierarchy, and federal law naturally draws more attention. Even judicial elections reflect that dynamic; people assume "the Supreme Court" means the U.S. Supreme Court, though few could even name its members.

As a result, training focuses on federal constitutional law. Recent developments, including the Roberts Court's skepticism toward state constitutional interpretation, have reinforced that trend. The move to a uniform bar exam has also reduced incentives to learn state-specific law. When I started, passing the bar meant mastering the law of the state where you practiced. That's no longer true.

We celebrate the U.S. Constitution as a founding document, but we rarely treat state constitutions with the same reverence. There's no state-level equivalent of *Hamilton* to revive public interest.

—State supreme courts themselves bear some responsibility. Many defer reflexively to the U.S. Supreme Court instead of leading with independent state constitutional analysis. Some courts—like those in Hawai'i and Oregon—do this well, but others begin with federal law and only add state constitutional reasoning as an afterthought, even in written opinions.

That's especially unfortunate in a period of federal retrenchment. For decades, states assumed federal rights would always provide a sufficient floor and failed to develop their own constitutional doctrines. Even when state rights mirrored federal ones, independent analysis would have created a richer, parallel jurisprudence.

In my state, we see the consequences of having tied ourselves too closely to federal law. One area where we did invest early was privacy and search-and-seizure law. That independent body of state cases now gives us tools to reason about rights without waiting on the U.S. Supreme Court.

The uniform bar exam raises a real question. When we test general legal knowledge across all fifty states, it inevitably pushes law schools to teach toward a common baseline. In practice, that baseline tends to be federal law: federal criminal procedure and federal constitutional law. Those subjects become the core curriculum, while state law is often relegated to electives you have to seek out.

I think a lot of this is cultural. It's striking when you think back to elementary school How often did anyone talk about a state constitution? We're steeped in this mythology about the founding: the Philadelphia convention, the hot weather, the federal Constitution. But I don't remember anyone ever talking about a given state's twentieth-century constitutional convention, where there were real debates about what kind of state the delegates wanted it to be. That history just isn't part of the story we tell. In a way, that omission is in our DNA.

—Interestingly, in my state, we actually had to pass a test on the state constitution to move on to high school. We had to study it.

I've been thinking about how this might change with younger generations. When I was growing up, there was a real reverence for the U.S. Constitution in schools. I'm not sure that reverence exists in the same way now. For a lot of teenagers today, the civil rights litigation that resonates most with them has played out under state law. The gay rights movement, in particular, really took shape there. My law students see firsthand how my state constitution has protected rights they care deeply about. Earlier generations looked to the federal Constitution for that protection. I think we're going to see a shift, as young people realize that some of the rights they consider fundamental aren't guaranteed federally, and they'll instead turn to their state constitutions to protect them. That's where this may start to grow.

One major problem is that many people don't distinguish between the U.S. Constitution and their state constitutions at all. There's widespread confusion about how the two systems work. People often assume that a decision interpreting the federal Constitution automatically applies to their state constitution as well. I saw this firsthand in my state after *Dobbs*. Our state supreme court was vandalized, and so was the statehouse next door. To me, that made clear how little the public understands that we have two distinct systems of constitutional law and judicial review.

Have Decisions in Your State Court Affected Federal Jurisprudence?

A good recent example involves marijuana and the Fourth Amendment. Federally, marijuana is still a controlled substance, so Supreme Court doctrine hasn't really changed. But at the state level, where marijuana is now legal in most places, courts have had to rethink what the smell of marijuana actually means. It used to be simple. Odor equaled probable cause. That no longer works. State courts have been out in front on this issue. In my

court, we took a middle position. The smell is a factor, but it is not determinative. Federal courts have started moving in that direction too, largely because they are not getting guidance from the U.S. Supreme Court.

Same-sex marriage is an obvious one. Hawai'i was an early pioneer, and Massachusetts was as well. Privacy rights are another area, especially in the tech context. California law has clearly influenced how those issues developed nationwide, long before they reached the U.S. Supreme Court. Abortion rights frameworks are another example. Questions about agency independence and administrative interpretation also come to mind. These ideas often percolate in the states first, even if we only notice them later when they reach the federal level.

One example from my state is disclosure. We adopted our disclosure rules before the U.S. Supreme Court and before the federal rules did. There are a lot of similar examples in procedural rules and evidentiary standards where ideas flow upward. They may not be high-profile cases, but they show that the Supreme Court is paying attention to what is working at the state level.

Another example is peremptory challenges. My state eliminated them entirely. Other states have taken different approaches, including revising how *Batson* challenges are handled. I actually served on the commission that considered one of those alternatives before we ultimately went in a different direction. These are experiments that other jurisdictions are watching closely, and I suspect the federal system eventually will as well, because *Batson* has real limitations. This kind of influence often goes unnoticed because it does not come from headline-grabbing cases.

Our same-sex marriage decision came out in the 2000s. I do not know whether the U.S. Supreme Court ever cited it directly, but I do think it likely had an influence.

We often focus on high-profile social issues when we talk about influencing the U.S. Supreme Court. But something that came up earlier reminds us that in our everyday work, we are constantly generating law that federal courts must apply. In diversity cases, federal judges are bound by state law, and those cases make up a large portion of the federal docket. So when we decide routine family law or property cases, that law frequently ends up being applied in federal court. It is a quieter form of influence, and not one the public tends to notice, but within our dual court system, it matters a great deal.

How Methods of Judicial Selection Affect Legal Interpretation

I have colleagues who will say, "So-and-so is up for election this year, so let's give more sensitive cases to someone else." They're thinking ahead for each other. And I do think that, in some instances, it makes judges less willing to take on cases with novel implications, especially if they don't want to be used as fodder in a campaign.

I'm not sure there's a real difference between novel interpretations and politically charged cases. Political reactions are going to happen no matter what. Most people here probably dealt with COVID-related cases, and it didn't matter how we ruled. Every time, there were angry calls and social media backlash. Ironically, I've had opinions that I thought were genuinely novel, and no one cared at all. That was actually reassuring.

As for whether elections make us more or less willing to take risks, I agree with what's been said. You're not going to win no matter what you do, so you might as well interpret the law the way you think is right. If you worry about who's going to be angry, you'll never get anything done. Especially in high-profile cases, someone is always going to be upset.

In my state, every judge is elected. I was a trial judge for eighteen years, elected every four years. Even now, it's still an elected position. My view has always been that your job is to follow the law and not worry about the politics. I figured voters would re-elect me because I did that. And if they didn't, they'd choose someone else. But not every judge sees it that way.

I've been appointed by both Republican and Democratic governors, and people often ask how that's possible. The answer is simple. I decide cases based on the law. Sometimes that favors one side, sometimes the other. If you always land on the same political side, you should do some soul-searching. Judges shouldn't be predictable by party label. Every case should be able to go either way. And when courts fail to interpret their own state constitutions independently, they dishonor both state and federal constitutional principles. Dual sovereignty only works if state courts take their own constitutions seriously, grounded in local history, values, and consequences.

I'm elected every six years, and I don't think it affects how I decide cases. When you're out campaigning, people mostly care about whether your name is familiar, whether you seem personable, and whether you speak well. Most people don't really understand what we do. I spend as much time explaining what the court of appeals actually is as I do talking about my qualifications. Half the time, I have to say, "No, I don't have a gavel." Given that reality, I just don't think elections meaningfully shape judicial decision-making.

In our state, though, we have enormous amounts of money pouring into judicial elections. Historically, those races tracked partisan outcomes until a very close supreme court race a few years ago. Since then, special interest spending has exploded. We now have the most expensive supreme court race in the country.

In that environment, judges do start thinking about which groups they might anger and whether that will result in millions of dollars being spent against them. I don't see that changing unless there's real reform around special interest spending in judicial elections.

We tend to approach this with gallows humor. On my state's court of appeals, our races aren't as targeted as supreme court races. But when special interests decide they want a particular justice gone, they'll find a case. It doesn't matter how obvious the legal outcome was.

If the case involves a sex offender, suddenly the judge is "soft on crime." The legal reasoning doesn't matter. They'll pull a case from eight years ago and build a dark-money campaign around it. Right now, most of that money is focused on supreme court races, but the tactic is always the same.

That instability is real. In my state, when a political phenom receiving a great deal of national attention ran strongly statewide, all of the appellate judges in one area were swept out. In the next cycle, the opposite happened. That kind of turnover is incredibly destabilizing for the courts.

I can't prove this, but you do see judges recuse themselves more often in politically sensitive cases, especially election-related cases, when they're up for retention. We don't have to give a reason for recusal, so it's hard to know why. But the timing often coincides with campaign cycles.

In my state, you have to give a reason for recusal. Listening to this discussion, I wonder whether it's not elections themselves, but the money involved, that influences which decisions judges make or hesitate to make.

In my state, this pressure is especially visible at the trial court level. We had a case where a wealthy individual funded a challenger who defeated an incumbent judge, allegedly because of a ruling in that individual's own case. Years later, the ethics process confirmed serious concerns, and the legislature is now closing a loophole that the episode exposed.

The flip side is that statewide races can be brutal. In my state, one individual spent millions of his own money running dark ads against an entire slate of judicial candidates. It was pure politics.

I spent several years as a defense lawyer and an equity partner at a major firm, and the Chamber of Commerce wouldn't even meet with me because I had the wrong letter next to my name. None of that had anything to do with my qualifications. That's just how political the system is.

I never assume I'll be on the bench for long, so I try to make the decisions I think are right while I'm there and let the consequences fall where they may. I don't plan for tomorrow. I focus on making the right call today.

On intermediate courts, most decisions never attract attention. Only a small fraction are likely to affect an election or retention vote. In a retention system, judges generally rule the way they think is correct. In the rare hot-button case, you may think more carefully, but you'd do that anyway.

In our state, we don't face elections, but judges are feeling pressure from the legislature. Budgets have to be approved, salaries are capped, and resources are cut. That pressure adds up.

—It's not just salaries. It's redistricting, cutting support staff, and limiting what judges are allowed to say in response to criticism. Meanwhile, legislators freely criticize the courts, often on behalf of friends who lost cases. Judges can't respond publicly, but the damage still spreads through the halls of the capitol.

—All of this chips away at the quality of the judiciary. Fewer people apply for openings. In one recent state supreme court vacancy, we had only five applicants. That should worry everyone.

—I'll add one example. In my state, the process for selecting a chief judge recently became extremely politicized. A highly qualified candidate was grilled aggressively by the Senate Judiciary Committee based on a handful of appellate decisions that were, in my view, mischaracterized. It didn't matter that he hadn't authored all of them, or that others later explained what the decisions actually meant. The narrative stuck, and he was never advanced. That experience reinforces the point that if someone wants to weaponize your decisions, they will, regardless of context.

I've seen judges delay ruling on controversial cases until after elections because they feared losing their seats. I've also seen a supreme court justice lose retention after a controversial decision. In those instances, that person's decisions were mischaracterized by millions of dollars' worth of ads. The lesson is that even doing the "right" thing doesn't protect you when money and misinformation enter the picture.

As chief judge, I assign panels two years in advance. For ballot-related cases, any judge who's on the ballot that year doesn't sit on those panels.

Most of us strive to follow the law and comply with the ethical rules. But there are judges who are influenced, whether they admit it or not.

In my state, lawyers who appear before you may also be on your campaign finance committee. Some judges ignore that completely. Others don't. You can feel it. I think the vast majority do their jobs with integrity, but pretending the pressure doesn't exist isn't realistic.

Is it Appropriate for State Courts to Attempt to Influence Federal Courts?

Sometimes on our court, when we don't like the result we're required to reach, we'll work together. The majority opinion will say, "This is what the law requires," and then someone else will write a dissent explaining why the law is wrong or outdated and should be reconsidered. We're candid about it. We know the result may be unsatisfying, but the dissent can point the way forward. It works well because we have a very collegial court.

I don't write opinions to tee them up for the U.S. Supreme Court. That's not the goal. But you do have to recognize that review can happen, and you need to write accordingly. It's about being disciplined and careful, not about trying to change the law or provoke a review. You don't want to be the one who lets something slip through because you weren't paying attention to that possibility.

On our court, there's been a real debate about whether to reach federal questions and whether we could have any influence on the Supreme Court. Frankly, I've always been skeptical of that idea.

I've always viewed our constitution as an independent document. I don't think about how our decisions might affect federal law. I think about how they affect the people of my state. If there's any influence beyond that, it's a byproduct, not a goal.

My focus is on writing the most sound and disciplined decision I can. Trying to influence federal courts doesn't strike me as a useful objective.

I've absolutely used language like that in opinions, and I've cited video recordings and other materials, knowing full well the success rate might be low. But those opinions become the foundation for the federal question that's coming. Somewhere out there is a law student or a clerk awake at three in the morning who's going to find that case and bring it to a judge. Sometimes it's worth the fight just to preserve the integrity of your court and your branch of government.

The reality is that courts are under constant pressure. If you give up authority too easily, it will be taken from you. Judges get labeled "conservative" or "liberal," and once that label sticks, you can't shake it. It affects elections and appointments, regardless of how carefully you write.

Do You Wish the U.S. Constitution Imitated Features of Your State Constitution?

Our constitution guarantees a right to education. I think that's something the federal Constitution could benefit from.

My state has an express right to privacy in our constitution, and it’s been incredibly useful.

Many states have open courts provisions, which don’t exist at the federal level. In some places, they’ve been used to strike down tort reform. Has anyone dealt with that?

This may be a pipe dream federally, but in my state, we amended our constitution by voter initiative to guarantee voting rights and create an independent redistricting commission. Gerrymandering was, in my view, our biggest problem, and we eliminated it. Unfortunately, that solution hasn’t spread to the other forty-nine states.

My state’s constitution includes a right to a clean and healthful environment. That single provision has allowed us to develop a substantial body of environmental law that’s now cited nationally. Montana has something similar, and these provisions are becoming especially important in climate litigation.

—So that gives standing to kids bringing climate cases?

—Exactly.

Our constitution also requires the state to protect trust resources like land, water, air, and Native rights. That framework is something the federal system could learn from.

We also have an independent pardons and parole board. The governor has no pardon power at all. That structure has gotten a lot of attention recently.

My state is a weak-governor state, and honestly, I wish the federal system had a weaker presidency.

An express separation of powers provision wouldn’t be a bad idea at the federal level. And I agree that an explicit right to privacy belongs there.

One thing we have is a constitutionally created ethics body overseeing the judiciary. I wish the U.S. Supreme Court had something similar. Judges shouldn’t be left to police themselves.

Points of Convergence

In the discussion groups, the moderators were asked to note areas where judges' thinking on issues raised in the Forum appeared to converge.

In what ways did the drafters of the U.S. Constitution and the drafters of state constitutions have different fears?

- Drafters of the U.S. Constitution wanted to prevent frequent amendment, whereas drafters of state constitutions did not.
- Drafters of state constitutions were more worried about elite influence than drafters of the U.S. Constitution.
- Drafters of the U.S. Constitution worried about majority rule, while drafters of state constitutions wanted to promote majority rule.
- Drafters of the U.S. Constitution were more concerned about protecting property interests.

How comfortable are you as a judge playing a role in direct democracy processes?

- Judges must be comfortable with playing this role because it's sometimes mandated by the state constitution they swore an oath to uphold.
- Judges who are popularly elected may feel more empowered to play a role in direct democracy processes.

What is the proper relationship between state constitutions and the Federal Constitution? Are there areas where you wish they imitated each other?

- State courts should not reflexively lockstep with federal courts, often because state constitutions had different provisions in them than are present in the U.S. Constitution.
- State courts can play a role in the resolution of federal cases by accepting certified questions from federal courts.
- State constitutions and the U.S. Constitution could learn from each other.
- The U.S. Constitution should have a single-subject clause requiring legislation to encompass one "subject" or "object."
- The state constitution should provide for appointment and life tenure of judges.
- Our state constitution should respect the rights of localities in a similar way that the U.S. Constitution respects the rights of states.

- State constitutions should imitate the U.S. Constitution by being more difficult to amend.
- State constitutions should imitate the U.S. Constitution by being shorter.
- Our state constitutions are unique documents and should not imitate the U.S. Constitution because they serve different purposes.
- The U.S. Constitution should have a right to public education and explicitly prohibit sex discrimination in the way many state constitutions do.

How do judicial selection methods and political structures affect judicial behavior and independence?

- Elections and polls do not—and should not—influence my decision-making as a judge.
- Judicial elections are at the back of a judge's mind when they decide cases, even as judges strive to be neutral and impartial.
- Can be difficult to reach too much into election results for the judiciary because of the nationalization of elections and wave elections that have little to do with individual candidates.
- Can be difficult to predict how voters will react to particular decisions.
- Many cases judges decide are not politically charged, and so judges don't have to consider political implications when deciding those cases.

Do State constitutions receive less respect than the U.S. Constitution? If so, why is that?

- There was widespread agreement that state constitutions receive less respect than the U.S. Constitution.
- The length of state constitutions and the fact that they are generally not taught in law school account for why they receive less respect than the U.S. Constitution.
- Many times, lawyers only bring federal issues before state court judges, which results in fewer opinions addressing state law, which results in less robust scholarship, which creates a loop where state constitutional law becomes less respected.
- State constitutions are less respected because civics at all educational levels tends to focus on the U.S. Constitution.

Appendices

FACULTY BIOGRAPHIES

Paper Authors and Speakers

Erwin Chemerinsky (Keynote Speaker) is Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. Prior to assuming this position, he was the founding dean of the University of California, Irvine School of Law, and a professor at Duke Law School, University of Southern California Law School, and DePaul Law School. He is the author of 20 books and over 200 law review articles. His most recent major book, *No Democracy Lasts Forever: How the Constitution Threatens the United States*, was published in August 2024. He frequently argues appellate cases, including in the United States Supreme Court. In 2022, he was the President of the Association of American Law Schools.

Jerry Dickinson (Paper Presenter) is Dean and Professor of Law at the University of Pittsburgh School of Law. A nationally recognized constitutional law scholar, his research focuses on constitutional politics, judicial federalism, civil liberties, and state constitutionalism. His scholarship has been published in law reviews and journals at Yale, NYU, Penn, Georgetown, Duke, Ohio State, Washington & Lee, and William & Mary. His forthcoming book, *The Bottom-Up Constitution: States and the Evolution of American Constitutional Law*, explores the critical role of state courts, legislatures, and constitutions in shaping federal constitutional doctrine.

Chief Justice Patricia Guerrero (Welcome Speaker) first joined the California Supreme Court as an associate justice in March 2022, making her the first Latina on the state's high court. In December 2017, her appointment was confirmed as an associate justice on the Fourth District Court of Appeal, Division One in San Diego. From 2013 to 2017, she served as a judge on the Superior Court of San Diego County and was the supervising judge of its Family Law Division in 2017. Prior to her appointment to the bench, Chief Justice Guerrero worked for fifteen years in private practice as an associate and equity partner, handling complex environmental and commercial litigation matters, and criminal and civil government enforcement cases. She also served as an assistant U.S. attorney at the U.S. Attorney's Office, Southern District of California, from 2002 to 2003. During her legal career, Chief Justice Guerrero served as a member of the Advisory Board of the Immigration Justice Project, which promotes due process and access to justice at all levels of the immigration and appellate court system. She has also assisted clients on a pro bono basis in immigration matters, including asylum applications and protecting vulnerable families by litigating compliance with fair housing laws. While a justice on the Fourth District Court of Appeal, Chief Justice Guerrero was chair of the State Bar's Blue Ribbon Commission on the Future of the Bar Exam and chair of the Judicial Council of California's Advisory Committee on Criminal Jury Instructions.

Jonathan Marshfield (Paper Presenter) teaches at the University of Florida Levin College of Law. He is a leading expert in state constitutional law, theory, and history. His research has been published in the University of Pennsylvania Law Review, Northwestern University Law Review, Duke Law Journal, and Michigan Law Review, among others. His state constitutional law research has been cited by various state high courts, including the New York Court of Appeals and the New Jersey Supreme Court. His research into constitutional change has been cited by leading scholars in law reviews, textbooks, and academic journals. He is a co-author of a forthcoming casebook on state constitutional law to be published with West Academic. Professor Marshfield has also served as a consultant to foreign officials regarding issues of constitutional revision, and he has advised public policy groups regarding voter awareness and ballot issues. Professor Marshfield has also taught at the University of Nebraska College of Law, where he twice won the Professor of the Year award, and at the University of Arkansas School of Law. He practiced commercial litigation with Latham & Watkins LLP and Saul Ewing LLP and clerked for Judge Robert B. Kugler, United States District Judge for the District of New Jersey, and Chief Justice James R. Zazzali, New Jersey Supreme Court.

Judge Jacqueline H. Nguyen (Keynote Speaker) was confirmed to the United States Court of Appeals for the Ninth Circuit on May 7, 2012. She received her commission on May 14, 2012, becoming the first Asian American woman to serve on a federal court of appeals. Prior to her confirmation to the Ninth Circuit, Judge Nguyen was a district judge on the United States District Court for the Central District of California. She also served previously as a trial judge on the Los Angeles County Superior Court from 2002 to 2009. Prior to taking the bench, Judge Nguyen spent seven years as an Assistant United States Attorney in the U.S. Attorney's Office in Los Angeles, where she was also a Deputy Chief in charge of training new AUSAs. Judge Nguyen began her legal career in private practice. Judge Nguyen received her A.B. from Occidental College in 1987 and earned her J.D. from UCLA Law School in 1991. Judge Nguyen has long been actively engaged in the legal community. As a lawyer, she served on various boards including the Women Lawyers' Association of Los Angeles County, the Southern California Chinese Lawyers' Association, and the Japanese American Bar Association. She co-founded and served as the President of the Asian Pacific American Bar Association from 1999 to 2000. As a judge, she continues to be engaged in a number of organizations, including the ABA's Appellate Judges Conference, the Appellate Judges Education Institute, the American Law Institute, and the Federal Judges Association. She also serves on the Judicial Conference Advisory Committee on Criminal Rules, the Judicial Council for the Ninth Circuit, and a number of committees, including the Ninth Circuit Standing Committee on Federal Public Defenders and the Ninth Circuit Criminal Rules Committee.

Peggy Wedgworth (Forum Moderator) is a Senior Partner and chair of the Antitrust Practice Group at Milberg Coleman Bryson Phillips Grossman, PLLC in New York. She began her career in the Brooklyn District Attorney's office and has litigated numerous antitrust, securities, commodities, and whistleblower matters on behalf of injured businesses, investors, and consumers. She currently represents a nationwide class of plaintiff car dealerships alleging antitrust violations concerning dealerships' data management systems; consumer class in the Google Play antitrust litigation; tractor owner class in the John Deere Tractor antitrust litigation; businesses in the Puerto Rico Rebar antitrust litigation; and consumer class in the Hard Disk Drive antitrust litigation. She has also successfully tried numerous cases, including a tobacco case in

the *Engle* litigation. She is currently the NCJI President and is a member of the Committee to Support the Antitrust Laws (COSAL), the New York State Bar Association's Antitrust Committee, and the American Association for Justice. She holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama School of Law.

Panelists

Elizabeth Cabraser is a founding partner of Lieff Cabraser Heimann & Bernstein, LLP, a plaintiffs' litigation firm with offices in San Francisco, New York, Nashville, and Munich. As an expert in complex civil litigation, Elizabeth has served as court-appointed lead, co-lead, or class counsel in scores of federal multi-district and state coordinated proceedings. These cases include multi-state Tobacco, the Exxon Valdez disaster, Breast Implants, Fen-Phen (Diet Drugs), Vioxx, Toyota sudden acceleration, the Volkswagen "Clean Diesel" and Fiat Chrysler Ecodiesel Emissions MDLs, numerous securities/investment fraud cases, and Holocaust litigation. Today, she serves in court-appointed leadership positions in several of the nation's highest profile civil cases, including serving as a Co-Lead Counsel in the Camp Lejeune Water Litigation. In January 2018, she was appointed to the Plaintiffs' Executive Committee and Settlement Negotiating Committee in the National Prescription Opiates MDL and serves as Plaintiffs' Lead Counsel in the McKinsey & Co. National Prescription Opiate MDL. Elizabeth received a J.D. from the University of California, Berkeley, School of Law (Berkeley Law), Berkeley, California, and an A.B. from the University of California, Berkeley, California. She currently teaches Aggregate Litigation as a lecturer at Yale Law School.

Justice Maria Elena Cruz serves on the Arizona Supreme Court. Prior to her appointment, she served for nearly eight years as a Judge on the Arizona Court of Appeals. On that court, she presided over appeals in every area of the law, including complex commercial litigation, criminal, family, juvenile, tax, unemployment, and other administrative law matters. Her service as an appellate judge was preceded by her time as the Presiding Judge of Superior Court in Yuma County. While she served in that capacity, administering the business of the courts county-wide, Justice Cruz presided over serious criminal cases, Drug Court, and Restitution Court, a victim restitution program she had established in her county and presided over as judge pro tem until her appointment to the Arizona Supreme Court. During her term as a superior court judge, Justice Cruz also presided over juvenile, family, civil, and criminal matters. Justice Cruz earned a Juris Doctorate and her Bachelor of Arts from the University of Arizona. After clerking at the Pima County Attorney's Office, she began her practice as a prosecutor in Yuma County. Later, Justice Cruz practiced in criminal defense, eventually venturing into solo practice, and served as judge pro tem for the Cocopah Indian Tribe. In 2008, Justice Cruz became the first woman and first Latinx elected Superior Court Judge in Yuma County, and in 2025, she became the first Afro-Latina appointed to the Arizona Supreme Court.

Justice Todd Eddins is an Associate Justice of the Hawai‘i Supreme Court. Justice Eddins graduated from the College of William & Mary and the William S. Richardson School of Law, where he was executive editor of the University of Hawai‘i Law Review. Justice Eddins teaches state constitutional law at Hawai‘i's law school. Justice Eddins served as a law clerk to Justice Yoshimi Hayashi of the Hawai‘i Supreme Court. He then worked as a public defender for over ten years. In private practice, he concentrated on criminal and civil litigation, representing defendants in some of Hawai`i's most high-profile cases and plaintiffs in complex

product liability cases. In 2017, Governor David Ige appointed Eddins to O'ahu's First Circuit Court. In three years, Eddins presided over eighty-five jury trials. In 2020, Governor Ige nominated Eddins to the Hawaiʻi Supreme Court. The Hawaiʻi Senate unanimously confirmed him, and in December 2020, Justice Eddins joined the five-member Hawaiʻi Supreme Court. Justice Eddins serves on several commissions, including the Hawaiʻi Access to Justice Commission and the Hawaiʻi Supreme Court Commission on Professionalism. He also serves on the Hawaiʻi Supreme Court's Judicial Education committee and the Hawaiʻi Supreme Court's Board of Bar Examiners committee.

Steve Hirsch is a partner in the Complex Appellate Litigation Group (CALG). Over a forty-year career, Steve has successfully briefed and argued cases spanning a vast range of legal fields. His clients have included major corporations such as Google, Intel, Genentech, Qualcomm, Coinbase, Lyft, Electronic Arts, and AT&T, as well as prominent law firms and individuals in civil and criminal cases. Legal-writing expert Bryan Garner named him one of four "especially outstanding" appellate brief-writers in the nation. Before joining CALG, Steve worked for decades at Keker, Van Nest & Peters LLP in San Francisco, where he was the only partner devoted primarily to appeals. He has taught appellate advocacy and legal writing at the Yale, Stanford, and Berkeley Law Schools. He maintains an active pro bono practice with leading pro-democracy organizations, often representing renowned legal scholars; and he is President of the Board of California Lawyers for the Arts. Steve obtained his Juris Doctor from Yale Law School.

R. Jeffrey Lowe is a partner with Kightlinger & Gray, LLP, in New Albany, Indiana, and Louisville, Kentucky. He is the chair of the firm's Employment and Civil Rights practice group. He regularly defends governmental entities and their employees in cases involving constitutional and state law torts throughout Indiana and Kentucky. His practice focuses on the defense of governmental entities and their employees on issues ranging from constitutional torts to zoning matters to employment issues, as well as state law claims made against his governmental clients. He regularly presents to his clients on the constitutional implications surrounding their actions. He also regularly defends professional liability, general liability, premises liability, transportation, and other matters. Jeff is the current President of DRI, having previously served on the DRI Board of Directors, and was elected to DRI's Executive Committee as Secretary/Treasurer in 2021. He has served in various roles within the DRI Civil Rights and Governmental Tort Liability Section, ultimately serving as its Chair. He is also a member of the Federation of Defense and Corporate Counsel, serves on the Kentucky Defense Counsel Board of Directors, and formerly served on the Defense Trial Counsel of Indiana Board of Directors. Jeff served as a member of the DTCI contingent of the joint Indiana Trial Lawyers Association/Defense Trial Counsel of Indiana Commission on the Resumption of Jury Trials in Indiana post-Covid.

Lori Rifkin Lori Rifkin is the Litigation Director at Impact Fund, a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve social justice. Lori has more than two decades of experience successfully litigating impact civil rights cases as an attorney in the public and private sectors, including at the trial and appellate levels in federal and state courts. Lori has litigated landmark cases in the areas of LGBTQ rights, the rights of incarcerated people, public benefits, and the school-to-prison pipeline, among others. Prior to joining the Impact Fund as Litigation Director in 2024, Lori ran Rifkin Law Office, a civil rights practice based in Oakland, California. She was previously a partner of the civil

rights law firm Hadsell Stormer Renick & Dai LLP, a Senior Trial Attorney for the Civil Rights Division of the United States Department of Justice (DOJ), a staff attorney at the American Civil Liberties Union, and an associate at the civil rights law firm Rosen, Bien, Galvan & Grunfeld, LLP. She graduated from New York University School of Law and received her undergraduate degree from Harvard College.

Miriam Seifter is the Richard E. Johnson Bascom Professor of Law and H.I. Romnes Fellow at the University of Wisconsin Law School, and Co-Director of the State Democracy Research Initiative. Her research addresses questions of state and federal public law, with a focus on challenges affecting democracy at the state level. She also teaches courses in Administrative Law, Property Law, and State and Local Government Law. Professor Seifter is the co-author of a new casebook, State Constitutional Law: Cases and Principles, published by Foundation Press. Professor Seifter's other recent publications appear in the Harvard Law Review, the Columbia Law Review, the Michigan Law Review, and the NYU Law Review, among others. In 2024, Seifter received the Ruth Bader Ginsburg Scholar Award from the American Constitution Society. Professor Seifter received a B.A. magna cum laude from Yale University, an M.Sc. with distinction from Oxford University, and a J.D. magna cum laude from Harvard Law School. After law school, she served as a law clerk for Chief Judge Merrick Garland on the D.C. Circuit and for Justice Ruth Bader Ginsburg at the Supreme Court of the United States.

Quinn Yeargain is an Associate Professor of Law and the 1855 Professor of the Law of Democracy at the Michigan State University College of Law, and teaches courses in constitutional and criminal law. Prior to joining the faculty at Michigan State, Professor Yeargain taught at the Widener University Commonwealth Law School in Harrisburg, Pennsylvania. He graduated from the Emory University School of Law and subsequently clerked on the United States Court of Appeals for the Eleventh Circuit for Judge Lanier Anderson. Professor Yeargain's scholarship is organized around the relationship between democracy and legal developments. His research focuses specifically on institutional changes in state constitutions through amendments, the use of democracy to expand and contract state constitutional rights and liberties, and the effect of democracy on the operation of the carceral state. Professor Yeargain is a co-author of State Constitutions: Institutions, Powers, and Rights, a state constitutional law casebook soon to be published by West Academic Publishing, and of the tenth edition of State and Local Government in a Federal System, a state and local government law casebook forthcoming with Carolina Academic Press.

Discussion Group Moderators

Jennifer Bennett is a principal at Gupta Wessler PLLC, where she heads the firm's San Francisco office and focuses on cutting-edge public interest and plaintiffs-side appellate litigation. Her practice covers a wide range of issues, including civil rights, consumer protection, constitutional law, worker rights, and government transparency. Jennifer regularly litigates before the U.S. Supreme Court, including recently arguing and winning two landmark victories on behalf of workers challenging forced arbitration in *Saxon v. Southwest* (2022) and *New Prime Inc. v. Oliveira* (2019). Her victory in *New Prime* was the first case in over a decade in which the Supreme Court ruled in favor of the party challenging arbitration. Jennifer also regularly handles appeals in both state and federal court on behalf of workers and consumers. She frequently represents jour-

nalists, media organizations, and nonprofits challenging government secrecy. And she regularly represents plaintiffs in civil rights cases involving difficult or novel legal issues. She earned her J.D. degree from Yale Law School.

David Berger is a partner at Gibbs Mura LLP in Oakland, California. He represents consumers in class action and mass arbitration matters with a special emphasis on data breach, privacy, and financial services litigation. David has represented data breach and privacy victims in the largest and most complex data security and privacy cases throughout the country, obtaining several billion dollars in settlements against entities including Equifax, Anthem, AT&T, T-Mobile, CapitalOne, and MGM. David earned his J.D. from Northwestern University School of Law and clerked in the Northern District of California.

Gary M. DiMuzio is a shareholder in the Asbestos Department at Simmons Hanly Conroy in New York City. He joined the firm in 2019, bringing twenty-five years of experience helping victims of mesothelioma and other environmental and workplace hazards. Gary has been litigating mesothelioma cases since 1998, and also representing plaintiffs in cases involving lung cancer, leukemia, liver cancer, silicosis, plant explosions, and environmental contamination. Gary received a B.M. in Classical Guitar Performance from Texas A&M University in 1986 and obtained his J.D. degree from the University of Houston Law Center in 1992. He undertook environmental public health studies at the University of Texas School of Public Health concurrently with attending law school. He also worked on environmental issues with public officials responsible for pollution control.

Misty Farris is Partner and an appellate attorney with Dean Omar Branham & Shirley in Dallas. She has spent more than twenty-five years litigating asbestos cases for plaintiffs. She has also worked as a teacher, as a minister, and at a home for the developmentally and physically disabled. Ms. Farris received her B.A. from the University of Houston and her J.D. from the University of Texas School of Law. She also holds an M.Div. degree, summa cum laude, from the Southern Methodist University Perkins School of Theology. She is a Fellow of the National Civil Justice Institute, and a member of the American Association for Justice, the Texas Trial Lawyers Association, and Public Justice (of which she was a Trial Lawyer of the Year in 2006).

Caragh Glenn Fay is managing partner at Fay Law Group in Maryland. She has over a decade of legal experience and is admitted to practice in Maryland and the District of Columbia. Her practice spans all key areas of personal injury law, including general negligence, medical malpractice, and terrorism. She is a graduate of the University of the District of Columbia David A. Clarke School of Law and received her undergraduate degree in Business Management and Legal Studies from the University of Maryland.

Parker Hutchinson works in the New Orleans office of Gibbs Mura LLP representing plaintiffs in class actions and other complex litigation. He has extensive practice in mass torts, particularly in law and briefing roles in the federal multidistrict litigations *In re 3M Combat Arms Earplug Products Liability Litigation*; *In re Taxotere (Docetaxel) Products Liability Litigation*; and *In re Fosamax Products Liability Litigation*. In his federal appellate advocacy, he achieved an expansion of the definition of "adverse employment action" under Title VII in an issue of first impression. He has prevailed in several appeals on behalf of Plaintiffs in Louisiana courts. Parker is a 2009 graduate of Columbia Law School, where he focused on public law and

was a leader at the Columbia Journal of European Law. During law school, he served as a judicial extern to the Honorable Stanwood Duval, Jr. of the U.S. District Court for the Eastern District of Louisiana. Before law school, Parker worked as a congressional staffer, a musician, and a writer. He earned his Bachelor of Arts in Communication, cum laude, from Tulane University in 2004.

Lucy Inman, a partner in Milberg's Raleigh, NC, office, concentrates her practice in appeals and dispositive trial and arbitration proceedings on behalf of consumers, including consumer class actions. She also serves as an arbitrator in commercial disputes. From 2015 through 2022, Judge Inman served on the North Carolina Court of Appeals. From 2010 through 2014, Judge Inman served as a Superior Court judge in North Carolina. Before joining the bench, Judge Inman practiced complex civil litigation in California and North Carolina. Judge Inman serves on the board of the Council of Appellate Lawyers within the American Bar Association's Judicial Division. She has presented continuing education programs for judges and attorneys on topics including writing, professional ethics, trial and appellate practice, and the connection between self-care and a healthy work environment. Judge Inman is a graduate of NC State University and The University of North Carolina School of Law at Chapel Hill.

Julie Braman Kane is a twenty-five-year partner at Coral Gables-based Colson Hicks Eidson where she has practiced law since 1993. Ms. Kane's litigation practice emphasizes representation of plaintiffs in products liability, personal injury, class action and business tort litigation. She is admitted to practice across Florida's state and federal courts and the United States Supreme Court. She serves or has served as Court-appointed lead or liaison counsel as well as on leadership committees in various mass and class litigations. She is a past president of the American Association for Justice and of the Attorneys Information Exchange Group. Ms. Kane graduated with honors from both the University of Miami (1990) and from the University of Miami School of Law (1993).

Mike Kelly is a shareholder at Walkup, Melodia, Kelly & Schoenberger in San Francisco. His forty-year law practice focuses on wrongful death, personal injury, products liability, pesticides, wildfire injury, medical devices, and trucking safety. He has been appointed by the Chief Justice of the California Supreme Court to membership on the statewide CACI jury instructions task force for nearly twenty years. He has presented more than 200 invited lectures, tutorials, seminars, and advocacy demonstrations across the United States, Asia, South America, the United Kingdom, and Eastern Europe. He is a founding executive board member of Trial School, a not-for-profit skills training organization that teaches trial techniques to lawyers who represent injured victims. He is a graduate of UC Law San Francisco, where he teaches trial advocacy.

Rayna Kessler is a partner in the New York City office of Robins Kaplan LLP and Deputy Chair of the National Mass Tort Group. She specializes in navigating complex civil and multivenue litigation, including products liability, medical malpractice, along with pharmaceutical and medical devices. With a reputation built on pioneering work in mass tort litigation, she is often at the forefront of emerging legal battles, such as the Benicar multidistrict litigation. She is also widely recognized for her advocacy on behalf of survivors of child sex abuse against large institutions, including the Catholic Church and the Jehovah's Witnesses. In recent milestones, Rayna was appointed as MDL Liaison Counsel for Exactech's knee, hip, and ankle replacement device litigation, which is currently pending in the Eastern District of New York. Rayna currently serves as a board member for Public Justice and a founding board member for Collective Liberty.

Michelle Kranz is a native of Springfield, Ohio. She is a 1993 graduate of the University of Toledo College of Law and a 1990 cum laude graduate of Miami University. She joined the firm immediately upon graduation from law school and has been a partner since 1998. She focuses her practice in the areas of national pharmaceutical and product liability mass torts and personal injury. Over her career, she has been appointed to numerous MDL leadership teams and most recently was appointed to the Plaintiff's Executive Committee involving the East Palestine train derailment. Michelle serves on the Board of Trustees of the National Civil Justice Institute, and is Immediate Past President of the Ohio State Bar Association. She also remains an active member of the Toledo Bar Association and is a Sustaining Fellow of the Toledo Bar Foundation. Michelle served as the President of the Toledo Bar Association from 2015-2016. She is a member of the Toledo Bar Association, the Ohio State Bar Association, the Ohio State Bar Foundation, the American Association for Justice, and the Ohio Association for Justice.

Shelby Leighton Shelby Leighton is a senior staff attorney with Public Justice's Access to Justice Project. She litigates high-impact appeals with the goal of making the civil court system a fair, equitable, and effective tool for those with less power to win just outcomes and hold those with more power accountable, including cases involving civil rights, access to courts, and consumer protection. Before coming to Public Justice, Shelby represented workers, consumers, and other plaintiffs in cases involving civil rights, employee discrimination, challenging forced arbitration and class action waivers, and human rights class actions. She also clerked for Judge Kermit Lipez of the U.S. Court of Appeals for the First Circuit and Justice Jeffrey Hjelm of the Maine Supreme Judicial Court. Shelby graduated magna cum laude from Georgetown Law and received her undergraduate degree from Claremont McKenna College in International Relations and Psychology.

Roger L. Mandel is a business litigation and class-action attorney at the Mandell Law Group in Dallas-Ft. Worth, where he is chair of the firm's class action practice. He has successfully represented consumers and small businesses in class actions for almost thirty-five years. He has tried numerous cases, including one of only two class action cases known to have been tried to a jury in Texas state court. He is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization and has briefed and argued appeals in the majority of the federal courts of appeals and the Texas Supreme Court. He received his B.B.A. (with High Honors) and his J.D. (with Honors) degrees from the University of Texas at Austin. Roger currently sits on the Board of Directors of the Public Justice Foundation, where he is a new member of the Executive Committee, and the Dallas Trial Lawyers Association, where he is a past president. He is a Fellow of the National Civil Justice Institute, the Texas Bar Foundation, and the Dallas Bar Association Foundation. He is also a member of the American Association of Justice, where he served as a Co-Chair of the Class Action Litigation Group, and the Texas Trial Lawyers Association, where he formerly served on the board.

Alyson McAllister is a partner in the law firm Sykes McAllister Law Offices. She handles all types of civil litigation and mainly represents Plaintiffs. She serves on the Boards of Governors for both the Utah Association for Justice and the American Association for Justice. During her twenty-plus years of practice, she has tried many cases in both federal and state court and has also argued several civil rights cases to the 10th Circuit Court of Appeals. She is married to Jared McAllister, and they live in Davis County with their son, James.

Gerson Smoger of Smoger and Associates, P.C. is past president of the National Civil Justice Institute, while also currently serving on the boards of Public Citizen, Public Justice (as a past president), the Civil Justice Research Initiative, the Human Rights Center at U.C. Berkeley, the advisory board of Physicians for Human Rights, and as a Commissioner for the International AIDS Society-Lancet Commission on Health and Human Rights. In the past, he has served for many years on the American Association for Justice (AAJ) Board of Governors, as Chair of its Legal Affairs Committee and as Chair of its Amicus Curiae Committee. As a plaintiff attorney, Dr. Smoger has tried cases and argued appeals throughout the United States. Dr. Smoger is co-sponsor of the Hogan/Smoger Access to Justice essay contest under the auspices of Public Citizen. He earned his B.A. from Lycoming College (summa cum laude), Ph.D. from the University of Pennsylvania (with distinction), J.D. from Berkeley Law, and is a member of the bars of Texas and California.

Molly H. Wolfe is with Fay Law Group in Maryland, where she helps those who are injured find reprieve for their injuries. Her civil practice includes personal injury, medical malpractice and wrongful death; she also handles cases involving criminal defense, family law, and general practice. Prior to practicing law, she clerked for Judge Maurice Ross of the D.C. Superior Court. She graduated cum laude from the University of the District of Columbia David A. Clarke School of Law and magna cum laude from the University of Texas at Arlington.

Corrie Yackulic has practiced law in Seattle, Washington since 1986, representing people and communities with injury claims against product manufacturers, polluters, rideshare companies, drivers and others. In addition to her practice in Seattle, she is Of Counsel to Sher Edling LLP, based in San Francisco, where she is part of the team representing public entities across the United States suing fossil fuel companies for damages due to climate change. Corrie is a Fellow of the American College of Trial Lawyers and the National Civil Justice Institute. Raised in the Pacific Northwest, Corrie is a graduate of Harvard Law School.

Genevieve Zimmerman is a partner at the Minnesota law firm of Meshbesher & Spence. She serves as MDL Court appointed lead counsel for plaintiffs in several large MDLs dealing with dangerous orthopedic devices. Genevieve has tried high-profile products liability and medical malpractice cases in state court and as lead trial counsel for multiple MDL bellwether trials. She has also demonstrated a passion for pro bono service throughout her career, representing a range of clients from domestic violence victims to students seeking to vindicate their constitutional rights to obtaining a 2019 jury verdict in favor of a father whose son was murdered at Sandy Hook in defamation cases against conspiracy theorists who published a book *Nobody Died at Sandy Hook* which denied his son ever existed. Genevieve is a member of the Local Rules Advisory Committee for the District of Minnesota and is the past President of the Minnesota Association for Justice. She is a past member of the Board of Governors for the American Association for Justice. Genevieve received her B.A. from Macalester College and her J.D. from Hamline University School of Law.

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Hon. Thomas D. Winokur, 1st District Court of Appeal

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Hon. G. Helen Whitener, Supreme Court

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Hon. Susan Crawford, Supreme Court
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U.S COURT OF APPEALS FOR THE NINTH CIRCUIT

Hon. Jacqueline Nguyen

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About the National Civil Justice Institute

NCJI is dedicated to the cause of promoting access to civil justice through its programs and publications, which give a balanced view of issues affecting the U.S. civil justice system. Since 1956, the Institute has offered programs which promote open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury.

Annual Forum for State Appellate Court Judges—Since 1992, NCJI's annual Judges Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Lauded by attending judges as "one of the best seminars available to jurists in the country," the Forum is unique in its mission to educate state judiciaries on the vital role of the U.S. civil justice system, and state courts in particular, in protecting citizens' rights

Academic Symposia—The Institute holds periodic Academic Symposia in conjunction with law schools to introduce new empirical research supportive of the civil justice system. Recent symposia include Tensions in Daubert (American 2024); The Future of Substantive Due Process: What Are the Stakes? (SMU 2023); The Internet and the Law: Legal Challenges in the New Digital Age (Hastings 2021); Class Actions, Mass Torts and MDLs: The Next 50 Years (Lewis & Clark 2019); The Jury Trial and Remedy Guarantees (Oregon Law Review 2017); The Demise of the Grand Bargain (Rutgers, Northeastern 2016); and The "War" on the Civil Justice System (Emory 2015).

Appellate Advocacy Award—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, environmental justice, and access to civil justice.

Civil Justice Scholarship Award—This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

Judicial Webinar Series—Cosponsored with the Brennan Center for Justice, this programming for state court judges addresses timely and impactful topics facing the judges who handle the vast majority of litigation in America.

NCJI Papers—NCJI has an expansive digital library of research resulting from its programs. NCJI Fellows, judges, courts, and academics receive complimentary copies of NCJI's publications.

Alliance with Academics—The Institute has developed strong relationships within the legal academic community. Currently, 90 Academic Fellows keep NCJI abreast of emerging legal trends.

NCJI Fellows—Attorneys who care about preserving the civil justice system are invited to join NCJI's important dialogue with judges and legal academics by becoming an NCJI Fellow. We offer several affordable, tax-deductible membership levels, with monthly options available.

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Papers of the National Civil Justice Institute

Reports of Forums for State Appellate Court Judges

2025 • JUDICIAL INTERPRETATION AND PRECEDENT: THE VITAL ROLE OF STATE COURTS

Jonathan Marshfield, University of Florida Levin College of Law, *Popular Accountability and State Constitutional Law*

Gerald Dickinson, University of Pittsburgh School of Law, *The Bottom-Up Constitution: States and the Evolution of American Constitutional Law*

2024 • ARTIFICIAL INTELLIGENCE AND THE COURTS

Discussions & papers: AI in the Courtroom: A Primer; AI Trends, Regulations, and Litigation; Judicial Economy in the Age of AI; AI and Evidence: What Should Judges Look For?; AI, Judges, and Legal Ethics; Deep Think: The Future of AI in the Law

2023 • EXPERT TESTIMONY: JUDGES, SCIENCE, AND TRIAL BY JURY

Michael Saks, Arizona State University, *Expert Evidence: Evolution of Rules and Practices*

Anne Bloom, UC Berkeley School of Law, *Judicial Gatekeeping, Expert Testimony, and the Future of American Courts*

2022 • CIVIL JUSTICE IN AMERICA: RESPONSIBILITY TO THE PUBLIC

Stephan Landsman, DePaul College of Law, Civil Justice and Accountability: The Challenge of Grave Corporate Misconduct

Stephen Daniels, American Bar Foundation, *The Rule of Law is Fragile: The Importance of Legitimacy and Acces*s

2021 • JURIES, VOIR DIRE, *BATSON*, AND BEYOND: ACHIEVING FAIRNESS IN CIVIL JURY TRIALS

Valerie P. Hans, Cornell Law School, *Challenges to Achieving Fairness in Civil Jury Selection*

Shari Seidman Diamond, Northwestern Pritzker School of Law, *Judicial Rulemaking for Jury Trial Fairness*

2020 • DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

Dustin B. Benham, Texas Tech University School of Law, *Foundational and Contemporary Court Secrecy Issue*s

Sergio J. Campos, University of Miami School of Law, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?*

2019 • AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

D. Theodore Rave, University of Houston Law Center, *Federal Trends Affecting Aggregate Litigation in the State Courts*

Myriam Gilles, Cardozo Law School, Yeshiva University, *Rethinking Multijurisdictional Coordination of Complex Mass Torts*

2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*

Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*

Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discover*y

Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*

Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*.

2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After* Concepcion

2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, Pleading, *Access to Justice, and the Distribution of Power*

2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of* Minnesota v. White

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY

Joseph Sanders, University of Houston Law Center, Daubert, Frye, *and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate:* Daubert's *Impact on the State Courts*

2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"
Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES
Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY
Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS
Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY
Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM
Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

Law Reviews from Academic Symposia

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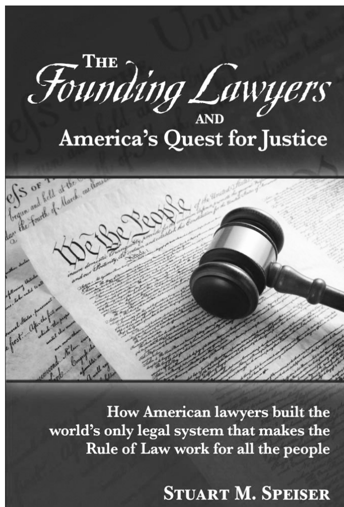

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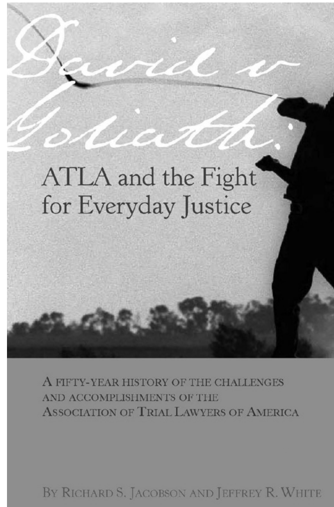

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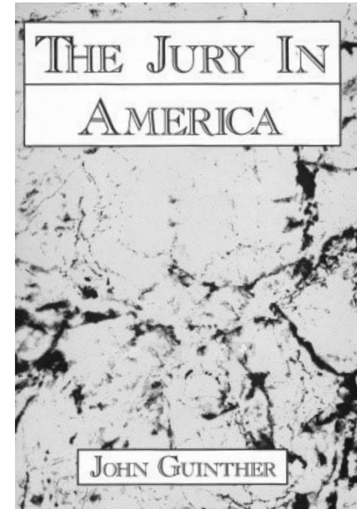

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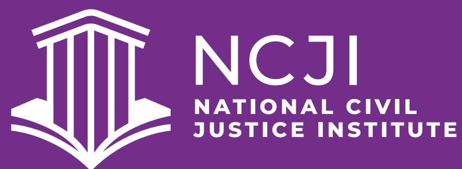

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