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SYMPOSIUM

INTRODUCTORY REMARKS: THE PROMISE AND LIMITS OF STATE CONSTITUTIONS

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Good morning. It's my honor to welcome so many judges, scholars, lawyers, community members, and students to this second day of the Symposium on the Promise and Limits of State Constitutions.

I welcome you as a member of the Board of the Brennan Center, which is co-sponsoring this event and working to save American democracy with informed analysis and strategic advocacy.[1]

I welcome you as a faculty member at this great law school. New York University has long supported the work of state courts through the Institute of Judicial Administration[2] and the more recently established Center on Civil Justice.[3] And while legal education overall

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[1] *See* BRENNAN CTR. FOR JUST., https://www.brennancenter.org [https://perma.cc/F67N-NSGJ] ("The Brennan Center for Justice at NYU Law works to build an America that is democratic, just, and free.").

[2] The Institute of Judicial Administration was founded in 1952. It is "dedicated to the judiciary and continues today as a leader in judicial education." INST. JUD. ADMIN., https://www.law.nyu.edu/centers/judicial [https://perma.cc/4RLR-JLLE].

[3] The Center on Civil Justice at NYU School of Law was founded in 2014. It is "dedicated to the U.S. civil justice system and the continued fulfillment of its purpose." CTR. ON CIVIL JUST., N.Y. UNIV. SCH. OF L., https://www.law.nyu.edu/centers/civiljustice [https://perma.cc/79CJ-NJZZ].

has overlooked the importance of state constitutions,[4] NYU has offered not one but two courses on this topic, taught by judicial greats Judge Albert M. Rosenblatt of the New York Court of Appeals[5]—happily, with us today as a panelist—and Judge Jeffrey S. Sutton of the United States Court of Appeals for the Sixth Circuit,[6] whose work yesterday's panelists repeatedly mentioned.[7]

I welcome you as a scholar who has written and continues to write about state courts and state constitutions.[8] Indeed, in three weeks, I'll be in Baton Rouge at a conference celebrating the fiftieth anniversary of the Louisiana state constitution,[9] which traces to a colonial history

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4 *See* Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 RUTGERS U. L. REV. 1141, 1142 (2015) ("While generations of scholars have lavished attention on the work of the U.S. Supreme Court, the exercise of judicial review by the state courts has gone mostly unexamined."); *see also* Jeffrey S. Sutton, Speech, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166 (2009) ("[S]tate constitutional law remains an underdeveloped area of the law . . . [and] it ought to be taught and studied more consistently in American law schools.").

5 The Honorable Albert M. Rosenblatt was a Judge of the New York Court of Appeals from 1999 until 2006, when he retired from the bench. Judge Rosenblatt currently is a Judicial Fellow at NYU School of Law, where he teaches the State Courts and Appellate Advocacy Seminar. *Albert M. Rosenblatt*, N.Y. UNIV. SCH. OF L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.courses&personid=28917 [https://perma.cc/FS8E-44C6]. Judge Rosenblatt is the author of numerous books and articles about state courts and state constitutions. *See, e.g.*, ALBERT M. ROSENBLATT, STATE CONSTITUTIONAL LAW: RIGHTS & PROTECTIONS (2024); ALBERT M. ROSENBLATT, THE EIGHT: THE LEMMON SLAVE CASE AND THE FIGHT FOR FREEDOM (2023).

6 The Honorable Jeffrey S. Sutton has served on the United States Court of Appeals for the Sixth Circuit since 2003 and was appointed chief judge in 2021. *The Hon. Jeffrey S. Sutton*, AM. L. INST., https://www.ali.org/members/member/287895 [https://perma.cc/G5MH-TAXT]. In Fall 2020, he taught the State Constitutional Law Seminar at NYU School of Law. *State Constitutional Law Seminar*, N.Y. UNIV. SCH. OF L., https://its.law.nyu.edu/courses/description.cfm?id=27510 [https://perma.cc/EZ2P-SZWP].

7 Works cited included both of Judge Sutton's recent books: JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) and JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

8 A partial list of the author's writings is included in ROSENBLATT, STATE CONSTITUTIONAL LAW: RIGHTS & PROTECTIONS, *supra* note 5, at § 11.04[3] (citing Helen Hershkoff, *The Private Life of Public Rights: State Constitutions and the Common Law*, 88 N.Y.U. L. REV. 1 (2013); Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALBANY L. REV. 553 (2006); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7 (1993); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) [hereinafter *Positive Rights*]; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999). *See also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

9 The Louisiana Law Review Volume 84 Symposium, "Louisiana's Constitution at 50: The Past, Present, and Future of Louisiana's Fundamental Law," was held in the McKernan Auditorium at the Paul M. Hebert Law Center on March 1, 2024. *See* Helen Hershkoff & Adam Littlestone-Luria, *The Louisiana Constitution and the Courts of Westminster: Standing*

that is rooted in the civil and not the common law.[10] And here at home, I applaud the *New York University Law Review* for supporting state constitutional scholarship by co-sponsoring this event and publishing the articles previewed at this Symposium.

I welcome you as a teacher—I see a number of my students and former students here, including Yidi Wu and Kate Evans, and I am optimistic and inspired that they will use law to protect democratic values of fair process and equal justice.

And I welcome you as a lawyer who, back in the 1980s and 1990s, worked in the trenches with a small number of advocates at The Legal Aid Society and then at the ACLU, looking to state constitutions to protect rights no longer available or, indeed, never available under the federal Constitution—rights that included quality, desegregated public schooling[11] and adequate shelter for the unhoused.[12]

As advocates we knew that our legal focus had to be broader than that of the federal Constitution. That view was rooted not only in the particulars of the political moment,[13] but also in an understanding of the federated nature of the American legal system. As Donald Lutz wrote in 1988, the U.S. Constitution is "incomplete without the state constitutions."[14] And, as advocates, we also knew that state court litigation, like all litigation, could not hope to be transformational unless allied with communities that were organized and mobilized to do political struggle.[15] Indeed, I'd like to give a shoutout to the Sheff

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and the Civil Law Heritage, 85 La. L. Rev. (forthcoming 2024) (manuscript on file with the authors).

10 John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 S.L.Q. 1 (1916), *reprinted in* 90 Tul. L. Rev. 529 (2016) (describing the history and sources of Louisiana law, particularly Roman and civil law).

11 Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996). For disclosure, the author was for some years part of the litigation team in this case.

12 Thrower v. Perales, 523 N.Y.S.2d 933 (Sup. Ct. 1987). For disclosure, the author was part of the litigation team in this case.

13 *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 Tex. L. Rev. 215, 218 (2019) ("Liberals have not had a working majority on the Supreme Court since 1969. For that reason, and although there are exceptions, the long-term development of constitutional doctrine and the use of judicial review . . . has tended to reflect and promote conservative values more than liberal ones.").

14 Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 Annals Am. Acad. Pol. & Soc. Sci. 23, 30 (1988); *see also* Whittington, *supra* note 4, at 1142 ("The state constitutions provide essential background for fleshing out the political system that the U.S. Constitution helped to establish.").

15 *See, e.g.*, Michael W. McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and Its Applications*, 11 Stud. L. Pol. & Soc'y 225 (1991) (noting that while litigation alone often fails to drive social change, it can play an important role as part of a larger social movement).

Movement, a coalition of parents, students, educators, and community members working then, and still working, to ensure access to quality, integrated education for every child in Hartford, Connecticut.[16]

Back then, state constitutional advocacy was an uphill battle, and somewhat lonely.[17] On a personal note, I thank Professor Robert Williams, one of yesterday's panelists,[18] for always taking my calls. At the time, Bob was a rare cheerleader among academics.[19] More typically, the academic community criticized the advocacy community's turn to state courts as a lawyer's move that lacked legitimacy—disparaging state constitutional claims as reactive and opportunistic.[20]

Admittedly, Justice William J. Brennan, Jr.'s clarion call to state courts, set out in his 1977 Meiklejohn Lecture, *State Constitutions and the Protection of Individual Rights*,[21] coincided with the end of the Warren Court and the start of the Burger Court's dismantlement of civil rights and civil liberties.[22] But tying the Justice's invocation of state constitutions only to that federal constitutional crisis would be

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[16] SHEFF MOVEMENT, https://www.sheffmovement.org [https://perma.cc/BH8G-ZVFM]. I am happy to acknowledge that Alex Knopp, the plaintiffs' representative in *Sheff v. O'Neill*, attended this Symposium.

[17] The work was lonely but not only because it focused on state courts and state constitutional advocacy. *See, e.g.*, Crystal Nix, *The New Social Reformers*, N.Y. TIMES MAG. (Oct. 26, 1986), https://www.nytimes.com/1986/10/26/magazine/the-new-social-reformers.html [https://perma.cc/SW3K-QGKX] (describing how public interest legal work does "not get the same respect or have the same allure as corporate work").

[18] *Event: The Promise and Limits of State Constitutions*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/events/promise-and-limits-state-constitutions [https://perma.cc/DUP4-HS7V] (indicating that Robert F. Williams, Distinguished Professor of Law Emeritus at Rutgers Law School, participated on the Judicial Federalism and the Status of State Constitutions panel).

[19] Robert F. Williams is the Distinguished Professor of Law Emeritus at Rutgers Law School and for many years served as the Director of the Center for State Constitutional Studies at Rutgers. *See Robert F. Williams*, RUTGERS L. SCH., https://law.rutgers.edu/directory/view/rfw [https://perma.cc/23AD-YLJP]. He is the author of numerous books and articles on state courts and state constitutions. *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS (2d ed. 2023); *see also* Helen Hershkoff, *Personal Recollections of Professor Robert F. Williams*, 72 RUTGERS U. L. REV. 1191, 1191 (2020) (celebrating Professor Williams on the occasion of his retirement and stating that "Bob's collegiality is exemplary").

[20] *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 804 (1992) (arguing that state constitutional discourse had not yet become sufficiently robust to constitute an independent body of law); *see also* James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 357 & n.7 (2016) ("Critics deemed Brennan's newfound interest in federalism opportunistic, and characterized his interest in state constitutions as arising from a purely instrumental desire to harness them in an ideological war that he had begun to lose at the national level.").

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

[22] *See, e.g.*, Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192 (1977) (discussing the Court's "counterassault" on constitutional rights).

shortsighted and misleading; in particular, it overlooks the important work of scholars and jurists who had pressed state constitutional claims even before his critical intervention. Indeed, Justice Brennan specifically credited the groundbreaking work of Hans Linde, who, as a professor and then as a judge in Oregon, emphasized the importance of developing an independent state constitutional jurisprudence and even argued for state law primacy.[23]

Critics of state constitutional litigation also argued that it ran counter to federalism and to principles of national supremacy.[24] Of course, the U.S. Constitution is supreme, and the states are expected to follow national constitutional law. But late twentieth-century state constitutional litigation built on a well-accepted feature of American constitutionalism: that the federal Constitution provides a floor for the enforcement of civil rights and civil liberties, leaving the states space to interpret their own constitutions—and the federal Constitution—in ways that go above that floor.[25] The illegitimacy argument eliminated the rights-protective component of federalism and reduced it instead to a line-drawing exercise concerned only with the placement of barriers and boundaries between the states and the national government—a shallow foundation that ignored the liberty-bearing reasons for dispersing power in the first place.[26] Justice Brennan knew better: federalism serves a functional goal, and it was devised as a "double source of protection" for rights and liberties.[27]

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[23] *See, e.g.*, Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970); *see also* Wayne V. McIntosh & Cynthia I. Cates, *The Power of Judicial Ideas: A Tribute to Justice Hans Linde*, 64 Alb. L. Rev. 1147 (2001); Shirley S. Abrahamson & Michael E. Ahrens, *The Legacy of Hans Linde in the Statutory and Administrative Age*, 43 Willamette L. Rev. 175 (2007); Philip P. Frickey, *Honoring Hans: On Linde, Lawmaking, and Legacies*, 43 Willamette L. Rev. 157 (2007); James L. Oakes, *Hans Linde's Constitutionalism*, 74 Or. L. Rev. 1413 (1995) (reviewing Robert F. Nagel, Intellect and Craft: The Contributions of Justice Hans Linde to American Constitutionalism (1995)). For an overview of earlier efforts to encourage discussion of state constitutions, see Robert F. Williams, Foreword, *Looking Back at the New Judicial Federalism's First Generation*, 30 Val. U. L. Rev. 1 (1996).

[24] Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denv. U. L. Rev. 85, 95 (1985) (arguing that divergence from federal constitutional precedent based on state policy disagreements "weakens the federal system" and appears "unseemly, result-oriented, and unprincipled").

[25] *See, e.g.*, Yvonne Kauger, William O. Douglas Lecture, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 Gonz. L. Rev. 1, 2 (1991) ("During his confirmation hearings as Chief Justice, William Hubbs Rehnquist remarked that he viewed the protections of the Federal Constitution as a floor rather than a ceiling . . . .").

[26] For a criticism of the line-drawing approach to federalism, see, for example, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 242 (2005).

[27] Brennan, *supra* note 21, at 503.

Justice Goodwin Liu elegantly expressed this theory of federalism in his remarks at yesterday's session.[28]

Criticisms of state constitutionalism did not end here. They went further and questioned whether state constitutions even deserved to be called constitutions,[29] characterizing them instead as laundry lists of special interest concerns—what one scholar called "little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions."[30] Admittedly, state constitutions are longer than the federal, and some include provisions that lack any federal analogue.[31] For example, many state constitutions afford detailed attention to fiscal matters[32]—taxation, appropriations, and public debt—that the federal Constitution mentions but largely commits to legislative discretion.[33] Relatedly, some state constitutions impose procedural constraints on executive and legislative action—such as "single-subject" clauses[34]—that aim to constrain elite domination and minority faction by requiring the government to be transparent in its work.[35] Yet, from the federal

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[28] *See* Goodwin H. Liu, Assoc. Just., Sup. Ct. of Cal., Remarks on Judicial Federalism and the Status of State Constitutions at the Brennan Center for Justice Symposium: The Promise and Limits of State Constitutions (Feb. 8, 2024).

[29] *See, e.g.*, James A. Gardner, Reply, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1025–26 (1993) ("Typically state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance, or to express the fundamental values or unique character of distinct polities. Lacking these qualities, state constitutions, to put it bluntly, are not 'constitutions' as we understand the term.").

[30] Ronald K.L. Collins, Commentary, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981).

[31] *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 188 (1983) ("State constitutions may contain individual constitutional rights having no analogue in the Federal Constitution.").

[32] Keith E. Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law*, 75 MD. L. REV. 383, 386 (2015) (noting that state constitutions are, "in important ways, economic documents"). For a discussion of the role of slavery in state fiscal and taxation policy, see, for example, Robin L. Einhorn, *Slavery*, 9 ENTER. & SOC'Y 491, 497, 498–99 (2008).

[33] *See* Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 271–72 (1977) (stating that the federal Constitution "has little to say about taxation and expenditures, and what it does say is neither detailed nor comprehensive" but arguing that by viewing the Constitution "as a whole, considering provisions not specifically directed to fiscal matters and taking into account the federal structure created by the Constitution, an imposing edifice of powers and limitations can be perceived").

[34] *See, e.g.*, Nancy Martorano Miller, Keith E. Hamm & Ronald D. Hedlund, *Constrained Behavior: Understanding the Entrenchment of Legislative Procedure in American State Constitutional Law*, 78 ALB. L. REV. 1459, 1463 (2014–2015) (explaining that single-subject clauses make it "very difficult for members of the legislature to enact potentially controversial legislation using procedures that could possibly mask the topic of the legislation").

[35] *See generally* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012) (discussing attempts to constrain economic elites by implementing state constitutional bars on special laws).

perch, these provisions seem not only cumbersome and onerous,[36] but also at odds with the countermajoritarian obsession that has dominated twentieth-century federal constitutional doctrine.[37] State constitutions also focus far more than the federal on democratic practice;[38] unlike the federal, they explicitly recognize the right to vote[39] and, in some states, access to public courts.[40] Even beyond these formal procedural rights, some constitutions, again unlike the federal, recognize that the material conditions of citizenship may require protections that go beyond that of common law rights to property and contract,[41] and they recognize the obligation of the state to provide for clear air,[42] for public schools,[43] and for public assistance when a person is down and out and can't work.[44] To call these provisions "trivial"[45]—a charge leveled at New York's "Forever Wild" clause that regulates the width of ski trails, reflecting the state's balancing between the goals of environmental protection and economic development[46]—is to miss the point. As Daniel J. Elazar

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36 *See* Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 B.U. L. Rev. 863, 865 (2009) (discussing state constitutional procedures that constrain legislative authority and work to bar "special privileges for interest groups").

37 The canonical discussion is that of Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–22 (1962).

38 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 861 (2021).

39 *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 101 (2014) (noting that all fifty states explicitly provide protections for the right to vote in their constitutions).

40 *See* Judith Resnik, *The Capital of and the Investments in Courts, State and Federal*, 99 N.Y.U. L. Rev. 1958, 1985–87 (2024).

41 *See, e.g.*, Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 2–3 (2013) ("Throughout the nineteenth and twentieth centuries and across the United States, activists, interest groups, and social movements championed positive rights, and built support for their inclusion in state constitutions.").

42 *See* Quinn Yeargain, *Decarbonizing Constitutions*, 41 Yale L. & Pol'y Rev. 1 (2023) (describing the role state constitutions could play in responding to climate change).

43 *See* Helen Hershkoff & Stephen Loffredo, Getting by: Economic Rights and Legal Protections for People with Low Income 429–520 (2020) (explaining the role of American constitutions in public education).

44 *See* Hershkoff, *Positive Rights*, *supra* note 8 (exploring federal court review of state constitutional welfare rights); *see also* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn St. L. Rev. 923 (2011) (discussing impact of federal jurisdictional doctrines on enforcement of state constitutional welfare rights).

45 *See* James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219, 1260 (1998) (observing that "state constitutions are notorious for including provisions that often seem trivial and unworthy of constitutional status").

46 N.Y. Const. art. XIV, § 1; *see* Gardner, *Failed Discourse*, *supra* note 20, at 819. *But see* Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More?—or Less?*, 127 Harv. L. Rev. 1419, 1429–30 (2014) (book review) (praising the existence of the "Forever Wild" guarantee

emphasized forty years ago, state constitutions build on a different set of philosophical assumptions than the federal and should be treated as a critical complement in our federated system of governance.[47]

But even if state constitutions are real constitutions, some critics said, "So what?" Given the ease of state constitutional amendment,[48] these documents were said to draw more from Mary Poppins than from James Madison: pie crust promises,[49] more fragile even than parchment promises—easily made, easily broken, hardly the stuff of immutable constitutional principle.[50] Advocates certainly recognized this peril, which went by the name of amendomania.[51] But with Article V of the federal Constitution top of mind,[52] and its attendant difficulties of formal constitutional amendment, they did not rule out the democratic

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and explaining that the ski trails amendment was added as an exception to the "Forever Wild" provision because, without it, no commercial development whatsoever would have been allowed in this part of New York).

47 Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS: J. FEDERALISM 11 (1982).

48 *See, e.g.*, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 279 (1949) (noting that, in 1949, thirty-five states had "relatively easy amending procedures" and that twenty-two of them had used their amending procedures "to enlarge greatly their constitutions"). *But see* Justin R. Long, *State Constitutions Are Slippery: A Reply to Professor Marshfield*, 51 NEW ENG. L. REV. 533, 535 (2017) (arguing that although state constitutional amendment is more frequent than federal constitutional amendment, "the Federal Constitution is *easier* to formally amend as a matter of law than state constitutions are").

49 *See* MARY POPPINS (Disney 1964) (describing a "piecrust promise—easily made, easily broken").

50 *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 857 & n.13 (2022) (listing scholars critical of the "popular responsiveness of state constitutional rights"); *see also* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011) (asking and exploring how we can trust and rely on constitutions when they are amenable to change and, as ultimately just pieces of paper, lack inherent enforcement mechanisms).

51 *See, e.g.*, John A. Dively & G. Alan Hickrod, *Update of Selected States' School Equity Funding Litigation and the "Boxscore"*, 17 J. EDUC. FIN. 352, 352 (1992) (discussing 1956 amendments to the Alabama Constitution that "altered the state's education clause so as to circumvent the Supreme Court's intent to desegregate the nation's public schools"). For disclosure, the author was part of the litigation team in a challenge to this amendment. *See also* Opinion of the Justices, 624 So.2d 107 (Ala. 1993), *aff'd in part*, *vacated in part*, *Ex parte* James, 713 So.2d 869 (Ala. 1997); Romer v. Evans, 517 U.S. 620, 623 (1996) (challenging an initiated amendment to the Colorado Constitution mandating "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation").

52 The "obduracy" of the U.S. Constitution to amendment has been the focus of a great deal of academic discussion. *Compare* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1955–61 (2003) (offering justifications for supermajority and state acquiescence requirements in the amendment process), *with* William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV. 1965, 1980–83 (2003) (arguing that the "obduracy" of the U.S. Constitution negatively impacts the country's ability to live up to the document's promises).

potential of the state amendment process, especially in states that allowed ballot initiatives directly from the people.[53]

The criticisms nevertheless continued. Indeed, the adjacent literature on the "parity" of state courts to enforce federal constitutional provisions seemed to assume their lack of parity with the federal courts,[54] or at least suggested that state court judges were not up to the task of interpreting even state constitutions because many of them lack the structural protection of lifetime tenure afforded by Article III. From this perspective, it made sense for state judges to march in lockstep with Article III courts given ballot-box pressures in states that let the voters select their judges.[55] Of course, partisan selection methods and popular elections posed a problem for judges who dared to step into the breach—they faced what Justice Otto Kaus of the California Supreme Court at the time called "the crocodile in the bathtub."[56] But the blunderbuss nature of this critique ignores that some of the greatest of the great judges were or began as state judges—think Brennan,[57] Cardozo,[58] Holmes,[59] and Traynor.[60] Indeed, in some states and on some issues, state judges have served as "jurisprudential entrepreneurs,"[61] motivating change at the federal level and producing what Judge Sutton and others have called a complicated but fruitful "dialogue" between state and federal courts.[62] But dialogue is not always protective of rights

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53 Recent scholarship has brought this possible virtue to the forefront. *See, e.g.*, Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, *supra* note 38 (arguing that, unlike the federal Constitution, state constitutions commit to democracy by enabling direct popular input).

54 *Compare* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal forums are superior sites for litigating federal constitutional issues), *with* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (responding critically to Neuborne).

55 For a discussion of the increasing politicization of judicial elections, see Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

56 Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133, 1136 (1997).

57 *See William J. Brennan, Jr.*, OYEZ, https://www.oyez.org/justices/william_j_brennan_jr [https://perma.cc/A8ZU-HRKV].

58 *See Benjamin N. Cardozo*, OYEZ, https://www.oyez.org/justices/benjamin_n_cardozo [https://perma.cc/9E6W-ENPH].

59 *See Oliver W. Holmes, Jr.*, OYEZ, https://www.oyez.org/justices/oliver_w_holmes_jr [https://perma.cc/UC2H-KNJC].

60 *See Past & Present Justices*, SUP. CT. OF CAL., https://supreme.courts.ca.gov/about-court/justices-court/past-present-justices [https://perma.cc/FQ6M-77KH].

61 *See* Hershkoff, *Positive Rights*, *supra* note 8, at 1140.

62 *See, e.g.*, Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 705 (2011) (arguing that "the development of the exclusionary rule involved a state-federal judicial partnership that continues to this day"); Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICK. L. REV. 75, 77 (2023) ("The doctrine of

and liberty; we should not ignore or erase the role of state constitutions and state courts in entrenching racial subordination and the Supreme Court's acquiescence—even partnership—in that enterprise.[63]

Yet here we are again, almost a half century since Justice Brennan delivered his 1977 Meiklejohn Lecture at the Harvard Law School, with a renewed focus on state constitutions, a restart said to be made urgent by "a stacked federal bench,"[64] the Supreme Court's embrace of originalism,[65] its refusal to redress partisan gerrymanders,[66] its decision in *Dobbs* to return the question of reproductive autonomy to the states,[67] and its newly minted approach to stare decisis[68] that puts equal protection,[69] due process,[70] and the work of the administrative

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federalization—the practice of the U.S. Supreme Court consulting state legislation or adopting state court doctrines to guide and inform federal constitutional law—is an under-addressed field of study in American constitutional law.").

63 *See, e.g.*, Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 845–51 (1982) (discussing Southern state constitutions that effectively disenfranchised Black Americans and the Supreme Court's failure to enforce the Fifteenth Amendment).

64 *See, e.g.*, Jennesa Calvo-Friedman & Lily Slater, *To Fight a Stacked Federal Bench, the ACLU Goes to the States*, ACLU (Aug. 12, 2022), https://www.aclu.org/news/civil-liberties/to-fight-a-stacked-federal-bench-the-aclu-goes-to-the-states [https://perma.cc/ZET9-8FMA] (explaining why "[s]tate courts hold promise in the face of a hostile federal judiciary"); *but see* Daniel A. Cotter, *State and Electorate Mobilization: The Most Promising Path to Justice in Modern America*, 56 UIC L. REV. 579, 583 (2023) (discussing the "recency bias" of Court critics).

65 *See, e.g.*, Thomas Wolf & Alexander Keyssar, *This Supreme Court's 'Originalism' Doesn't Have Much to Do with History*, BRENNAN CTR. FOR JUST. (Oct. 3, 2023), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-originalism-doesnt-have-much-do-history [https://perma.cc/5255-RFVP] (arguing that the originalism of the Roberts Court is devoid of context and limits the breadth of constitutional rights).

66 *See, e.g.*, Paul M. Smith, *The Supreme Court, Gerrymandering, and the Rule of Law*, AM. BAR ASS'N (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/the-supreme-court-gerrymandering-and-the-rule-of-law [https://perma.cc/S5QT-MYNM].

67 *See, e.g.*, Lara Bazelon & James Forman, *Liberals Have Lost the Supreme Court for a Generation. Their Only Hope Is To Seize State Courts and Launch a Counterrevolution*, N.Y. MAG. (July 5, 2023), https://nymag.com/intelligencer/2023/07/liberals-should-use-state-courts-to-check-the-supreme-court.html [https://perma.cc/8XJR-CRJ8] (detailing the importance of state courts in counteracting the conservative majority in the Supreme Court).

68 Devin Dwyer, *After Roe Ruling, Is 'Stare Decisis' Dead? How the Supreme Court's View of Precedent Is Evolving*, ABC NEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047 [https://perma.cc/R9T7-U72K].

69 *See* Melissa Murray, *Foreword: Making History*, 133 YALE L.J.F. 990, 1001 (2024) (observing that the Roberts Court's "disregard of equality, in tandem with the *Dobbs* majority's slavish adherence to history and tradition, offers the Court an avenue 'to silently gut or dismantle equal protection doctrine'" (quoting Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 951 (2024))).

70 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due

state in jeopardy.[71] Yet the focus of today's panels—access to courts, reproductive autonomy, and politics—certainly echoes concerns from the 1980s and 1990s. So, to borrow from that great legal thinker Yogi Berra—is this "deja vu all over again"?[72]

Hardly.

Fifty years ago, scholars talked about the new judicial federalism.[73] Today they use terms like "vigilante federalism"[74] and "brute force (anti) federalism."[75] The crocodile in the bathtub seems warm and fluffy in today's hyperpolarized, AI-generated, money-infused battleground of state judicial elections[76]—but, of course, this is true of all elections and the federal judicial process as well.[77] Moreover, state judges today face

process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."); *see also* Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates About Substantive-Procedural Due Process*, 76 SMU L. Rev. 613, 622 (2023) (discussing how *Dobbs* has unsettled "the role played by due process in legal ordering").

71 *See, e.g.*, Rachel Frazin & Zach Schonfeld, *Supreme Court Set for Pivotal Cases that Could Claw Back Federal Administrative Power*, The Hill (Jan. 14, 2024, 5:00 PM), https://thehill.com/policy/energy-environment/4405258-supreme-court-set-for-pivotal-cases-that-could-claw-back-federal-administrative-power [https://perma.cc/UDY9-XZNV].

72 *Yogi-isms*, Yogi Berra Museum & Learning Ctr., https://yogiberramuseum.org/about-yogi/yogisms [https://perma.cc/NB7W-APS5].

73 The "New Judicial Federalism" was used to describe two related but distinct trends: first, the Supreme Court's invocation of federalism as a limitation on the enforcement of rights and liberties against state actors, *see, e.g.*, Weinberg, *supra* note 22, at 1193–94 (describing judicial federalism as "requiring deferences to state administration and state adjudication that only yesterday were thought unnecessary or unwise"), and second, the emphasis on federalism as a mechanism for enforcing rights and liberties through state courts and state constitutions, *see, e.g.*, Robert F. Williams, *The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 Rutgers U. L. Rev. 949, 951 (2020) (noting the trend beginning in the 1970s of state courts recognizing more expansive rights in state constitutions than in the U.S. Constitution).

74 Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 Cornell L. Rev. 1187 (2023) (associating vigilante federalism with state enactment of laws that enable private citizen enforcement to surveil members of their own communities).

75 Kathryn Kisska Schultze, John T. Holden & Corey Ciocchetti, *Brute Force (Anti) Federalism*, 60 Am. Bus. L.J. 1 (2023) (coining the term "brute force (anti) federalism" to describe the contemporary trend, across the political aisle, of pushing the boundaries of the Founders' conception of the federalism balance).

76 *See, e.g.*, Douglas Keith, *The Politics of Judicial Elections, 2021–2022*, Brennan Ctr. for Just. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/J6XF-T6H5]; Michael Waldman, *Money Pours into State Judicial Elections*, Brennan Ctr. for Just. (Jan. 25, 2022), https://www.brennancenter.org/our-work/analysis-opinion/money-pours-state-judicial-elections [https://perma.cc/PK3A-5ADE] (noting that outside groups spent $35 million on state court elections in 2019–20). *But see* Herbert M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, 48 L. & Soc. Inquiry 371 (2023) (arguing that even many "elected" judges originally obtained their positions by appointment).

77 *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 Nw. U. L. Rev. 1869, 1871 (2008) (calling the Article III appointment process "high-stakes, explosively partisan, and often nasty").

a new battery of partisan assaults aimed at chilling their interpretive independence, especially when they step into the widening breach of federal rights retrenchment.[78] For these reasons and others, some commentators warn that the United States is in the midst of democratic decline and at a perilous crossroads in its history.[79] Yet scholars also talk about "solidarity federalism,"[80] and others view the current moment as an opportunity for states to "reclaim their proper role as primary guarantors of individual liberty for their citizens."[81]

Nevertheless, a number of factors distinguish today's turn to state courts and state constitutions from earlier interventions.

Fifty years ago the universe of state constitutional advocates was really small and regarded as liberal in outlook.[82] Today, conservatives have joined the state constitutional movement and set their sights not only on litigating in state courts but also on shaping the composition

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78 *See, e.g.*, Michael Milov-Cordoba, Douglas Keith & Alicia Bannon, *Legislative Assaults on State Courts in 2023*, Brennan Ctr. for Just. (Jan. 9, 2024), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2023 [https://perma.cc/V4ZJ-7XH7] (explaining efforts by state legislatures to affect and/or overrule state court judicial decisions and procedure); Robyn Sanders & Michael Milov-Cordoba, *Judicial Ethics Doesn't Bar Judges from Speaking Out About Diversity and Racial Injustice*, Brennan Ctr. for Just. (Sept. 20, 2023), https://www.brennancenter.org/our-work/analysis-opinion/judicial-ethics-doesnt-bar-judges-speaking-out-about-diversity-and-racial [https://perma.cc/5LMP-SKFY] (explaining political attacks on judicial ethics and standards commissions); Michael Milov-Cordoba, *Ohio Legislators Target State Judges to Thwart New Constitutional Amendment on Abortion*, Brennan Ctr. for Just. (Nov. 20, 2023), https://www.brennancenter.org/our-work/analysis-opinion/ohio-legislators-target-state-judges-thwart-new-constitutional-amendment [https://perma.cc/M3A7-5MB4]; Billy Corriher, *State Republicans Try to Remove Top Jurist for Mentioning the Existence of Racial Bias*, Slate (Aug. 30, 2023), https://slate.com/news-and-politics/2023/08/north-carolina-gop-anita-earls-ethics-case.html [https://perma.cc/XTT2-MSCY].

79 *See, e.g.*, Miriam Seifter, *Saving Democracy, State by State?*, 110 Calif. L. Rev. 2069, 2071 (2022) (discussing the risk that the United States will face a "violent, undemocratic future" (quoting Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 Calif. L. Rev. 1991, 1993 (2022))).

80 Erin F. Delaney & Ruth Mason, *Solidarity Federalism*, 98 Notre Dame L. Rev. 617 (2022) (arguing that important federalism principles arise from horizontal solidarity obligations between states in tandem with vertical state-federal relationships and state autonomy).

81 David Carrillo & Brandon V. Stracener, *State Court Takeaways from* Dobbs, State Ct. Rep. (Apr. 26, 2023), https://statecourtreport.org/our-work/analysis-opinion/state-court-takeaways-dobbs [https://perma.cc/NH4Z-Q6S7].

82 *See* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081, 1091 (1985) ("Some commentators have described the increased use of state constitutions as a ploy by liberal justices and courts to evade the more conservative approach of the Supreme Court."); *see also* Sutton, *supra* note 62, at 711 (suggesting that Justice Brennan's lecture "may have prompted state court advocates and judges to misperceive this option as designed only to be a liberal ratchet, to give just some rights but not others a second chance in the state courts").

of the state bench.[83] The playing field includes lawyers and analysts from both sides of the political aisle, including conservative think tanks and advocacy groups, attorneys general (red and not only blue), school boards, electoral commissions, and legislators of all political stripes that have enlisted a state court strategy for political and legal advantage.[84] The goals of some of these new entrants do not inevitably align with Justice Brennan's vision of a state constitutional renaissance—goals that include greater protection of property rights (for example, through disestablishment of the New Deal Settlement by eliminating the presumption of constitutionality accorded economic regulation)[85] and selective disincorporation of the Bill of Rights.[86]

Moreover, fifty years ago state courts differed from today's often improved and updated courthouses. As evidence, consider how state courts were able to pivot during the pandemic to remote proceedings because of prior investments in improved administration and technological upgrades.[87] These new resources go beyond infrastructure modernization and include administrative authority deployed to

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[83] *See* Aaron Mendelson, *How Republicans Flipped America's State Supreme Courts*, Ctr. for Pub. Integrity (July 24, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts [https://perma.cc/BN3J-S782] ("Republican politicians in eight states have transformed their state supreme courts—altering the process by which justices reach the bench, or the size of the court. The moves have pushed the courts to the right or solidified conservative control.").

[84] *See, e.g.*, Leonard G. Brown, III, *County Politicians and State Courts—Continual Friction and "Dissention"*, 95 Pa. Bar Ass'n Q. 33 (2024) (describing conflict between Pennsylvanian courts and elected county officials); Yurij Rudensky, *Status of Partisan Gerrymandering Litigation in State Courts*, State Ct. Rep. (Dec. 18, 2023), https://statecourtreport.org/our-work/analysis-opinion/status-partisan-gerrymandering-litigation-state-courts [https://perma.cc/X3NV-V7B8] (describing how voters have turned to state courts and state constitutions to challenge gerrymandered maps, including in New York, where the redistricting commission and legislature have had to redraw maps); J. Dillon Pitts, *Constitutional Law—The Powers of State Attorneys General to Determine Public Interest*, 43 U. Ark. Little Rock L. Rev. 109, 109 (2021) ("State attorneys general (AGs) are politicizing the office of the Attorney General by taking partisan positions and failing to enforce (or defend) state laws."); Derek W. Black, *The Education Power*, 110 Va. L. Rev. 341 (2024) (describing conflicts over the power to decide education policies, including among state superintendents, boards of education, legislatures, and governors).

[85] *See, e.g.*, Richard A. Epstein, *The Double-Edged Sword of State Constitutional Law*, 9 N.Y.U. J.L. & Liberty 723, 727–44 (2015) (criticizing the lack of federal judicial overview of state pension regulations).

[86] *See, e.g.*, Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. Crim. L. & Criminology 63 (1996) (arguing that state constitutions should be relied upon to protect defendants' rights rather than courts being forced to engage in state-federal "redundancy").

[87] *See, e.g.*, Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. Legis. & Pub. Pol'y 321 (2021); *see also* David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 77 DePaul L. Rev. 171 (2022) (describing post-COVID trends and empirical studies focused on the impact of those trends).

aid case disposition and protect procedural fairness. A key example concerns the area of indigent defense,[88] illustrated in New York by the path-marking work of Chief Judge Lippman in expanding access to justice.[89] But let's be clear: State courts need more funding, more equipment, and more staff to deal with dockets that are exponentially larger than the federal.[90] They especially need more resources to deal with an outsized pro se docket because parties can't afford counsel[91]—a situation so acute that scholars now talk about lawyerless courts.[92] And

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[88] *See, e.g.*, Adam B. Sopko, *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144, 159 (2023) (discussing how state court rulemaking has been used to broaden individual rights).

[89] *See* Jonathan Lippman, *A Perspective from the Judiciary on Access to Justice*, 87 FORDHAM L. REV. 155 (2019) (listing accomplishments of the access-to-justice campaign and explaining the Chief Judge's motivation for supporting it); *see also* Fern Fisher, *Moving Toward a More Perfect World: Achieving Equal Access to Justice Through a New Definition of Judicial Activism*, 17 CUNY L. REV. 285 (2014) (describing how various judges have worked to ensure access to the courtroom for unrepresented litigants).

[90] *See* Meredith R. Aska McBride, *Parity as Comparative Capacity: A New Empirics of the Parity Debate*, 90 U. CIN. L. REV. 68, 116–17 (2021) (calling on Congress and state legislators "to direct resources to state courts" and observing that "[t]he federal judiciary may well be overworked," but "that does not mean . . . that the state courts can take on more cases"); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2105 (2019) (contending that "federalization of state claims in the past forty years seems to be an important driver in the relative decline of state courts' budgets, stature, and role as common-law innovators"). As of 2019, "state courts handled 99.09% of civil and criminal cases filed in the United States." NAT'L CTR. FOR STATE CTS. & STATE JUST. INST., THE ROLE OF STATE COURTS IN OUR FEDERAL SYSTEM: AN ANALYSIS OF HOW STATE COURTS ARE CHARGED WITH IMPLEMENTING FEDERAL LAW 6 (Jan. 2022); *see also* COURT STATISTICS PROJECT, https://www.courtstatistics.org [https://perma.cc/6J2G-GA9Y] (cataloging caseload data from state courts in all fifty states).

[91] *See* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1926 (2016) ("State budgetary difficulties have resulted in the literal shutting down of courts, closed to business despite pressing needs such as domestic violence protection orders and childcare subsidies."). For variations on the problem, see, for example, Daria F. Page & Brian R. Farrell, *One Crisis or Two Problems? Disentangling Rural Access to Justice and the Rural Attorney Shortage*, 98 WASH. L. REV. 849 (2023); PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 13 (May 2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts [https://perma.cc/J7FS-BA84] (noting statistic that, in general matters, cases in which both parties have legal representation constitute less than fifty percent of state court dockets); Gregory G. Gordon, *Self-Represented Litigants and the New Normal in Family Court*, NEV. LAW., Dec. 31, 2023, at 27 ("One of the most significant changes to our court system [in Nevada] in recent years is the increasing number of self-represented litigants. The trend is alarming in family court where the percentage of contested domestic relations cases that involves at least one pro se litigant exceeds 85 percent." (emphasis in original removed)). Judge Gordon notes that "[t]here are no official statistics" available on the number of self-represented parties. *Id.* at 27 n.1.

[92] *See, e.g.*, Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022) (arguing that there are fundamental differences between the procedures of "lawyered" courts and "lawyerless" courts).

in cases in which only one party is unrepresented and defaults, the court de facto presides not over an adversary proceeding but a one-party case.[93] This trend hurts real people, but it also hurts legal development. In particular, state constitutional claims are not likely raised in cases that lack counsel or in which counsel are overwhelmed by crushing caseloads—as you heard yesterday, because of underfunding, public defender offices may not have time or resources to raise and brief state constitutional issues during a criminal trial or post-conviction proceeding.[94] Given the adversarial model, a state court is unlikely to raise a state constitutional issue sua sponte.[95] That's not to deny the value of big headline cases, affirmative cases, and so-called impact cases filed on the offense.[96] But state constitutional law also needs to develop in the defense and, as Chief Judge Judith Kaye of the New York Court of Appeals emphasized, sometimes in common law decisions that reflect state constitutional values[97]—a process that depends on a pipeline of cases in which issues are surfaced, histories are mined, records are developed, and arguments are pressed. The process needs lawyers with a "support structure" that enables meaningful adversarial development.[98] Professional and scholarly resources thus also are essential to encouraging the development of a robust state

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93 *See, e.g.*, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 Stan. L. Rev. Online 64, 68 (2023).

94 *See* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 772 (2022) ("State court judges typically, and often correctly, blame practitioners for failing to raise and develop state constitutional arguments adequately."); John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 Loy. U. Chi. L.J. 965, 988 (2013) ("My analysis of Illinois cases from 2006 through 2010 demonstrated numerous instances where the Illinois Supreme Court expressly refused to consider an independent state constitutional claim because the litigant failed to adequately raise it.").

95 *See* Anderson, *supra* note 94, at 988.

96 *See, e.g.*, Nathaniel M. Fouch, *A Document of Independent Force: Towards a Robust Ohio Constitutionalism*, 49 U. Dayton L. Rev. 1, 39 (2023) (considering whether state court judges "are more comfortable waiting for an appropriate test case to use as a vehicle for the issuance of a teaching opinion" about state constitutional doctrine); Sanford Jay Rosen & Ernest Galvan, *Surveying Systemic Reform Litigation*, L.A. Law., July/Aug. 2022, at 14.

97 *See* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 Rutgers L.J. 727 (1992) (describing a revival in state common law and its capacity for fairness and justice); Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 Stan. L. Rev. 1521 (2010) (examining whether positive rights clauses in some state constitutions can and should influence common law decisionmaking).

98 *See* Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 22 (1998) (discussing the need for a "support structure for civil rights and civil liberties litigation"); *see also* Richard S. Price, *Linde's Legacy: The Triumph of Oregon State Constitutional Law, 1970–2000*, 80 Alb. L. Rev. 1541, 1547 (2017) (discussing scholarship that has "emphasized how material resources are essential to initiating and sustaining calls for legal change").

constitutionalism, including scholarship and convenings such as this Symposium; the Brennan Center's *State Court Report*, covering state courts and state constitutional developments, is a welcome addition to the scene.[99]

What else is different? To their enormous credit, as yesterday's session shows, an increasing number of state judges are engaged in the hard work of devising interpretative methods that do not simply fall in lockstep with the federal.[100] Of course, courts can borrow and should learn from each other.[101] But it borders on the incoherent for a state judge interpreting a twentieth-century document to rely exclusively on federal originalist approaches that look to the eighteenth century.[102] And conversely, the U.S. Supreme Court has much to learn from these state court interpretative approaches and should welcome being in dialogue with state judges.[103] Consider the Massachusetts Supreme Judicial Court barring life in prison without parole for anyone under age twenty-one.[104] And consider Montana's theory of predicate rights—the idea that a right can be fundamental if it is deemed necessary to the

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[99] *Brennan Center Launches State Court Report, Website Dedicated to State Constitutions and Courts*, Brennan Ctr. for Just. (Sept. 12, 2023), https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-launches-state-court-report-website-dedicated-state [https://perma.cc/36TB-XDNM].

[100] *See, e.g.*, Bolick, *supra* note 94; The Hon. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307 (2017) (describing how state courts are independently considering the constitutional reasoning of Supreme Court opinions); Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353 (2019) (describing the role of state constitutional law in securing liberties stemming from federalism); Pierre H. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism*, 90 U. Cin. L. Rev. 1061 (2022) (describing a new era of experimentation with state constitutional law). *See generally* Kristen L. Fraser, McCleary*: Positive Rights, Separation of Powers, and Taxpayer Protections in Washington's State Constitution*, 91 Wash. L. Rev. Online 91 (2016) (describing a new perspective of state constitutional law with respect to positive rights).

[101] *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459 (2010) (providing a taxonomy of judicial borrowing).

[102] *See, e.g.*, Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and Its Independent Courts*, 40 Quinnipiac L. Rev. 501 (2022) (asserting that it is nonsensical for Connecticut courts to adopt originalist approaches used in federal cases); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2350, 2399–400 (2015) (noting the adoption of originalist principles depends on the political and legal culture of a given state).

[103] *Cf.* Dickinson, *supra* note 62, at 77 (describing "federalization" as "the practice of the U.S. Supreme Court consulting state legislation or adopting state court doctrines to guide and inform federal constitutional law").

[104] Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024); *see also* Alicia Bannon, *Massachusetts Breaks New Ground in Limiting Youth Punishments*, State Ct. Rep. (Jan. 22, 2024), https://statecourtreport.org/our-work/analysis-opinion/massachusetts-breaks-new-ground-limiting-youth-punishments [https://perma.cc/2QN7-A8RK].

exercise of an enumerated fundamental right—and its development of middle-tier scrutiny.[105]

No doubt, the state amendment process continues to hang like a sword of Damocles over the durability of state constitutional rights, and the situation is far more complex today than it was fifty years ago.[106] Indeed, the "New" New Judicial Federalism faces a host of vulnerabilities, always present in state constitutional jurisprudence, but which today may even be more perilous.[107] In the time that remains, let me raise four concerns.

The first concern draws from the basic assumption of the New Federalism, namely, the metaphor of federal law as a floor. This metaphor recurs in scholarship and decisions, and it emphasizes that state courts may ratchet up, but may not ratchet down, the content of federal constitutional rights and liberties.[108] The record, however, shows a disturbing countertrend—case reporters include state court decisions with "below-the-floor" readings of federal constitutional rights that evade Supreme Court review. The phenomenon is so pervasive as to have a name: "leaky floors."[109] A significant current example comes from the Supreme Court of North Carolina, which held that a plaintiff alleging race discrimination must prove discriminatory intent and

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105 Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1311 (Mont. 1986).

106 *See* Daniel Gordon, *Brennan's State Constitutional Era Twenty-Five Years Later—The History, the Present, and the State Constitutional Wall*, 73 Temp. L. Rev. 1031, 1034 (2000) (arguing that Brennan "overestimated the effectiveness of state constitutions in protecting individual rights" and the capacity for state constitutions to be "easily amended in response to the majority will over minority rights"); *see also* Emily Zackin & Mila Versteeg, *De-judicialization Strategies*, 133 Yale L.J.F. 228 (2023) (discussing efforts through amendment to remove labor rights, debtor rights, and abortion rights from state constitutions to avoid state court enforcement and interpretation). For disclosure, the author in 2017 opposed calling a constitutional convention in New York. *See* Helen Hershkoff, Statement in Opposition to a Constitutional Convention, Submitted to the Association of the Bar of the City of New York (Mar. 22, 2017), https://documents.nycbar.org/files/HershkoffConConStatement.pdf [https://perma.cc/V25W-7DKZ].

107 *See, e.g.*, Gordon, *supra* note 106.

108 *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 Ariz. L. Rev. 227 (2008) (arguing that understanding the federal Constitution as a floor in criminal procedure ignores the many ways in which state constitutions exist "above" and "below" that floor).

109 *See id.* at 230, 259 ("Despite the prevalence of the floor metaphor, it simply may not support the real structure of state law."); *see, e.g.*, Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 Campbell L. Rev. 101, 117 (2004) (explaining that "[i]n form and effect . . . North Carolina's test for determining whether the right to a speedy trial has been violated presents a marked departure from that articulated by the United States Supreme Court" and "[i]n the balancing process, the test weights the government's excuses more heavily and the prejudice suffered by the defendants less heavily . . . . The . . . test is therefore more rigid and less protective of criminal defendants' rights to a speedy trial than is constitutionally permitted").

disparate impact "beyond a reasonable doubt," a standard far tougher than the already tough federal standard for such claims.[110]

The second concern is in some sense the mirror image of the first—not too little Supreme Court review, but too much.[111] The state constitutional strategy generally assumes that the Supreme Court will take a hands-off approach to a state court judgment that rests on state law, a jurisdictional rule known as the independent and adequate state grounds doctrine.[112] Without getting into the weeds of federal jurisdiction, anyone who lived through *Bush v. Gore*[113] knows that the Supreme Court has many ways to review state judgments even when they seemingly are based on state law.[114]

The third concern draws from another assumption of the New Federalism—indeed, the article of faith that when the Supreme Court refuses to recognize a federal right, eliminates a federal right, or declines to enforce a federal right, it opens up interpretive space for state courts to fill the gap.[115] No doubt the Court's rights retreat pushes the question over to the states, whether to the legislature or the

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110 Holmes v. Moore, 886 S.E.2d 120, 120 (N.C. 2023); *see also* Robyn Sanders, *North Carolina Supreme Court Upholds Voter ID Law 5 Months After Striking It Down*, STATE CT. REP. (May 8, 2023), https://statecourtreport.org/our-work/analysis-opinion/north-carolina-supreme-court-upholds-voter-id-law-5-months-after-striking [https://perma.cc/JK3W-R227].

111 *See* Ronald K.L. Collins, Foreword, *The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5, 6 (1989) (discussing "the strategic use of state constitutional law in a way that expands the rights domain while insulating such state court decisions from otherwise adverse federal court review").

112 *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *Preliminary Note on the Independent and Adequate State Ground*, *in* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 497–501 (5th ed. 2003) (providing an overview of the independent and adequate state grounds doctrine); *see, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983) (analyzing jurisdiction question as dependent on whether the issue at hand rests on an adequate and independent state ground); *see also* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 82 (2002) ("Since at least the 1789 Judiciary Act, the Court has been authorized to review state-court judgments only on questions of federal law. . . . [T]he Court has . . . recognized that where a state-court judgment rests on an 'adequate and independent' state-law ground . . . the . . . Court lacks jurisdiction to review [it] . . . .").

113 531 U.S. 98 (2000).

114 *See, e.g.*, Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 510 (2002) (describing the "independent and adequate state ground doctrine" in the context of the Bush-Gore litigation); *see also* G. Alan Tarr, Espinoza *and the Misuses of State Constitutions*, 73 RUTGERS U. L. REV. 1109, 1113 (2021) (evaluating Montana justices' decision in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), based on the sufficiency of the state constitution to address the issue at hand).

115 *See* Jeffrey S. Sutton, *What Should Be National and What Should Be Local in American Judicial Review*, 2022 SUP. CT. REV. 191, 207 (2023) ("If a Court decision errs in *subtracting* matters from federal constitutional protection, that leaves more room for the states to fill in the gaps than Court decisions that err in *adding* constitutional protection.").

courthouse. But the Court's decision, whether characterized as rights resistance or rights minimalism, affects the space that is opened up for a state court's own interpretive activity. In some situations, the absence of a federal right works to undercut recognition or enforcement of such a right, even in states in which the state constitution explicitly includes the right that the Supreme Court has disclaimed. For example, it is frequently claimed that the Supreme Court's refusal to locate a right to public schooling in the Fourteenth Amendment, as it did in *San Antonio School Independent School District v. Rodriguez*,[116] opened up space for state courts to interpret state constitution education clauses.[117] The record, however, is more complex. In some states, such as Wisconsin, the Supreme Court's approach narrowed democratic options by hardwiring notions of local control into state constitutional education clauses when no such limitation existed.[118] Moreover, in those states where the constitution does not include a right of the sort that the Supreme Court has extinguished or rejected, the decision to recognize such a right—as *Dobbs* makes explicit[119]—is left to the vagaries of state law.[120]

A fourth and final concern draws from the continuing practice of lockstepping—not only to the interpretation of specific constitutional provisions, but also to the federal conception of the judicial role. Too many state courts continue to import Article III justiciability doctrine into their state constitutions even if their judicial clauses do not even refer to case or controversy.[121] As a result, those plaintiffs who cannot

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116 411 U.S. 1 (1973).

117 Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 Va. L. Rev. 1963, 1971–74 (2008) (noting language in the dissent encouraging state-level redress of education funding inequities through interpretation of state constitution provisions and pointing out that most states adopted legislation with that aim following *Rodriguez*).

118 *See* Helen Hershkoff & Nathan D. Yaffe, *Federalism and Federal Rights Minimalism: Overlooked Effects on State Court Education Litigation in Wisconsin*, 2021 Wis. L. Rev. 1011, 1035–36 (2021).

119 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. . . . We now . . . return that authority to the people and their elected representatives.").

120 *See* Marshfield, *supra* note 50, at 932 ("When the Supreme Court declines to extend a national right, it . . . leaves the issue to the ultimate control of state popular majorities . . . ."); *see also* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 Harv. L. Rev. 728, 730 (2024) (reporting that two months after the *Dobbs* decision, "Indiana passed and signed into law one of the most restrictive abortion bans in the country").

121 *See, e.g.*, Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 Rutgers U. L. Rev. 1309 (2017) (noting, with dismay, that many state courts have adopted an analog to the federal justiciability doctrine, despite the incongruity between those courts and federal doctrine, thereby locking plaintiffs asserting certain constitutional rights out of state court); *see also* Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, *supra* note 8, at 1833 (advocating that state courts do not blindly embrace federal

access federal court likewise are shut out of state court.[122] But don't be lulled into thinking that an independent state standing doctrine—allowing cases to be brought in state court that don't meet the judicially devised requirements of Article III—will save a plaintiff's victory from federal review. To the contrary, the Supreme Court's distinction between first-instance standing and appellate standing has created a jurisdictional asymmetry, at least where a losing defendant can allege a "direct injury" from an adverse state-court decree that "rests on principles of federal law."[123]

In 1986, Justice Brennan delivered his Madison Lecture, *The Bill of Rights and the States: Revival of State Constitutions as Guardians of Individual Rights*, here at NYU Law School.[124] I listened to that lecure on a big screen set up in Greenberg Lounge where we are now assembled, part of an overflow audience that I joined hurrying in from my legal aid office.[125] The Justice, through his words and presence, encouraged optimism in the transformational potential of state constitutions to achieve a diverse, inclusive, and fair democracy. Today's panels ignite a similar optimism—but with fifty years of experience, let's temper optimism with realism about the limits and even perils of this approach.[126]

Thank you, welcome, and now let's turn to our fabulous speakers.

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justiciability doctrine as their own, absent an independent examination of its comportment with state and local judicial and constitutional values).

122 *See, e.g.*, Landau, *supra* note 121, at 1320, 1329.

123 *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617–18 (1989) (holding that although the federal court would have lacked power to decide the state taxpayer suit in the first instance, defendant suffered an injury from an adverse judgment sufficient to support Article III standing on appeal to the Supreme Court); *cf.* Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 Wm. & Mary Bill Rts. J. 1155 (2018) (considering a course for no-standing plantiffs to enforce federal law in the Court).

124 William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986) (observing how state courts began taking a more expansive approach to rights protection in response to growing restrictions from the Supreme Court starting at the end of the 1960s).

125 *See* Helen Hershkoff, Commentary, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. Rev. 1517, 1554 (2000) (discussing Brennan's 1986 Madison Lecture).

126 *Cf.* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695, 1697 (2010) (acknowledging the "tremendous limits on state constitutional law as a way of advancing individual liberties and civil rights"); *see also* Seifter, *supra* note 79, at 2072 (urging that reformers enlist a state constitutional strategy because reforms "must begin wherever they are feasible—and as soon as possible").