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Primacy in Theory and Application: Lessons From a Half-Century of New Judicial Federalism

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Cover Page Footnote

Associate Justice Catherine R. Connors is a graduate of Northwestern University, College of Arts and Sciences, and its School of Law. After clerking for Chief Judge John F. Grady of the U.S. District Court, Northern District of Illinois, she became an associate, then partner, in the Maine law firm Pierce Atwood LLP, focusing on motion and appellate practice. She was appointed by Governor Mills to the Supreme Judicial Court in 2020. Connor Finch is a graduate of the College of William and Mary and University of Virginia School of Law. He currently Serves as an Assistant Attorney General for the Office of the Attorney General for the District of Columbia.

PRIMACY IN THEORY AND APPLICATION: LESSONS FROM A HALF-CENTURY OF NEW JUDICIAL FEDERALISM

Hon. Catherine R. Connors & Connor Finch

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PRIMACY IN THEORY AND APPLICATION: LESSONS FROM A HALF-CENTURY OF NEW JUDICIAL FEDERALISM

Hon. Catherine R. Connors & Connor Finch*

ABSTRACT

In his 1977 article, *State Constitutions and the Protection of Individual Rights*, Justice Brennan famously reminded jurists that our governmental system includes two constitutions applicable to each state, and New Judicial Federalism was born. Since then, state courts have applied their own Bills of Rights using different approaches with varying degrees of enthusiasm. The primacy approach, requiring state courts to consider the state constitution first, and turning to the federal constitution only if needed to resolve the case, is theoretically optimal but inconsistently followed, even in the few jurisdictions professing to adopt that approach. This Article posits that the reason the primacy approach has gained little traction is because it is the hardest approach to follow, at least in the beginning. In response, this Article proposes a non-exhaustive checklist for review of claims under state constitutions. This checklist, if repeatedly and consistently applied, provides judges and lawyers at least a partial solution to the practical difficulties that have hamstrung the development of state constitutional law for the last half-century.

INTRODUCTION

In 1977, after issuing frequent dissents, Justice Brennan urged state courts to consider their own constitutions independently rather than accept the majority view of the Burger Court as the final word on fundamental civil rights.¹ Courts and critics responded with a flurry of activity adopting, evaluating, and criticizing what has been labelled “new judicial federalism.”²

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1. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan’s article, while justly famous, should not be understood solely as a response to the conservative movement of the Supreme Court, as he discussed the concept years earlier in a 1961 lecture. See Leonore F. Carpenter & Ellie Margolis, *One Sequin at A Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 259 (2020); see also *infra* note 38 (discussing Justice Brennan’s work in drafting the 1947 New Jersey Constitution).

2. See *State v. Baldon*, 829 N.W.2d 785, 814–20 (Iowa 2013) (Appel, J., concurring); *State v. Cardenas-Alvarez*, 25 P.3d 225, 236–38 (Baca, J., concurring); see also G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997) (defining new judicial

Three major lessons can be drawn from almost a half-century of the new judicial federalism movement. First, the “primacy” approach, in which state courts begin their analysis with their own constitutions, provides the optimal methodology to implement an appropriately vigorous interpretation of state constitutions. Second, the primacy approach has neither been adopted broadly nor applied consistently because it requires hard work over a sustained period. Third, the obstacles confronted when implementing the primacy approach are not insurmountable and are worth the effort to overcome. This Article advocates a systematic, checklist review that eschews ad hoc decision-making.

This Article proceeds in four parts: (i) a short overview of the now not-so-new judicial federalism movement, its definitions, and its history; (ii) an explanation of why a robust application of state constitutional law remains important and the primacy approach optimal; (iii) identification of the practical difficulties in applying the primacy approach; and (iv) a checklist to facilitate that application.

I. NEW JUDICIAL FEDERALISM AND THE ROLE OF STATE CONSTITUTIONS IN PROTECTING CIVIL LIBERTIES

A. Definitions

Legal scholars and courts have identified at least three approaches to the interpretation of state constitutions:

- *Primacy*. This approach requires analysis and application of state constitutional provisions to come first when a party raises a constitutional issue, even if the state provision is identical in language to its federal counterpart. The court interprets the state provision independently of any construction given to the federal counterpart, and only accords weight to federal interpretations if they are deemed persuasive.³
- *Interstitial*. The court looks first to the federal constitution. If the issue is settled under that constitution, the court ends its analysis. If not, the court proceeds to analyze the question under the state constitution to determine whether there is a strong reason to deviate from the interpretation given to its federal counterpart.⁴

federalism as “the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution”).

3. See generally Hans A. Linde, *First Things First: Rediscovering the States Bill of Rights*, 9 U. BALT. L. REV. 239 (1980) [hereinafter *First Things First*]; see also *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281 (discussing application of the primacy approach in Maine); *State v. Beauchesne*, 868 A.2d 972, 975 (N.H. 2005) (“[W]e have consistently followed the ‘primacy’ approach to adjudication of constitutional issues.”); *State v. Athayde*, 2022 ME 41, ¶¶ 20–21, 277 A.3d 387 (discussing the three reasons Maine uses the primacy approach); *State v. Kennedy*, 666 P.2d 1316, 1320–21 (Or. 1983). Aside from Maine, New Hampshire, and Oregon, which have expressly adopted the primacy approach, Washington might also be deemed to fall into this category. See *Matter of Williams*, 496 P.3d 289, 296 (Wash. 2021) (“Where feasible, it is this court’s duty to resolve constitutional questions first under our own state constitution before turning to federal law.”); *State v. Coe*, 679 P.2d 353 (Wash. 1984).

4. See *State v. Kono*, 152 A.3d 1, 40 (Conn. 2016) (Zarella, J., concurring in part); *State v. Hunt*, 450 A.2d 952, 955 (N.J. 1982) (applying the New Jersey state constitution “in the spirit” announced in “The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324 (1982),” which advocated for

- *Lockstep*. The court interprets a state constitutional provision as the equivalent of its federal counterpart.⁵

Beyond these broad categories, many courts have used other labels that fall within the spectrum between primacy and lockstep, including “dual sovereignty,”⁶ “limited lockstep” or “narrow interstitial,”⁷ and piecemeal primacy.⁸ Other courts reject labels.⁹ Where a jurisdiction appears on this spectrum might only be gleaned by the reasoning the court applies in individual decisions.¹⁰ From a conceptual perspective, however, the primacy approach stands apart in that it treats state constitutions as protectors of civil rights at least equal to the federal Constitution, while both the lockstep and the interstitial approaches view the United States Constitution as the paramount protector, with state constitutions acting at most as gap-fillers or supplements.¹¹

the interstitial approach); *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (“We today specifically adopt the interstitial in preference to the primacy approach.”).

5. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L. Q. 93, 103 (2000).

6. See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1029–30 (1985) (discussing the dual sovereignty approach). Vermont might be described as falling within this category, in which both the state and federal constitutions are considered regardless of whether one provides a dispositive result. See *State v. Badger*, 450 A.2d 336, 346–47 (Vt. 1982). Because the dual sovereignty approach requires consideration of the state constitution independently of the federal constitution, it will be considered a subset of the primacy approach for the purposes of this Article.

7. The Illinois Supreme Court identified itself as lockstep, although it subsequently stated that it “embraced a narrow version of the interstitial approach” or “limited lockstep.” *People v. Caballes*, 851 N.E.2d 26, 42 (Ill. 2006).

8. Iowa appears to apply a piecemeal primacy approach, choosing to apply the primacy approach in specific settings, see *State v. Baldon*, 829 N.W.2d 785, 821–22 (Iowa 2013) (Appel, J., concurring), as may Utah, see West v. Thomson Newspapers, 872 P.2d 999, 1007 (Utah 1994) (“[D]efamation is an area particularly well suited to the primacy approach.”).

9. See *Jones v. City of Philadelphia*, 890 A.2d 1188, 1207 n.32 (Pa. Commw. Ct. 2006) (“Our Supreme Court has not applied a single methodology in evaluating state constitutional issues . . . but, instead, it’s [sic] ‘preferred approach has been to eschew such rigid categories.’”) (citations omitted) (describing the Pennsylvania court as at times combining an interstitial and dual sovereignty approach).

10. An intermediate appellate court described the Ohio approach as follows: “[T]he Ohio Supreme Court turned to a “lock-step” approach, concluding that [Ohio Const. Article I, Section 14] protects ‘the same interests and in a manner consistent with the Fourth Amendment.’ Recently, however, after testing primacy analysis, the court apparently revived its appetite for the interstitial approach.” *State v. Thierbach*, 635 N.E.2d 1276, 1279 (Ohio 1993) (citations omitted).

11. See Mark S. Coven, *The Common Law as a Guide to State Constitutional Interpretation*, 54 SUFFOLK U. L. REV. 279, 295 n.140 (2021); see also John W. Shaw, *Principled Interpretations of State Constitutional Law—Why Don’t the ‘Primacy’ States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1025–29 (1993) (comparing the modern approaches to state constitutional law); *State v. Cardenas-Alvarez*, 25 P.3d 225, 239–241 (N.M. 2001) (Baca, J., concurring in the result) (discussing the adoption of the interstitial approach in New Mexico); Stephen R. McCullough, *A Vanishing Virginia Constitution?*, 46 U. RICH. L. REV. 347, 349 (2011) (opining that the Virginia Supreme Court has interpreted most rights under the Virginia Constitution to be “co-extensive” with the U.S. Constitution, and, after doing so, stops conducting any independent analysis of such rights).

B. History

To understand which approach makes the most sense to apply in modern times, we must dive briefly into the past.

1. Phase I – 1776 to 1868: The Dominance of State Constitutions

When the United States Constitution came into force, state constitutions were the chief source of legal protection of civil liberties. The federal government had limited powers¹² and the United States Bill of Rights did not apply to state governments.¹³ The federal Bill of Rights derived from state constitutions, not vice versa.¹⁴

In 1857, the Justices of the Maine Supreme Judicial Court demonstrated their independence by rejecting the United States Supreme Court's reasoning in *Dred Scott v. Sandford*.¹⁵ *Dred Scott*, which is universally understood as one of the worst, if not the worst, decision in the history of the United States Supreme Court, held that any person of African descent whose ancestors were brought to the United States as slaves was not a citizen of the United States.¹⁶ In Maine, a state with a significant abolitionist movement,¹⁷ the legislature asked the justices of the

12. See THE FEDERALIST NO. 17 (Alexander Hamilton); see also *id.* NOS. 45, 46 (James Madison).

13. See *Barron ex rel. Tiernan v. City of Baltimore*, 32 U.S. 243, 247 (1833); *Baldon*, 829 N.W.2d at 807–10 (Appel, J., concurring) (outlining a more comprehensive overview of this history).

14. *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975).

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. “By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the [thirteen] states (and Vermont as well) had enacted Constitutions to fill in the political gap caused by the overthrow of British authority Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. Included in these Revolutionary constitutional provisions were [a]ll of the rights that were to be protected in the federal Bill of Rights. By the time of the Treaty of Paris (1783) then, the American inventory of individual rights had been virtually completed and included in the different state Constitutions whether in separate Bills of Rights or the organic texts themselves.”

Id. (emphasis added). See also Coven, *supra* note 11, at 291 n.116; Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400 (1987) [hereinafter *Dual Constitutionalism*] (stating each of the Thirteen Colonies had already adopted a constitution before the framers of the federal constitution gathered in Philadelphia).

15. Opinion of the Justices, 44 Me. 505, at *16 (1857).

16. *Dred Scott v. Sandford*, 60 U.S. 393, 403, 427 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. See, e.g., *Baker v. State*, 744 A.2d 864, 888 (Vt. 1999) (“No court was ever more decisive than the United States Supreme Court in *Dred Scott* . . . [n]or more wrong.”).

17. Maine entered the Union as a free state in 1820 as part of the Missouri Compromise, balancing the entry of Missouri as a state without restrictions on slavery. Missouri Compromise, ch. 22, 3 Stat. 545 (1820) (repealed 1954); An Act of Separation, ch. 19, 3 Stat. 544 (1820); *Missouri Compromise (1820)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/missouri-compromise#:~:text=Citation%3A%20Conference%20committee%20report%20on,1789%2D1989%3B%20National%20Archives> (last visited Dec. 6, 2022).

Supreme Judicial Court their opinions as to “whether free native born colored persons, of African descent, are recognized as ‘citizens of the United States’” under the Maine Constitution.¹⁸ All but one of the justices answered that such persons were citizens and,¹⁹ for varied reasons, rejected the United States Supreme Court’s reasoning.²⁰ Justice Appleton opined:

Each state being sovereign, and having full and uncontrolled power over the *status* of its inhabitants, the constitution of the United States having imposed no restrictions as to the color or race of those who may be citizens of a state, the people of this state, in convention assembled, formed a constitution upon principles of the purest democracy, making no distinctions and giving no preferences, but resting upon the great *idea of equality before the law*.²¹

Justice Appleton’s opinion was not only a profound statement of equality, but also reflected the understanding that each state acted as the principal protector of civil rights within its jurisdiction.²²

Before the Civil War, state constitutions mattered.

2. Phase II – 1868 to the 1970s: The Diminution of the Role of State Constitutions

The Civil War changed the relationship among the federal government, the states, and the people, unifying the several states into a single nation.²³ With the enactment of the Fourteenth Amendment, the incorporation of the Bill of Rights, and the explosion of federal regulatory oversight over daily life, the role of state constitutions as primary protectors of civil rights faded.²⁴

18. Opinion of the Justices, 44 Me. 505, at *3 (1857). Advisory opinions from the justices of the Supreme Judicial Court are required within narrow parameters under the Maine Constitution. ME. CONST. art. VI, § 3.

19. See Opinion of the Justices, 44 Me. 505, at *24–25 (1857) (opinion of Hathaway, J.) (concluding that such persons were not citizens).

20. See *id.* at *2–17 (1857) (opinion of Tenney, Rice, Cutting, May, and Goodenow, JJ.); *id.* at *26–119 (opinion of Appleton, J.); *id.* at *119–52 (opinion of Davis, J.).

21. *Id.* at *115–16 (opinion of Appleton, J.).

22. See Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 201 (1998).

23. See generally JAMES MCPHERSON, *THE WAR THAT FORGED A NATION: WHY THE CIVIL WAR STILL MATTERS* 6–7 (2015); see also Andrew Burt, *‘These United States’: How Obama’s Vocal Tic Reveals a Polarized America*, THE ATLANTIC (May 13, 2013), <https://www.theatlantic.com/politics/archive/2013/05/these-united-states-how-obamas-vocal-tic-reveals-a-polarized-america/275739/> (discussing how before the Civil War, people referred to “these United States” in the plural, but after the War, people began to refer to “the United States” in the singular).

24. For a summary of the federal courts gradually replacing the states in protecting civil rights, see *McDonald v. City of Chicago*, 561 U.S. 742, 759–766 (2010). Incorporation—the Supreme Court’s gradual determination that most of the guarantees in the U.S. Bill of Rights applied to the states through the federal Due Process Clause—proved a major factor in shifting the role of civil rights protection to federal authorities. See *State v. Kono*, 152 A.3d 1, 38–39 (Conn. 2016) (Zarella, J., concurring).

3. *Phase III – 1977 to 2018: The Launch of New Judicial Federalism—
With Mixed Results*

Action followed Justice Brennan’s exhortation in 1977 for state courts not to follow Supreme Court precedent reflexively when considering state constitutions.²⁵

An avalanche of law review articles lauded his call to action.²⁶ Articles then followed that criticized new judicial federalism, followed by criticism of that criticism.²⁷

Within the new judicial federalism movement, Maine, like Oregon and New Hampshire, embraced the primacy approach, noting that “[i]t is only when we conclude that [a party’s] claim under the state constitution fails, therefore, that we

25. Justice Brennan’s call to arms was seminal. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 11–12 (1995) [hereinafter *State Courts at the Dawn of a New Century*]. Judith Kaye, Chief Judge of the New York Court of Appeals, recalled, “I still remember the excitement those stirring words generated. Many of us had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.” *Id.* That said, state constitutionalism had never wholly died, and momentum preceding 1977 can be traced to—among other events—express reminders in Supreme Court decisions that states were free to impose greater protections based on their own constitutions. See, e.g., *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (“Of course, the States are free, pursuant to their own law, to adopt a higher standard.”); *Cooper v. California*, 386 U.S. 58, 62 (1967) (noting that the Supreme Court’s holding did “not affect the State’s power to impose higher standards on searches and seizures than required by the Federal Constitution if it [chose] to do so”); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.”) (emphasis in original). Several state courts took up the gauntlet before 1977. See, e.g., *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970) (“While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court’s interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”); *People v. Disbrow*, 545 P.2d 272, 280 (Cal. 1976) (holding that, contrary to federal rule, involuntary admissions may not be used for impeachment); *State v. Santiago*, 492 P.2d 657, 664 (Haw. 1971) (excluding prior convictions for impeachment purposes as unreasonable burden on right to testify on one’s own behalf); *State v. Collins*, 297 A.2d 620, 626–27 (Me. 1972) (adopting evidentiary protections for confessions exceeding the federal standard); *State v. Sklar*, 317 A.2d 160, 170–71 (Me. 1974) (ruling that the state constitution guarantees the right to trial by jury for petty crimes).

26. Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 7 (1996) (“Legal scholars, political scientists and historians, all eager to participate in the discussion or to join the cause, or at least the fray, warmly embraced the ‘new judicial federalism,’ ‘dual constitutionalism’ and ‘independent state constitutionalism,’ the various names by which the movement has come to be known.”); see also *State v. Baldon*, 829 N.W.2d 785, 815 nn.9, 12 (Iowa 2013) (Appel, J., concurring) (citing just some of this “voluminous literature”).

27. Compare James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that state constitutionalism fails in the face of a single national identity), with David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992) (strongly disputing Gardner’s conclusion that state constitutionalism is inherently impossible). See generally Goodwin Liu, *State Constitutionalism and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1311 (2017) [hereinafter *A Reappraisal*].

must then examine [the judgment] from a standpoint of federal constitutional law.”²⁸ Maine’s Chief Justice McKusick wrote:

The state judiciaries are entering the third century of our dual judicial system with a sturdy self-confidence accompanied by a strengthened awareness of their responsibility to interpret and enforce their state constitutions. . . . In the third century, a state court can, with independence, discharge its responsibilities to both constitutions without pursuing any external agenda, liberal or conservative. With self-confidence the state court can eschew any reactive, adversarial approach to the interpretation of state constitutional provisions paralleling federal ones.²⁹

But the task of giving effect to fifty state constitutions requires more than theory and enthusiastic commentators. The actual effect of the movement on state court decisions was limited.³⁰ Opinions as to the scope of the movement’s impact ran the gamut between the conclusion that new judicial federalism is now entrenched in the mindset of state courts, with a bright future ahead, to an assessment that the movement rightly failed.³¹ Looking at the data, results in the half century after Justice Brennan’s article might be best described as uneven.³²

28. *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984); *see also State v. Ball*, 124 N.H. 226, 232, 471 A.2d 347, 351 (1983) (“[W]e will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.”); *State v. Kennedy*, 666 P.2d 1316, 1318 (1983) (“The history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, that all questions of state law be considered and disposed of before reaching a claim that this state’s law falls short of a standard imposed by the federal constitution on all states.”).

29. Vincent L. McKusick, *Foreword* to 3 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW xi (Nat’l Ass’n of Att’ys Gen. eds., 1990).

30. *See* Hans A. Linde, *Does the “New Federalism” Have a Future?*, in 4 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 251, 252 (Nat’l Ass’n of Att’ys Gen. eds., 1991) [hereinafter *New Federalism*] (“Despite all the attention and support for the new federalism, most state courts remain largely untouched by this supposed tide.”).

31. *Compare* Mary Bonauto, *Equality and the Impossible – State Constitutions and Marriage*, 68 RUTGERS L. REV. 1481, 1532–33 (2016) (using the advancement of marriage equality through state court decisions as an example supporting the mindset that new judicial federalism is entrenched in state courts), *with* McCullough, *supra* note 11, at 351–52 (noting, as an example of the opposite view, that while Virginia has a rich constitutional history dating from the 1776 Declaration of Rights through the current 1971 Constitution, many provisions in the present Virginia Bill of Rights have been rendered relatively inconsequential by decisions pronouncing state constitutional rights to be co-extensive with federal constitutional counterparts).

32. *See* Richard S. Price, *Linde’s Legacy: The Triumph of Oregon State Constitutional Law, 1970-2000*, 80 ALB. L. REV. 1541, 1553, 1553–54 n.84 (2017); Justin Long, *Intermittent State Constitutionalism*, 34 PEP. L. REV. 41, 42–44. A study of results in Washington state, which applies a welcoming approach to state constitutional arguments, showed that in an eleven-year period after issuance of a decision encouraging such arguments, only two of twenty-one sections of the state’s Declaration of Rights with analogous federal counterparts were interpreted independently. Hugh D. Spitzer, *Which Constitution? Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187, 1210 (1998).

4. Phase IV – 2018 to the Present: A Resurgence of the Revival?

While statistical studies are lacking, the last few years appear to have seen an uptick in state courts' "willingness to independently locate rights in state constitutions."³³ Two developments likely contribute to and bode for a continued, expanding interest in advancing challenges based on state constitutions.

First, while Justice Brennan's call to arms was, in part, a reaction to a perceived erosion of constitutional rights as found by the Warren Court, an argument can be made that the Supreme Court exercised "surprising moderation" in the decades that followed.³⁴ In contrast, the Roberts Court, despite calls for moderation from the Chief Justice, might now be viewed as pursuing a more aggressive retrenchment of previous recognitions of civil rights.³⁵

Second, Judge Jeffrey S. Sutton of the Sixth Circuit Court of Appeals has become a strong and persuasive advocate for this revival. Since its publication in 2018, his easy-to-read book, *51 Imperfect Solutions*,³⁶ has been widely cited by both academics and judges, reflecting renewed interest and impact in state constitutionalism.³⁷

II. THE MERITS OF A VIGOROUS APPLICATION OF STATE CONSTITUTIONAL LAW AND USE OF THE PRIMACY APPROACH TO MEET THIS OBJECTIVE

Predicting whether the latest effort to invigorate state constitutionalism will find traction and, more importantly, determining whether it should, begins with an assessment of the criticisms lodged after the inception of the new judicial federalism movement.

33. See Carpenter & Margolis, *supra* note 1, at 269–70 (discussing recent examples of the independent interpretation of state constitutions, including the Kansas Supreme Court finding a right to an abortion under the Kansas state constitution and a Pennsylvania case invalidating a redistricting plan).

34. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24 (1992) (noting that the Supreme Court took a middle course in cases involving abortion, the Establishment Clause, Free Speech, federalism, and property rights in the 1991 term).

35. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2316–17 (2022) (Roberts, C.J., concurring in the judgment) (advocating for a more measured approach to abortion rights); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021) (discussing the probable impact of the Supreme Court's changing composition in the context of Court reform).

36. JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (Oxford Univ. Press, 2018).

37. See, e.g., *Jones v. Mississippi*, 141 S. Ct. 1307, 1323 (2021); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). Justice Kavanaugh, in these two opinions, cites to *51 Imperfect Solutions* on equal terms with Justice Brennan's article. To date, *51 Imperfect Solutions* has prompted multiple symposiums, roundtables and lectures, and has been cited in at least 176 secondary materials, 62 briefs, and 47 judicial opinions, including citation by the highest courts of at least 20 different states. See *infra* Appendix 1. Goodwin H. Liu, Associate Justice of the California Supreme Court, is also a vocal advocate of state constitutionalism. See, e.g., A Reappraisal, *supra* note 27, at 1307; see generally Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304 (2019) [hereinafter *Constitutional Structure*].

A. Politics

The chief criticism of new judicial federalism has been that it is result oriented, with a politically based, liberal agenda.³⁸ This criticism is unsurprising because Justice Brennan's 1977 article was expressly motivated by dissatisfaction with an increasingly conservative Supreme Court.³⁹ Also, a state constitutional analysis only changes outcomes when the court interprets the state constitution as more protective of civil and individual rights than its federal counterpart.

As an historical matter, however, the movement began before Justice Brennan published his famous article and authored many of the dissenting opinions he referenced.⁴⁰ Instead, the philosophical impetus for the movement can be traced to then-Professor Hans Linde's effort to revive federalism in 1970 with his article, *Without "Due Process" Unconstitutional Law in Oregon*.⁴¹ As espoused by Linde, who joined the Oregon Supreme Court in 1977, the primacy approach is devoid of political content, liberal or conservative.⁴² Both in theory and as time has shown, there is nothing intrinsically liberal or conservative in focusing on rights recognized under a state constitution.⁴³ A state constitution can provide less

38. See Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432–34 (1988) (criticizing Brennan's vision as outcome-oriented and an exercise in "judicial activism"). Maltz's criticism may itself be results-oriented, however, in that he lauds a "conservative" decision of the Oregon Supreme Court that held, under the Oregon constitution, that all "voluntary confessions" may be admitted. *Id.* at 444–46 (discussing *State v. Smith*, 301 Or. 681, 725 P.2d 894 (1986)); see also Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996) (arguing that new judicial federalism reflects "a kind of forum shopping for liberals"); Friedman, *supra* note 5, at 96 ("[C]ritics argue that expansive state constitutional interpretation of cognate provisions may reflect nothing more than disagreement with the Supreme Court's reasoning or adoption of Justice Brennan's programmatic aims, and amounts to simple result-oriented rejection of the U.S. Supreme Court's narrower interpretations of federal constitutional provisions protecting individual rights and liberties."). If one agrees that "substantive due process is an oxymoron that lacks any basis in the [federal] constitution," then a doctrine that allows state courts to protect unenumerated rights using a substantive due process framework could be viewed as suspect. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quotations omitted).

39. While a part of this position is based on the recognition of Justice Brennan as a liberal champion of civil rights, one should not forget that he also sat on the New Jersey Supreme Court for five years and participated in drafting an update of the New Jersey Constitution in 1947. See *A Reappraisal*, *supra* note 27, at 1312.

40. See generally 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) (discussing the development of state constitutionalism since he gave Justice Brennan a lecture in 1961).

41. Hans A. Linde, *Without "Due Process" Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 125–26 (1970) [hereinafter *Without Due Process*].

42. See Price, *supra* note 32, at 1558 ("Where Brennan's arguments were based heavily on the use of state Constitutions to avoid a recent conservative turn in his own colleagues, Linde's arguments turned exclusive on a powerful constitutional logic."); SUTTON, *supra* note 36, at 174–77 (explaining how the language used by Justice Brennan "may have helped to perpetuate, if not to create" the myths that new judicial federalism is political liberalism instead of a politically-neutral, first principles approach as advocated by Linde).

43. See Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421 (1996) ("[T]he continuing strength of this movement does not derive from a desire to continue, at the state level, the agenda of the Warren-Brennan Court. It derives from the aspiration of state court judges to be independent sources of law."); A. E. DICK HOWARD, *THE RENAISSANCE OF STATE CONSTITUTIONAL LAW*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW, 1, 12 (1988)

protection or greater protection than its federal counterpart.⁴⁴ In certain areas, such as privacy or free speech, even attempting to identify which conclusions fall onto which side of the political spectrum can be a fool's errand.⁴⁵

B. Get with Reality

A second criticism is that the movement ignores reality. Under this view, the Nation no longer has state-differentiated values;⁴⁶ new judicial federalism in general, and the primacy approach in particular, ignores current federal dominance.⁴⁷ If the Civil War reformed the Nation, why upset or disregard that uniformity with a patchwork of decisions based on anachronistic state constitutions?

As a threshold matter, the premise that we no longer have state-differentiated values is at least a simplification.⁴⁸ But whether or not the original concept of states' holding primary importance has waned, the conceptual genius of federalism

("Certainly it would be misleading to suppose that the independent use of state constitutions is a liberal or conservative phenomenon when the groups or individuals who may stand to benefit from the decisions vary as widely as business groups, criminal defendants, and environmentalists.").

44. See, e.g., *Welchek v. State*, 247 S.W. 524, 529 (1922) (noting that TEX. CONST. art. I, § 9 incorporates no exclusionary rule similar to that found in Fourth Amendment).

45. See James D. Heiple & Craig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1510 (1998) ("A state court can interpret its constitution to protect the economic and property rights traditionally favored by conservatives as easily as it can protect the civil rights liberties customarily championed by liberals."); *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940, 945 (1971) (striking down economic regulation on filled dairy products based on the state constitution). The Supreme Court's view on property rights announced in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005) triggered a flurry of decisions rejecting the majority's view based on the takings clauses in their state constitutions. See, e.g., *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019); *Norwood v. Horney*, 853 N.E.2d 1115, 1136–42 (2006); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 647 (2006).

46. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993) (describing the perception of the state as a defined political community as "romantic myth").

47. See, e.g., *State v. Kono*, 152 A.3d 1, 35 (Conn. 2016) (Zarella, J., concurring) (stating the primacy approach "is inconsistent with the plain reality that that federal law now dominates the field of individual constitutional rights, even in state proceedings"); see also *Davenport v. Garcia*, 834 S.W.2d 4, 40 (Tex. 1992) (Hecht, J., concurring).

48. Kahn, *supra* note 46, at 1150. One reason cited by Kahn for his position is that, given the mobility of citizens, the current values of states might have little in common with the authors of a constitution. *Id.* But the criticism that original state drafters might not share the values of current state residents can be leveled equally against non-originalist interpretations of the United States Constitution. Mobility rates are also decreasing in U.S. populations. William H. Frey, *US Population Growth Hits 80-year Low, Capping Off a Year of Demographic Stagnation*, BROOKINGS INSTITUTION (Dec. 21, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/21/us-population-growth-hits-80-year-low-capping-off-a-year-of-demographic-stagnation/> [https://perma.cc/2YRH-RF3S]. Moreover, the regional nature of the "red-blue" political divide suggests that values may differ between geographic localities, if not limned by state borders. See Gregor Aisch et al., *The Divide Between Red and Blue America Grew Even Deeper in 2016*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/interactive/2016/11/10/us/politics/red-blue-divide-grew-stronger-in-2016.html> (discussing increasing local political variation based on electoral results).

remains an integral component of our system of government.⁴⁹ The fundamental approach to government applied by the Founders was dispersal of authority, both in the checks and balances of multiple branches of government and through the “double security” of federalism.⁵⁰ Thus, while some commentators have argued that a uniform position on fundamental rights is preferable to avoid confusion or promote efficiency, this perspective gives insufficient weight to our Founders’ perception that these benefits do not trump structuring state and federal governments in a way that provides multiple guarantees of individual liberties.⁵¹

The diversity of federalism recognizes that there is often no one “right,” static answer to difficult issues regarding the scope of constitutional protections. Justice Robert Jackson famously noted that high courts “are not final because we are infallible, but we are infallible only because we are final.”⁵² Both horizontal federalism, whereby state courts look to each other for persuasive reasoning, and vertical federalism, whereby the Supreme Court looks to the reasoning of state courts, provide healthy and productive avenues for many minds to tackle difficult

49. See Friedman, *supra* note 5, at 97. As one commentator noted, “though a state court’s authority to interpret its own constitution flows most immediately from that constitution, the legitimacy of its independent interpretation of a cognate provision derives support from a value enshrined in the federal constitution.” *Id.*

50. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991). In the Federalist Papers, James Madison wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51. See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (commenting on the “genius” of the Framers in “split[ting] the atom of sovereignty”).

51. See *State v. Baldon*, 829 N.W.2d 785, 829 (Iowa 2013) (Appel, J., concurring) (“If efficiency were the constitutional goal, there would be no bicameral legislature, no separation of powers, federalism would be replaced by a unified national state, and there would, of course, be no state courts.”); see also *A Reappraisal*, *supra* note 27, at 1335 (“The Framers understood that a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy. The redundancies built into our structure of government largely serve to channel and manage conflict rather than to facilitate permanent resolution.”). A uniformity argument is also unrealistic because, given the few cases the Supreme Court reviews, it can scarcely establish a uniform rule in matters involving endlessly different iterations of factual differences. See *Baldon*, 829 N.W.2d at 825–27 (Appel, J., concurring) (arguing that uniformity is neither theoretically required nor practical). The uniformity argument also fails to the extent that the Supreme Court oscillates in its own decision-making. See *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000) (“[State] constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards.”); *Dual Constitutionalism*, *supra* note 14, at 417 (“[C]ontinuing a policy of conformity necessarily depends upon the continuation of that to which one has chosen to conform.”).

52. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

questions. The citation of state courts as laboratories of change is well known.⁵³ With the Supreme Court acting as the “lowest common denominator,”⁵⁴ state experimentation poses fewer risks affecting smaller populations, allowing for innovation.⁵⁵

While the states are small laboratories, state courts hear more cases in many areas such as family and criminal law; with this experience comes an understanding of the consequences and implications of their decisions.⁵⁶ In their daily lives, ordinary citizens engage more with their state system than with federal courts. This not only means that state courts are the more likely fora in which the population confronts a need to address the scope of their liberties,⁵⁷ but also that state courts can develop the law in certain areas based on a much higher volume of experience. This experience, developed in confronting the consequences of decisions on local populations, provides value and can contribute to a positive diversity of perspectives.⁵⁸

53. See, e.g., *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.”); see also *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

54. *Alderwood Assocs. v. Washington Env’t Council*, 635 P.2d 108, 115 (Wash. 1981) (en banc) (“The [United States Supreme] [C]ourt must . . . establish a rule which accounts for all the variations from state to state and region to region. The rule must operate acceptably in all areas of the nation and hence it invariably represents the lowest common denominator.” (citing David J. Fine et al., *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 290 (1973)).

55. See SUTTON, *supra* note 36, at 178, 207; A Reappraisal, *supra* note 27, at 1330 (“The Supreme Court may decline to enforce a constitutional right ‘to its full conceptual boundaries’ because of a concern that its interpretation would not only bind the federal government but also impose uniformity on the states. This concern has no applicability to state courts; they need not worry that their constitutional rulings will constrain the prerogatives of other jurisdictions. The value of judicial federalism may be partly understood as a function of this institutional difference.”) (footnotes omitted).

56. See *Duncan v. Louisiana*, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (“The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances.”); *Colorado v. McKnight*, 446 P.3d 397, 407 (Colo. 2019) (“Criminal law has traditionally been considered best left to the expertise of the state courts as the vast majority of criminal prosecutions take place in state, rather than federal, court.”) (citing Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1150 (1985); *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990)).

57. See *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring) (“The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people.”).

58. See A Reappraisal, *supra* note 27, at 1330. Studies are mixed as to whether the electoral accountability of many state judges makes state courts less responsive than federal courts to individual rights claims. See *id.* at 1331 (“To be sure, political accountability and the possibility of electoral backlash can induce judicial restraint. But such accountability also lessens the counter majoritarian difficulty and, perhaps counterintuitively, may aid rather than diminish the legitimacy of counter majoritarian decision-making by state courts. This, too, is an institutional difference that helps to explain the value of judicial federalism.”).

Finally, most state constitutions are more easily amended than their federal counterpart.⁵⁹ When the Supreme Court interprets the federal constitution, the Court's word is functionally final given the difficulty in the amendment process.⁶⁰ In contrast, if the people of a state disagree with an interpretation of a state constitution, they can often more easily reject the court's interpretation through the amendment process.⁶¹ Accordingly, not only are the stakes lower in terms of the number of people affected by decisions, but also the state court's view on any right is not quite as final.

Thus, federalism is not a quaint anachronism but continues to provide benefits today. Even if it were an historic relic, federalism constitutes our embedded governmental framework and its implementation is the duty of state courts.⁶² State judges swear to uphold their state constitution as well as the United States Constitution.⁶³ If one views history as including a long period of state courts' abdication of that duty with unfortunate results,⁶⁴ then state courts are simply returning to what the Founders intended.⁶⁵

59. See SUTTON, *supra* note 36, at 18, 213.

60. The most recent Supreme Court case to be superseded by constitutional amendment was *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that Congress lacked the power to lower the voting age to 18 in state and local elections). This holding was "effectively overruled" by the Twenty-Sixth Amendment. *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 612 n.51 (D.C. Cir. 1974).

61. For example, when the California Supreme Court ruled the death penalty unconstitutional under the state constitution, this ruling was overturned by a constitutional amendment. *California v. Anderson*, 493 P.2d 880 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27. When the Supreme Court issued its decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), some states amended their own constitutions. See *e.g.*, VA. CONST. art. I, § 11 (amended 2013); MICH. CONST. art. X, § 2 (amended 2006).

62. See *Delaware v. Van Arsdall*, 475 U.S. 673, 705 (1986) (Stevens, J., dissenting) (arguing that the examination of the state constitution first is "best suited to facilitating the independent role of state constitutions and state courts in our federal system").

63. See *e.g.*, ME. CONST. art. IX, § 1 ("[Every judge] shall, before entering on the discharge of the duties of that place or office, take and subscribe to the following oath or affirmation: 'I . . . do swear, that I will support the Constitution of the United States and of this State, so long as I shall continue a citizen thereof. So help me God.' [and] 'I . . . do swear that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as . . . according to the Constitution and laws of the State. So help me God'").

64. Some commentators have attributed the development of the United States Constitution as the dominant protector of civil rights to the failure of state courts to enforce their own constitutions to protect civil liberties. See Shaw, *supra* note 11, at 1023–24; Schuman, *supra* note 27, at 280 (arguing that the incorporation doctrine "resulted from the unwillingness of many state courts, particularly in the South, to use their own constitutions to protect their citizens from state overreaching"); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1018 (2003) ("[F]or a long period of time state equality guarantees lay relatively dormant, ignored by state courts or enervated by them of their potential vitality."); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 331 (2011) ("Over time, . . . the federal Constitution displaced state constitutions as the most important source of individual rights. There are many reasons for this, but certainly much of the blame must lie with the states, which trampled rights their constitutions nominally guaranteed, and with the state judges who acquiesced.").

65. Shaw, *supra* note 11, at 1026 ("[T]he primacy approach reflects a return to the 'original logic of the federal system' with the states returning to their nineteenth century role of protecting the rights of individual citizens from state action.") (citing Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984)).

C. Mush

Another complaint attacks application more than theory: the argument that new judicial federalism is not a doctrine at all because it lacks defining cohesion and is not well done in practice.⁶⁶

But whatever the merit in this argument, state constitutions must play *some* role in the analysis of civil rights. Perhaps the most telling support for this proposition is that no state court currently professes to apply a lockstep approach, nor does the Supreme Court advocate that state courts do so. Hence, the issue is not whether courts should look to their own constitutions in analyzing civil rights, but rather how they should.

The primacy approach, applied consistently, addresses all three criticisms because it is not ad hoc. The state court does not sporadically look to a state constitution only after considering an issue under the United States Constitution. Instead, the state court systematically interprets its own constitutional provisions by applying a consistent, transparent methodology.⁶⁷

In sum, (i) state constitutionalism is a necessary and useful aspect of our federalist framework and (ii) the primacy approach best achieves the benefits of state constitutionalism.⁶⁸ If one accepts these propositions, the question is obvious:

66. See Gardner, *supra* note 27, at 763 (“[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”); *id.* at 837 (“[T]he communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own.”).

67. See Price, *supra* note 32, at 1542, 1602; SUTTON *supra*, note 36 at 174–78; Dennis J. Braithwaite, *An Analysis of the “Divergence Factors”: A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 32 (2001) (arguing the primacy approach is best because an interstitial approach prevents or discourages a coherent development of the state’s law, in effect delegating to the Supreme Court the duty to interpret the state constitution); Eric B. Schnurer, *The Inadequate and Dependent “Adequate and Independent State Grounds” Doctrine*, 18 HASTINGS CONST. L.Q. 371, 374 (1991); Donna M. Nakagiri, *Developing State Constitutional Jurisprudence After Michigan v. Long: Suggestions For Opinion Writing And Systemic Change*, 1998 DET. COLL. L. MICH. ST. UNIV. L. REV. 807, 823 (observing that the primacy approach “arguably better comports with our nation’s federalist structure, reduces its own potential for rendering advisory opinions on federal questions unnecessarily, and potentially promotes judicial economy of both state and federal benches by avoiding unnecessary appeals.”). New Jersey’s Justice Pollock notes, in particular, that “[t]he primacy model is faithful to historical sequence when a state’s constitution predated the federal constitution.” *Id.* (quoting Stewart G. Pollock, *Adequate and Independent State Grounds as A Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 984 (1985)).

68. Other practical and jurisprudential reasons call for looking to state constitutions before considering the federal constitution, *i.e.*, the primacy approach. If a matter is resolved under a state constitution, for example, then it follows that no deprivation of rights has occurred under the Fourteenth Amendment—there is no federal violation. *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981) (“The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.”); see also SUTTON, *supra* note 36, at 180. Also, as a matter of prudence, state courts engage in judicial restraint before tackling an interpretation of the federal constitution. *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984) (“Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution.”) (citations omitted).

why have more state courts not adopted that approach? And, to follow up, why have adopters of the primacy approach not applied it consistently?⁶⁹ As discussed below, the reason why is simple: although the primacy approach is theoretically sound, it is also the most difficult to apply.⁷⁰

III. THE DIFFICULTIES IN APPLYING A CONSISTENT, SYSTEMATIC STATE CONSTITUTIONAL REVIEW

Independently interpreting a state constitution in a non-ad hoc manner requires real effort.⁷¹ Multiple obstacles stand in the way.

Appellate courts are busy courts. In Maine, for example, with no intermediate court, practically all adjudicatory decisions are appealable to the Supreme Judicial Court sitting in its appellate capacity as the Law Court.⁷² In jurisdictions like Maine with no intermediate court, the pool of precedential decisions on constitutional issues is typically small.⁷³ When confronted with the choice of deciding a complex issue as a question of first impression under a state constitution or applying federal decisions directly on point, the application of federal precedent is the far easier choice.⁷⁴

If a state court nevertheless accepts the challenge of examining its own constitution independently of the United States Constitution and, as a part of this

69. As to inconsistency in the application of the primacy approach, see Joshua D. Dunlap, *A Venerable Bulwark: Reaffirming the Primacy Approach to Interpreting Maine's Free Exercise Clause*, 73 ME. L. REV. 1, 13 (2021); Jamesa J. Drake, *Reviving Maine's State Constitutional Protection Against Unreasonable Searches and Seizures*, 68 ME. L. REV. 321, 325–28 (2016) (discussing the history of state constitutionalism in Maine); MARSHALL J. TINKLE, *THE MAINE STATE CONSTITUTION* 20 (G. Alan Tarr ed., 2d ed. 2013); Long, *supra* note 32, at 42–43; Shaw, *supra* note 11, at 1041–47; Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61, 62 (1988). While Maine never explicitly abandoned the primacy approach after expressing its approval of the it in 1984, neither the phrase “primacy approach” nor “primacy rule” was used in a single published opinion of the Law Court between 1986 and 2019. Citation to the approach has recently resumed. *See, e.g.*, *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281.

70. *See* TINKLE, *supra* note 69, at xix (“It is easy to pay lip service to the state constitution as the primary source of our liberties and the rock on which all state and local authority rests; it is more difficult to break old habits and take the constitutional ‘road less travelled by.’”).

71. *See* Price, *supra* note 32, at 1555–56 (“Building an independent state constitutional jurisprudence entails taking on additional costs, which deters most courts from doing so, and lawyers follow the courts’ lead.”).

72. CHARLES K. LEADBETTER ET. AL., *UNIFORM MAINE CITATIONS* 37 (2022). This lack of an intermediate appellate court should also provide incentive to a litigant to raise a state constitutional argument because if it does pursue such an argument, the argument will be heard by the state’s highest court, whereas the U.S. Supreme Court hears very few certiorari petitions. *See* SUTTON, *supra* note 36, at 19.

73. *See* Glen S. Goodnough, *The Primacy Method of State Constitutional Decision-making: Interpreting the Maine Constitution*, 38 ME. L. REV. 491, 499 (1986) (“[T]he Law Court, like other state supreme courts applying the primacy method, faces a fundamental interpretive difficulty: the lack of a developed body of independent state constitutional doctrine from which the court can draw to give meaning to the state constitutional provision in question.”).

74. *See* A Reappraisal, *supra* note 27, at 1315 (“The instinct of judges, when confronted with an open-textured constitutional provision, is not to innovate but to look for precedent. This makes sense as a matter of resource conservation: There is no need to research every legal question from scratch, and the answers or analyses provided by other courts may be instructive.”).

analysis, looks to the legislative history of the state constitution for guidance. While countless volumes have been written as to the meaning and history of the United States Bill of Rights, the legislative history of a state constitutional provision can be sparse, difficult to find, and ambiguous.

Take Maine again as an example. Its Constitution was adopted in 1820 with little substantive debate on its Declaration of Rights.⁷⁵ Maine was once a part of Massachusetts and inherited its laws when it became a state;⁷⁶ hence, Massachusetts authority before 1820 is a good starting point for interpreting the Maine Constitution.⁷⁷ But one cannot simply view the Maine Declaration of Rights in lockstep with the Massachusetts Declaration of Rights, which was adopted in 1780 and written largely by Federalist John Adams.⁷⁸ First, the Maine drafters did not adopt Massachusetts' language in whole.⁷⁹ Second, Maine did not separate from Massachusetts until its population became largely Jeffersonian, Democratic-Republican.⁸⁰ Third, forty years had passed between 1780 and 1820 and, during

75. See generally Index of Debates, in *Debates and Journal of the Constitutional Convention of the State of Maine (1819-1820)* xi (1894). The little substantive discussion relating to rights focused on religion, Debates, Resolutions and Other Proceedings of the Convention, in *Debates and Journal of the Constitutional Convention of the State of Maine*, 94–115, and education, *id.* at 278–91. The paucity of debate of the contents of the Maine Constitution could be attributable to the short period of time dedicated to its drafting – less than three weeks. Index of Debates, *supra*. See *id.* (index at xi); <https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/>; *Amendments to the Maine Constitution, 1820-Present*, ME. STATE LEGISLATURE, <https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/> (last updated Nov. 2021) (explaining that Maine's Constitutional Convention began on October 11, 1819 and a draft constitution was adopted on October 29, 1819).

76. ME. CONST. art. X, § 3 (“All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation.”); Separation of Maine Act, 1819 Mass. Acts 248, 253, <https://archives.lib.state.ma.us/bitstream/handle/2452/110107/1819acts0036.pdf?sequence=4&isAllowed=y> (last visited Dec. 7, 2022); see also *McGarvey v. Whittredge*, 2011 ME 97, ¶ 31, 28 A.3d 620; *Harnish v. State*, 531 A.2d 1264, 1266 (Me. 1987); *Hilton v. State*, 348 A.2d 242, 244 (Me. 1975); *Davis v. Scavone*, 149 Me. 189, 192–93, 100 A.2d 425, 427 (1953).

77. A People's Address, which was appended to the Constitution and sent to the Maine electorate for approval, provided as follows: “The constitution of Massachusetts, venerable as the work of the fathers of the Revolution, endeared to the people by many associations, and replete with the soundest principles of liberty and government, has in forty years' experience proved inconvenient and defective in some few of the provisions. Assuming that instrument as a basis the convention proceeded to frame a constitution for the State of Maine deviating in those cases only where experience of this and other states in the Union seemed to justify and require it.” *Journal of the Constitutional Convention, in Debates and Journal of the Constitutional Convention of the State of Maine (1819–1820)* 105–06 (1894).

78. Edward W. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK UNIV. L. REV. 873, 880–81 (1980).

79. See *In re Benoit*, 487 A.2d 1158, 1172 n.23 (Me. 1985) (“Although the Maine Constitutional Convention of 1819 looked to the 1780 Constitution of the Mother Commonwealth as a model for many provisions, Massachusetts had nothing that could have served as a model for Maine's compensation clause.”) (citation omitted).

80. See RONALD F. BANKS, *MAINE BECOMES A STATE: THE MOVEMENT TO SEPARATE MAINE FROM MASSACHUSETTS, 1785-1820*, 207 (1970) (“The democratic leanings of the [Democratic-Republicans] of Maine were manifested in the Constitution of Maine In fact, it can be plausibly argued that the separation movement, after it was captured by the [Democratic-Republicans], was a movement to democratize political and economic life in Maine.”); 2 WILLIAM D. WILLIAMSON, *THE HISTORY OF THE STATE OF MAINE; FROM ITS FIRST DISCOVERY, A.D. 1602, TO THE SEPARATION, A.D. 1820, INCLUSIVE* 24 (1832) (listing reasons for separation) (“Political differences separated the

that period, both the United States and multiple other states had adopted their own constitutions.⁸¹ Thus, while the Maine Supreme Judicial Court has often looked to the Massachusetts Constitution and precedent for guidance or a starting point,⁸² it has not always adhered to the interpretation of the Massachusetts Supreme Judicial Court and looks to other jurisdictions for persuasive authority.⁸³

Adding to the difficulties in finding relevant legislative history, Maine has also retained its original constitution, and thus it does not have the documentation typically available to aid courts in other states to interpret their more recent constitutions and conventions.⁸⁴

In sum, a legislative history search in Maine will require diligence and may not help resolve the issue before the court.⁸⁵ Maine is far from alone in this dilemma.⁸⁶

people. The majority party in Massachusetts was Federalist while in Maine the majority party was Republican. The people of Maine were more in sympathy with the democracy of Jefferson than with the conservatism of the Federalists. They were on the whole pioneers and their economic interests would be better served by the Republicans than by the Federalists. Furthermore, they had greater sympathy with the liberalism of Jefferson and were less frightened by his religious ideas than were the old Federalist Puritans of Massachusetts.”)

81. TINKLE, *supra* note 69, at 6 (arguing that the structure and language of the Maine Constitution “bore little resemblance to its putative model”).

82. *See, e.g.*, Opinion of the Justices, 437 A.2d 597, 609–10 (Me. 1981) (discussing a Massachusetts opinion on the Massachusetts Constitution, *Opinion of the Justices. to Senate*, 383 Mass. 895, 424 N.E.2d 1092 (1981), in considering the validity of a similar bill proposed by the Maine Legislature).

83. *See, e.g.*, Opinion of the Justices, 460 A.2d 1341, 1348 (Me. 1982).

84. *Compare* Opinion of the Justices, 343 A.2d 196, 200 (Me. 1975) (discussing how Article VI of the Maine Constitution was adopted with no debate), *with* *Tabler v. Wallace*, 704 S.W.2d 179, 184 (Ky. 1985), *overruled by* *Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557 (Ky. 2020) (noting the “extensive history of our present constitution”). In 1963, based on the recommendation of a commission appointed by the legislature to review the Maine Constitution, Art. I, § 6-A was added to the Maine Declaration of Rights. Section 6-A supplements the protection of due process and equal protection previously read by the Maine Court into the original Declaration of Rights. *See* *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶¶ 41–42, 281A.3d 618 *as revised* (Sept. 8, 2022). The commission proposed, and the Maine Legislature accepted, language from a professor who, when arguing why this provision should be added, said,

[i]f the states would take care of their own civil liberties problems there would be no excuse for the U.S. Supreme Court to humiliate and embarrass the states by deciding against them on the ground that segregation in the schools and bus stations, or other discriminatory practices, are a violation of due process or equal protection in the 14th amendment to the U.S. Constitution

Edward F. Dow, *Our Unknown Constitution: Stronger States Needed*, Portland Sunday Telegram, April 8, 1962, at 20B col. 4.

85. The documentarian for Maine’s 1962 Constitutional Commission summarized the issue as follows:

Since the deliberations of the Constitutional Convention of 1819-20, which were painstakingly recorded by Jeremiah Perley and published in his “Debates,” no single work has been published which satisfactorily comprehends either the Constitution or the Constitutional history of the State of Maine in nearly 143 years. Records, such as they are, exist in the Legislative files, records and journals of the House and Senate, in the Maine State Library (Public Document Collection) and Secretary of State’s office, the

While commentators have posited that the rejection of state constitutionalism has philosophical underpinnings,⁸⁷ the more pedestrian answer is that it is hard to avoid the allure of simply aligning with federal interpretations when a busy jurist is confronted with little state constitutional precedent and scarce to non-existent legislative history.

IV. FACILITATING STATE CONSTITUTIONALISM: A CHECKLIST

The inherent difficulties in applying the primacy approach are not insurmountable. Courts may start by (i) framing the issue; (ii) asking for help; and (iii) recourse to a checklist.

A. Preliminaries

If a state court is interpreting its own constitution, it must be clear that it is doing so. If not, the Supreme Court will assume (rightly or wrongly⁸⁸) that the state court has interpreted the federal provision and, therefore, review the state court's interpretation.⁸⁹ The state court must be explicit, making clear that it has based its decision on the independent ground of its own constitution, looking at federal precedent, if at all, solely for persuasive purposes.⁹⁰

Laws of Maine, Advisory Opinions and Decisions of the Supreme Judicial Court and in various manuscripts and publications dealing with selected parts of the Constitution.

The fact that no serious effort has been made to reassemble the scattered documents and papers of the Convention, itself, is particularly appalling, when viewed in the light of the importance of the protections guaranteed to each of us in the resulting document.

Proceedings of the Second Constitutional Commission of the State of Maine (1962-1963) ii (1963).

86. See *State Admin. Bd. of Election L. v. Calvert*, 327 A.2d 290, 301 (Md. 1974) (“We have often lamented the absence of legislative history as an aid to the interpretation of Maryland constitutional and statutory provisions.”); *Shields v. Gerhart*, 658 A.2d 924, 929 (Vt. 1995) (noting the lack of any record of discussion or debate over the adoption of the Vermont Constitution).

87. See Long, *supra* note 32, at 96–99 (suggesting that state judges may be influenced in avoiding decision-making based on the state constitution by a desire to avoid accountability and the influence of a nationalist ideal of American exceptionalism).

88. See *Michigan v. Long*, 463 U.S. 1032, 1066 (1983) (Stevens, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting). See generally Lauren Gailey, *Thirty Years Too Long: Why the Michigan v. Long Presumption Should Be Rejected, and What Can Be Done to Replace It*, 53 DUQ. L. REV. 483 (2015).

89. *Michigan v. Long*, 463 U.S. at 1040–41; see also *Wisconsin v. Constantineau*, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting) (“For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject.”).

90. See Long, 483 U.S. at 1041 (“If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.”). When certiorari was granted for a decision of the Tennessee Supreme Court, the Tennessee Court inserted a footnote in a subsequent decision that the decision before the Supreme Court had been decided on adequate and independent grounds, which was apparently sufficient, in that the Supreme Court then dismissed certiorari as improvidently granted. See *State v. Howell*, 868 S.W.2d 238, 259 n.7 (Tenn. 1993). The New Hampshire Supreme Court has made a blanket assertion that it should be presumed that its decisions are based on state, not federal law. *State v. Ball*, 471 A.2d 347, 352 (N.H. 1983). The courts in Maine and Oregon have made similar

B. A Little Help, Please

If a state court is going to create a body of precedent based on its state constitution, it cannot do so by itself.

1. Lawyers

Chief Justice McKusick wrote, “[w]hether the Law Court gets and decides issues of Maine constitutional law depends largely upon the advocacy of lawyers in the trial and appellate courts.”⁹¹ An appellate court cannot rule on an argument not raised.⁹² At a bare minimum, practitioners must cite the state provision in its constitutional challenge; some judges and commentators have suggested that it may even be malpractice to fail to do so.⁹³ The Law Court has often declined to address state constitutional provisions because they were not raised by the parties.⁹⁴

If, however, there is nothing to be gained by a state law argument, then it is not only excusable, but preferable, for a practitioner not to raise a state law claim and make the court carry out a fruitless exercise. Just as it is not productive when the state court’s decision is a result-oriented deviation from federal law, little is gained from a lawyer’s assertion that their client’s rights are protected under a state constitutional provision with no explanation except a tacit admission that the argument fails under federal law. Practitioners need not always raise the state constitution, but rather that they should at least explore the possibility.

assertions. *State v. Flick*, 495 A.2d 339, 343 n.2 (Me. 1985); *State v. Kennedy*, 666 P.2d 1316, 1321 (Or. 1983). Justice Ginsburg expressed doubt as to whether such a blanket statement would prove effective. *Evans*, 514 U.S. at 31.

91. Vincent L. McKusick, *Foreword to the First Edition of MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION* (1992).

92. *But see* *First Things First*, *supra* note 3, at 383 (explaining that even if the parties do not raise the state constitution, the court should feel free to address the question on its own).

93. *See, e.g.*, *State v. Baldon*, 829 N.W.2d 785, 816 (Iowa 2013) (Appel, J., concurring) (“In light of the availability of state constitutional claims and the complete lack of any strategic reason not to pursue them, a number of state court judicial opinions indicate the failure to bring a state constitutional claim may amount to malpractice.”); *State v. Lowry*, 295 Ore. 337, 365, 667 P.2d 996, 1013 (Jones, J., concurring) (“Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice.”); *Commonwealth v. Kilgore*, 719 A.2d 754, 757 (Pa. Super. Ct. 1998) (finding counsel ineffective for failure to raise state search and seizure claim); *see also* Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 178 (2009) (“[N]o lawyer worth his or her salt can be a good advocate in today’s world without appreciating the possibility—and value—of raising state and federal [constitutional] claims in representing a client.”).

94. *See, e.g.*, *State v. Thornton*, 485 A.2d 952, 952–53 (Me. 1984) (deciding not to address state claim, deeming it not preserved); *see also* *State v. Thomas*, 2022 ME 27, ¶ 13 n.3, 274 A.3d 356; *State v. Philbrick*, 481 A.2d 488, 493 n.3 (Me. 1984) (“Because the Defendant does not argue that his state constitutional rights were infringed, we depart from our preferred practice of deciding issues on the basis of our state constitution before we address federal constitutional questions. Just as certain considerations of judicial restraint ordinarily impel us to ground a decision on state, rather than federal law, other considerations of judicial restraint lead us to refrain from deciding important state constitutional issues that have been neither briefed nor argued.”). In at least one case, however, the Law Court addressed a general challenge to a confession as involuntary as implicating both the United States Constitution and Article I, section 6 of the Maine Constitution. *State v. Caouette*, 446 A.2d 1120, 1121 n.2 (Me. 1982).

Practitioners, like judges, are busy too and need not pursue arguments with remote chances of success.

If a practitioner does raise a claim under a state constitution, courts differ as to the extent that a party must develop the argument for the court to address it.⁹⁵ A litigant cannot expect or presume that the court will do all the heavy lifting.⁹⁶ At a minimum, if practitioners do not develop state constitutional arguments beyond a bald citation, they risk waiver.

A related question is when the lawyer must raise the issue. Generally, appellate courts will not consider constitutional issues not properly raised before the trial court, such that best practice requires development at all stages of litigation. Hence, both trial and appellate lawyers must be sensitive to the need to raise and develop the state claim.⁹⁷

95. See *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Macy, C.J., concurring) (summarizing the case law requiring development). In *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011), the court stated, “[w]hen there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved Even in these cases in which no substantive distinction had been made between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.” In New Hampshire, the supreme court only asks the parties to raise the issue, contrary to the position preferred by Justice Souter when he sat on that court:

Advocacy consists of something more than citation or incantation, and we have held in other contexts that a brief’s mere passing reference to an issue does not suffice to present that issue for appellate adjudication. Rather, a party seeking a State constitutional ruling in this court has no less a duty to us than he has to the trial court: to state the issue directly and to develop supporting arguments premised on policy or authority.

. . . .

Perhaps it is worthwhile to add a word about the need that underlies the insistence on the standard I have tried to express. It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.

State v. Bradberry, 522 A.2d 1380, 1389 (1986) (Souter, J., concurring specially) (citation omitted).

96. As then Associate Justice William C. Koch Jr. from the Tennessee Supreme Court observed, “[j]ust to be honest with you, the lawyers have been very little help.” *Judicial Panel: Tennessee Legal Reform from A Judicial Standpoint*, 1 BELMONT L. REV. 201, 208 (2014). See generally Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 78–83 (2013) (discussing the “collective and individual failings of the bench, bar, and legal academy” to develop state constitutionalism).

97. There are exceptions to this rule. In *State v. McKinney*, 59 Kan. App. 2d 345, 351–57, 481 P.3d 806, (2021), the appellate court addressed both a Second Amendment claim, as well as a claim under the analogous Kansas constitutional provision, even though neither were raised at the trial level, because the Court of Appeals of Kansas will address newly asserted constitutional claims to prevent the denial of fundamental rights. Some appellate courts will also consider some constitutional claims argued for the first time on appeal under an obvious error standard. See, e.g., *In re Child of Lacy H.*, 2019 ME 110, ¶

Finally, just as state courts need to be clear when they are addressing a claim on state constitutional grounds, they should also be clear when they are not. Otherwise, jurists examining earlier precedent that cites a jumble of state and federal decisions will struggle to identify when their predecessors ruled based upon the state constitution and when they did not.⁹⁸

Until a coherent methodology exists in a jurisdiction indicating how the court considers claims under the state constitution, the criticism that lawyers fail to raise state constitutional arguments, while correct, may be unfair.⁹⁹ Given its coherence, if not its ease of application, the primacy approach provides the best road through the state constitutional analytic journey. The key to practical implementation is making the journey as easy as possible.

2. Schools

Just as courts cannot be expected to engage in a review of the state constitution without the help of lawyers, lawyers would benefit from some training in state constitutions in law school.¹⁰⁰ The Vermont Supreme Court noted that “despite the burgeoning developments in state constitutional law, only about a dozen law

9, 212 A.3d 320, 323 (“Because the constitution issue has been raised for the first time on appeal, we review the due process and equal protection issues for obvious error . . . [defined as] error that is ‘seriously prejudicial error tending to produce a manifest injustice.’”).

98. As one commentator summarized:

Once state law has become interwoven with federal law, what is the effect of a new Supreme Court ruling on the state’s jurisprudence? Does the state constitutional provision now mean what the Supreme Court has since determined the United States Constitution to mean? Or does the state constitutional provision mean exactly what the state court said it meant at the time of its ruling -- i.e., the older Supreme Court holding? When the state court initially adopted the federal interpretation of the federal provision as the meaning of the analogous provision in its state’s constitution, did it do so for the purpose of saying “we will follow the Supreme Court in its determinations on this issue for all time?” Or did the state court do so for the purpose of saying “we follow the Supreme Court’s determinations on this issue at this point in time, reserving the right to not adopt any later changes the Supreme Court may make in the future?” If the analytical foundations of the earlier state decision are unclear, how is anyone really to know which course the state court intended?

Nakagiri, *supra* note 67, at 847.

99. See Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771, 772 (2021) (describing the chicken-and-egg problem of developing state constitutional law when lawyers do not raise arguments because there is no clear method for doing so, and thus judges cannot develop state constitutional law).

100. See, e.g., State Courts at the Dawn of a New Century, *supra* note 25, at 12 n.63 (“[I]t is largely the failure of our nation’s law schools to teach state constitutional law that has resulted in the poor grade earned by the vast majority of counsel who fail to develop state constitutional issues in their court filings.”); Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1354 (2019) (“[L]aw schools still exclude state constitutional law from the standard curriculum, offering few courses to equip new attorneys with the knowledge and knowhow to identify and argue state constitutional claims effectively.”); New Federalism, *supra* note 30, at 261 (“[I]f the ‘new federalism’ faces a doubtful future, much of the responsibility rests on law schools.”).

schools have courses in state constitutional jurisprudence.”¹⁰¹ As one Iowa Supreme Court Justice observed, to address this omission, the Conference of Chief Justices passed a resolution urging all law schools to offer a course in state constitutional law in 2010, noting “declarations of rights . . . are often greater than federally guaranteed rights and liberties” and that “being a competent and effective lawyer requires an understanding of both the Federal Constitution and state constitutional law.”¹⁰² But classes in state constitutions—or even a module on state constitutions in the required class on Constitutional Law—remain the exception, not the rule.¹⁰³

This lack of training leads to a self-perpetuating cycle: law schools fail to cover state constitutional law, producing lawyers and judges untrained in this area, who then do not argue or rely upon state law and, given the lack of state precedents, law schools do not offer training in state constitutional interpretation.¹⁰⁴ Worse still, by not even mentioning state constitutions, the general required Constitutional Law course gives the misimpression that there is only one document with any relevant application.¹⁰⁵

This dearth of training is a solvable problem. While in 1978 there may not have been collected materials to teach state constitutional law,¹⁰⁶ multiple casebooks now treat the subject.¹⁰⁷ Law schools and professors have the tools to teach state constitutional law.

One reason cited for this lacuna in both training and assertion in court is the lack of an “epistemic community” with the incentive to develop and advance state constitutionalism; the movement is by definition decentralized because there are fifty different state constitutions, and interest groups typically focus on specific constitutional rights.¹⁰⁸ But even if special interest groups lack motivation to

101. *State v. Jewett*, 500 A.2d 233, 235 (1985).

102. *State v. Baldon*, 829 N.W.2d 785, 817 (Appel, J., concurring) (citing Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 909, 912 (2011)).

103. See SUTTON, *supra* note 36, 193–96.

104. See Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 32 (1994).

105. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse*, 24 RUTGERS L.J. 927, 933 (1993) [hereinafter *State Constitutions*] (“General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation.”).

106. See Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978) (“The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from ‘federally’ oriented law schools. The lack of treatises of [sic] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to ‘nationalize’ the law and denigrate the state bench.”).

107. See, e.g., ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (4th ed. 2006); JEFFREY S. SUTTON ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (3rd ed. 2020); JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* (4th ed. 2006). Jennifer Friesen clerked for Justice Hans Linde in 1978–79. Rayna Jackson, In Memoriam: Hans Linde, available at <https://law.uoregon.edu/memoriam-hans-linde> [<https://perma.cc/R9DL-UBEX>].

108. See Price, *supra* note 32, at 1556.

develop state constitutionalism for its own sake, any litigant advancing a specific right should be motivated to review the possibility of taking two, rather than one, chances to prevail in state court.¹⁰⁹

3. Archivists

As noted above in Section III, looking for historical sources to assist in reading state constitutions is often the proverbial search for the needle in the legal haystack. Then-Justice Koch of the Tennessee Supreme Court impliedly chastised practitioners for not “run[ning] over to the archives at the University of Tennessee or up to North Carolina where some of our organic documents are kept”¹¹⁰ With primary source materials appearing daily on the internet, a significant contribution by state archivists, librarians, historical societies, and other interested persons, both academic and non-academic, could be not only to upload resources related to the legislative history of the state constitutions, but to organize them and make them searchable and accessible.

C. A Checklist

As stressed above, courts should interpret state constitutions in a systematic and consistent way, rather than turn to a state constitution only when the court disagrees with United States Supreme Court’s precedent.¹¹¹ Ad hoc approaches to state constitutionalism not only invite criticism, but also create confused precedent. In order to facilitate the application of a systematic methodology, this Article proposes the use of a checklist.¹¹²

Commentators and courts have identified items to review in analyzing a claim under a state constitution.¹¹³ What follows is a synthesis of these items and how

109. See SUTTON, *supra* note 36, at 7 (using a basketball free-throw analogy to bemoan “American lawyers regularly taking just one shot rather than two to invalidate state [action] on behalf of their clients”).

110. *Judicial Panel: Tennessee Legal Reform from a Judicial Standpoint*, *supra* note 96, at 208.

111. See, e.g., Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PA. STATE L. REV. 837, 848–850 (2011) (noting that a coherent methodology in constitutional review supports the legitimacy of judicial decisions, including those that invalidate legislation).

112. The use of checklists has been extolled in medicine and other arenas. See generally ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2010). Checklists are also a common tool in the law when legislatures or courts craft multiple-factor tests to apply in various contexts. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 40 (2007).

113. For examples of courts identifying criteria in developing an argument under the state constitution, see *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008); *Jones v. State*, 745 A.2d 856, 864–65 (Del. 1999) (citing *State v. Hunt*, 450 A.2d 952, 962 (N.J. 1982) (Handler, J., concurring)); *People v. Tanner*, 853 N.W.2d 653, 666 n.17 (Mich. 2014); *Kahn v. Griffin*, 701 N.W.2d 815, 829 (Minn. 2005); *State v. Dellorlano*, 517 A.2d 1163, 1166 (N.H. 1986); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *State v. Jewett*, 500 A.2d 233, 236–37 (Vt. 1985) (providing guidance as to the types of arguments that may be considered to interpret state constitutions); *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986); *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 836 (Wyo. 2019); *Autran v. State*, 887 S.W.2d 31, 37 (Tex. Crim. App. 1994) (plurality). *C.f.* *State v. Gaskins*, 866 N.W.2d 1, 50–56 (Iowa 2015) (Waterman, J., dissenting) (espousing an interstitial approach and criticizing the majority’s failure to identify neutral “divergence” criteria for construing the

they have and might be applied. Every case is fact-specific; some items may be more important than others and, indeed, some items in the proposed checklist might provide no useful contribution to the analysis.

1. Text and Structure

That we start with the text of the state constitutional provision “needs little explanation.”¹¹⁴ The text must be read as a whole.¹¹⁵ Accordingly, the meaning of one provision can affect the meaning of another. In Colorado, for example, the reasonableness of warrantless dog sniffs changed under the search and seizure provision of the state constitution when marijuana was legalized through a constitutional amendment.¹¹⁶ As another example, Maine has applied its separation of powers doctrine more strictly than have the federal courts because the Maine Constitution expressly contains separation of powers provisions, unlike the United States Constitution¹¹⁷ The Maine Constitution also includes at least three different provisions related to equal treatment under the law.¹¹⁸ Does this repetition and the specific language used in each provision bear significance in any particular context?¹¹⁹

2. History

When the text is clear, there may be no need to go further. But more often, given Justice Marshall’s famous declaration that we are expounding a constitution,¹²⁰ written with broad language to stand the test of time, we must examine other indicia of meaning in the language used.¹²¹ However difficult to find, when they do exist, materials regarding the historical meaning of

state constitution). Commentators have added, amplified, or summarized these lists. See, e.g., Rush & Miller, *supra* note 100, at 1360; Nakagiri, *supra* note 67, at 850 n.269 (listing various articles addressing state constitutional arguments).

114. *Jewett*, 500 A.2d at 236.

115. See Opinion of the Justices, 2015 ME 107, ¶ 40, 123 A.3d 494 (“One part [of the Constitution] may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another if by any reasonable construction the two can be made to stand together.”) (alteration in original); *In re Neely*, 2017 WY 25, ¶ 47, 390 P.3d 728, 744 (Wyo. 2017) (“Our conclusion is further reinforced by an examination of the entire Wyoming Constitution, for [e]very statement in the constitution must be interpreted in light of the entire document, with all portions thereof read in *pari materia*.”) (alteration in original).

116. See *People v. McKnight*, 2017 CO 36, ¶ 7 (holding that a dog sniff for marijuana is a “search” pursuant to the state constitution).

117. See *State v. Hunter*, 447 A.2d 797, 799–800 (Me. 1982); ME. CONST. art. III, § 2.

118. Me. Const. art. I, §§ 1, 6 and 6-A.

119. See generally *Shaman*, *supra* note 64 (noting the multiple provisions in state constitutions relating to equal protection and how state courts apply them differently than the federal counterpart).

120. See *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819); see also *Gibbons v. Ogden*, 22 U.S. 1, 187–88 (1824) (eschewing a strict construction of the language in the United States Constitution).

121. The Maine Constitution, like the United States Constitution’s Sixth Amendment, grants the right to a jury trial in “all” criminal prosecutions. See ME. CONST. art. I, § 6. Unlike the United States Supreme Court, the Maine Supreme Judicial Court has interpreted “all” to mean “all,” looking at textual differences elsewhere in the Maine Constitution as well as legislative history. *State v. Sklar*, 317 A.2d 160, 166–76 (Me. 1974).

constitutional text and/or the intent of the drafters in using specific vocabulary can provide important aid,¹²² recognizing that courts do not read such materials as historians but rather as jurists.¹²³

Broader historical context can also help.¹²⁴ For example, in 1880, the Maine Constitution was amended to require only a plurality to win elective office, rather than the former requirement that a candidate win a majority of the vote. This amendment was a direct response to riots that broke out in the Maine Capitol in 1879, which required Joshua Chamberlain, then-commander of the Maine militia and former governor and Gettysburg hero, to intervene.¹²⁵ The justices of the Maine Supreme Judicial Court considered this history in an advisory opinion rejecting ranked choice voting.¹²⁶

122. This Article does not seek to step into the debate between originalists, focused on meaning, versus others who look to intent. Under either perspective, historical evidence can be relevant. *See, e.g.,* *D.C. v. Heller*, 554 U.S. 570, 584 (2008) (containing a discussion by Justice Scalia, an originalist rejecting the relevance of legislative history as to intent, diving deeply into historical documentation to determine the meaning of the text of the Second Amendment); *see also* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16, 38 (Amy Gutmann et al. eds., 1997) (explaining that he consults *The Federalist* because “their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood”).

123. *See Baker v. State*, 170 Vt. 194, 206–07 (1999) (citations omitted).

The responsibility of the Court, however, is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them . . . “[O]ur duty is to discover . . . the core value that gave life to Article [7].” Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.

Id.

124. *Id.* at 206.

We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials. The Vermont Constitution was adopted with little recorded debate and has undergone remarkably little revision in its 200-year history. Recapturing the meaning of a particular word or phrase as understood by a generation more than two centuries removed from our own requires, in some respects, an immersion in the culture and materials of the past more suited to the work of professional historians than courts and lawyers.

Id.; *see also* *State v. Santiago*, 122 A.3d 1, 20–27 (Conn. 2015) (striking down the death penalty under the Connecticut Constitution in part based on pre-constitutional legal traditions in Connecticut and the historical circumstances leading up to the adoption of the state constitution in 1818).

125. Opinion of the Justices, 2017 ME 100, ¶¶ 63, 162 A.3d 188, *as revised* (Sept. 19, 2017).

126. *Id.* at ¶¶ 54–64.

3. *The Common Law and Statutes*

State statutes can illuminate meaning,¹²⁷ and the common law can be a helpful resource.¹²⁸ Just as state constitutions were considered the origin of civil rights protections prior to the development of federal law, the common law constituted the basis of such protections before constitutional enactments.¹²⁹

As just a few examples, the Law Court has construed language in Article I, Section 6 of the Maine Constitution referencing a “judgment by the peers or laws of the land” to incorporate the “processes and proceedings of the common law.”¹³⁰ The Supreme Court of Idaho, relying on the common law in 1889, concluded that the Idaho analogue to the Fourth Amendment prohibited warrantless arrests for completed misdemeanors.¹³¹ A constitutional right to die has found antecedents in the common law.¹³²

The common law evolves per changing societal values,¹³³ and a court’s pronouncement in that area can be superseded by statute.¹³⁴ But the state of the law

127. See *State v. Lindquist*, 869 N.W.2d 863, 875–76 (Minn. 2015) (discussing the relationship between statutes and constitutional interpretation as to whether a good faith exception exists to exclusionary rule); *State v. Carter*, 322 N.C. 709, 719 (1988) (finding that the North Carolina Constitution does not have an exclusionary rule relying in part on N.C. GEN. STAT. § 15A-974 (1983)).

128. See Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989) (noting “rights now denominated as constitutional had well-recognized common law antecedents”); see also Coven, *supra* note 11, at 299 (“The authority for expanding state constitutional protection lies not in any differences in the text, history, or structure of federal and state constitutions, but in the evolving standards of state common law. It is not the language of the text which serves as the basis for constitutional interpretation, but the contemporary norms as most persuasively expressed in the development of that state’s common law.”); 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, 750–51 (1992) [hereinafter Foreword]; *State Courts at the Dawn of a New Century*, *supra* note 25, at 15–17.

129. See Coven, *supra* note 11, at 299 (stating that constitutional protections of basic liberties were a product of “concepts of natural law, common law developments, and other modes of reasoning that transcended state-specific texts or understandings”)

130. *Dwyer v. State*, 151 Me. 382, 392, 120 A.2d 276, 282 (1956); see also *State v. Learned*, 47 Me. 426, 432–33 (1859) (tracing the constitutional limits on state legislation in the criminal area to, *inter alia*, the common law).

131. *State v. Clarke*, 446 P.3d 451, 457 (Idaho 2019).

132. See Coven, *supra* note 11, at 314 (“The common law has evolved to recognize the individual’s interest to die.”); *Matter of Conroy*, 486 A.2d 1209, 1221 (N.J. 1985) (basing right to die on constitutional and common law concepts); and *Matter of Farrell*, 529 A.2d 404, 410 (N.J. 1987) (same).

133. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (noting that the common law is affected by “[t]he felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy”); *Leegin Creative Leather Prod. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“[T]he common law adapts to modern understanding and greater experience.”); *Funk v. United States*, 290 U.S. 371, 381–82 (1933) (eliminating the common law prohibition against spousal testimony, and holding that the federal court had the power to update the common law in accordance with current practice and customs); *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939) (“[T]he common law gives expression to the changing customs and sentiments of the people.”).

134. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 50 (1912) (“A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office

at the time of the adoption of the constitutional text and the policy interests reflected in that law can shed light on meaning and intent, as well as identify local or regional interests influencing textual choices.

4. Expressed Values

This conceptual, somewhat amorphous bucket can subsume other criteria in that a jurisdiction's values are often reflected in sources including but not limited to the common law, state statutes, and state judicial precedent.¹³⁵ Like the common law and statutes, the manifestation of values evolve over time, triggering debate as to the relevance of changes after the adoption of the constitutional text.¹³⁶

Despite these difficulties, values can be identified and considered. Notably, some values are aspirational, reflecting the enduring ideals of the drafters.¹³⁷ Often, a state constitution begins its analogue to the federal Bill of Rights with a global pronouncement acknowledging natural rights and broad objectives.¹³⁸ Other

of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”) (citations omitted).

135. See Coven, *supra* note 11, at 298 (“[T]he differences [in meaning between the state constitutional provision and a federal counterpart] may lie in the particular concerns, attitudes, and values of the state populace; the principles considered to be part of a state’s traditions; and the values and norms expressed in prior state court decisions.”).

136. See *id.*, at 317 (“Just as the common law evolves to reflect the state’s fundamental values, so must the interpretation of its state constitution. State courts must interpret their constitutions to enable the state’s constitutional law to reflect modern values.”) (citations and quotation marks omitted).

137. See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393 (1998) (“[T]he community to which the constitution corresponds is not the actual group of people who happen to live in the state, but rather the aspirational community constituted by the principles set forth in the constitution.”).

138. See, e.g., ME. CONST. art. I, §§ 1–2.

Section 1. Natural Rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Section 2. Power inherent in people. All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.

Id. The language in ME. CONST. art. I, § 1 regarding the right to acquire, possess and protect property as a natural, inherent, and unalienable right has been cited in analyzing the scope of the sovereign immunity of the State or lack thereof in certain real property suits. See *Welch v. State*, 2004 ME 84, ¶ 9, 853 A.2d 214. For a comprehensive study of how such language in state constitutions, along with state due process provisions, were applied prior to 1868 to protect what the authors describe as Lockean Natural Rights, see Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1311 (2015). For a modern example of the impact of an express provision in a state’s constitution protecting “natural” and “unalienable” rights, see *Com. v. Weston W.*, 913 N.E.2d 832, 840 (Mass. 2009) (concluding, in striking down a juvenile curfew, that these rights include a fundamental right of free movement).

constitutional provisions, while reflecting the specific concerns of the times, have lasting broader applications.¹³⁹

In short, a value endures from the constitution's inception, but how it manifests itself in a changing world can affect constitutional interpretation. What is a reasonable search or seizure, what constitutes cruel and unusual punishment, and what violates substantive due process are just some examples in which changing norms can affect outcomes in applying unchanged constitutional text.¹⁴⁰ These norms can vary not just over time but by jurisdiction.¹⁴¹

Hence, evidence of values both before and after enactment of the constitutional provision at issue might be relevant.

5. *Economic and Sociological Considerations*

Courts have relied on economic and sociological materials to interpret constitutions.¹⁴² The classic example of the impact of such materials is reflected

139. For example, while the Alaska constitution borrows many of its provisions from the constitutions of other states and the federal constitution, it has a specific provision guaranteeing due process in executive and legislative investigations as a reaction to the McCarthy hearings. See ALASKA CONST. art. I, § 7; Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 303–04, 313 n.117 (2005).

140. See *Florida v. Riley*, 488 U.S. 445, 454–55 (1989) (O'Connor, J., concurring) (stating that reasonable expectations of privacy may change over time depending on what “society is prepared to recognize as ‘reasonable’”) (quoting *Katz v. United States*, 389 U.S. 347, 361, 576 (1967)); *State v. Akers*, 2021 ME 43, ¶ 27, 259 A.3d 127 (noting what is a reasonable search depends upon what society recognizes as reasonable). For an interesting overview of the establishment of the need for probable cause in Maine, see Wesley M. Oliver, *Portland, Prohibition, and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure*, 23 ME. BAR J. 210, 218 (2008). Regarding cruel and unusual punishment, see *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (“Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that ‘currently prevail.’ The Amendment ‘draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.’”) (citations omitted); *Libby v. Comm’r of Correction*, 432 N.E.2d 486, 495 (1982) (“Article 26 [of the Massachusetts Declaration of Rights], like the Eighth Amendment, bars punishments which are ‘unacceptable under contemporary moral standards.’”) (citation omitted). Regarding substantive due process, see *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

141. For example, New Mexico found the privacy interest protected by its constitution broader than that found by the Supreme Court in the U.S. counterpart. *State v. Sutton*, 816 P.2d 518, 524 (N.M. Ct. App. 1991) (noting that the scope of Fourth Amendment protection established by decisions of the United States Supreme Court may depend upon concepts that “have evolved in areas with very different customs and terrain. In New Mexico, lot sizes in rural areas are often large, and land is still plentiful. Our interpretation and application of the state constitution must take into account the possibility that such differences in custom and terrain gave rise to particular expectations of privacy when the state constitution was adopted”).

142. See generally *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106; *State v. Jewett*, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985); *Newell v. State*, 277 A.2d 731, 737 (Me. 1971), *overruled by State v.*

in *Muller v. Oregon*, which upheld a state law limiting working hours for women.¹⁴³ To support the conclusion that the statute bore a reasonable relationship to public health and safety, then-attorney Louis D. Brandeis submitted a brief containing statistics, a litany of similar state and foreign statutes, and extracts from tens of committee reports to support the conclusion that long hours of labor are dangerous to women and shorter hours are beneficial from an economic perspective.¹⁴⁴ The Court in *Brown v. Board of Education* similarly put a stake in the heart of its decision in *Plessy v. Ferguson* by citing statistical evidence and sociological research for the conclusion that separate is *not* equal, but rather that segregation imposes detrimental psychological effects upon the children of the minority group.¹⁴⁵

A common thread throughout the examination of these checklist items is the goal of discerning the purpose of the constitutional provision at issue.¹⁴⁶ Just as evidence of values can cut across the checklist items, so too can constitutional purpose, which can be gleaned from history, legislative history, and so on. Understanding that constitutions are not intended to embody any particular economic theory, economic and sociological consequences can shed light on whether the constitutional purpose is served by any particular interpretation of the constitutional text.¹⁴⁷

Cook, 1998 ME 40, 706 A.2d 603 (“With our deepening appreciation of the principles of the social sciences and of human values, our courts’ concepts of judicial fair play have steadily evolved.”).

143. *Muller v. State of Oregon*, 208 U.S. 412, 418–19 (1908).

144. Brief for Respondent at 11–12, *Muller v. State of Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605 at *5.

145. *Brown v. Bd. of Educ.*, 347 U.S. at 492–95, *abrogating Plessy v. Ferguson*, 163 U.S. 537 (1986), *aff’d in part, rev’d in part*, 349 U.S. 294 (1955); *see also Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of out [sic] whole experience and not merely in that of what was said a hundred years ago.”).

146. *See, e.g., State v. Senn*, 882 N.W.2d 1, 8 (Iowa 2016) (“First and foremost, we give the words used by the framers their natural and commonly-understood meaning. However, we may also examine the constitutional history and consider the object to be attained or the evil to be remedied as disclosed by the circumstances at the time of adoption.” (quoting *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 457–58 (Iowa 2014)); *Payne v. Sec’y of State*, 2020 ME 110, ¶ 17, 237 A.3d 870 (“When interpreting provisions of the Maine Constitution, ‘we look primarily to the language used. Because the same principles employed in the construction of statutory language hold true in the construction of a constitutional provision, we apply the plain language of the constitutional provision if the language is unambiguous. If the provision is ambiguous, we determine the meaning by examining the purpose and history surrounding the provision.’” (quoting *Voorhees v. Sagadahoc Cnty.*, 2006 ME 79, ¶ 6, 900 A.2d 733 (citations omitted)).

147. For a discussion of the importance of interpreting constitutional text in light of its purpose and socio-economic consequences, *see* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, 25 REV. LITIG. 501 (2006).

6. Precedent

The precedent of the interpreting state court is of course relevant, if not binding. For example, when state constitutions share similar constitutional language, or states share common regional values, precedent interpreting the constitution of the sister state may be more helpful than consideration of precedent interpreting the federal constitution.¹⁴⁸

The treatment of garbage might or might not be one example of regional differentiation affecting the usefulness of precedent from other states. In *California v. Greenwood*, the Supreme Court held that defendants have no reasonable expectation of privacy once they dispose of material in their trashcan.¹⁴⁹ Several New England states disagree with this proposition.¹⁵⁰ Can this be traced to an urban-rural differential? A Yankee propensity to be left alone?¹⁵¹ Maine is not only rural, but relatively poor—can this background explain the Law Court’s ruling finding an equal protection violation in the treatment of mobile home parks?¹⁵²

148. See Opinion of the Justices, 2015 ME 107, ¶ 40, 123 A.3d 494 (“[W]e may look to the interpretation of constitutional provisions undertaken by other courts when the constitutional language at issue is similar or drawn from similar historical passages.”) (citing Opinion of the Justices, 175 A.2d 405, 407 (Del. 1961)). At least one commentator has opined that state courts should give more weight to precedent from other states interpreting their own constitutions than federal precedent, given the differing role of the federal constitution in identifying only the floor for constitutional protection. 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, 403 (1984) (“Horizontal federalism, or reliance upon decisions of other states, should be more persuasive. The Supreme Court, and the Constitution it interprets, differ in too many ways from state courts and state constitutions for that Court’s decisions to carry presumptive weight in state constitutional analysis.”); see also Pollock, *supra* note 67, at 992 (“To the extent that state courts depart from federal analysis, it becomes increasingly important for the courts to communicate with each other about significant decisions affecting fundamental rights.”). An example of the Maine Law Court looking to its sister states is in its interpretation of the right to a trial by a jury “of the vicinity.” ME. CONST. art. I, § 6. The Law Court identified the meaning of that term by looking to the treatment by other states, the common understanding of the term, and treatment of the term when Maine was a part of Massachusetts. *State v. Longley*, 119 Me. 535, 538–41, 112 A. 260, 261–63 (1921).

149. *California v. Greenwood*, 486 U.S. 35, 40–41 (1988).

150. *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003); *State v. Morris*, 680 A.2d 90, 92–94 (Vt. 1996). *But cf.* *State v. May*, 608 A.2d 772, 776 (Me. 1992) (concluding wallet left in police cruiser was not necessarily abandoned).

151. Though, the Alaska Supreme Court also found its constitution more protective of trash than the Fourth Amendment, a decision followed by an amendment to its constitution incorporating an explicit privacy right. *Smith v. State*, 510 P.2d 793, 797–98 (Alaska 1973), *modified by* *Beltz v. State*, 221 P.3d 328, 334–35 (Alaska 2009) (concluding that “the explicit protection of privacy set out in article I, section 22 of the Alaska Constitution necessarily modifie[d] *Smith* and increase[d] the likelihood that a person’s expectation of privacy in garbage can be deemed objectively reasonable”). Given the geographic diversity of the jurisdictions diverging from the federal view, the protection of household trash appears not to be a unique value held by New Englanders, but it might reflect rural versus urban values. See *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985); *State v. Crane*, 2014-NMSC-026, ¶ 34, 329 P.3d 689; *State v. Lien*, 441 P.3d 185, 187 (Or. 2019); *State v. Boland*, 800 P.2d 1112, 1116 (Wash. 1990).

152. *Begin v. Town of Sabattus*, 409 A.2d 1269, 1276 (Me. 1979) (holding that limitation on the number of permits granted per developer per year violated the equal protection clause under both Maine and federal constitutions). This decision was followed by enactment of statutory protections. See *Bangs*

7. *Persuasiveness*

Finally, while we can look to all these items to glean meaning, we should not lose sight of the need to be proactive, not reactive, in order to fulfill the states' role in our federalist system. Even in the absence of qualitatively different language, a compelling legislative history, or other factors calling for deviation from a federal counterpart, the argument in favor of an independent interpretation of a state constitutional provision still resonates if the reasoning behind that result is sound.¹⁵³ The key is to engage in the interpretation of the state constitution considering its text as if there were no federal counterpart and looking at that text with fresh eyes, including origins that might or might not be shared with the federal counterpart, as well as state-centric factors. Only after that drill should precedent from the federal courts be examined for persuasiveness.¹⁵⁴

CONCLUSION

Whether a jurisdiction follows the primacy or interstitial approach, roadmaps for advancing challenges under state constitutions have been offered by state courts ready, willing, and able to construe their own state constitutions. While the primacy approach demands the additional discipline of ignoring federal precedent, at least beyond a source of persuasion as opposed to the default position, the primacy exercise grows easier with practice and with each exploration of the background and context of the relevant state constitution's provisions.¹⁵⁵ The more each sister state undertakes the same exercise, the more courts may look to their decisions for persuasion.¹⁵⁶ When a state considers its own constitution, a well-reasoned opinion from a sister state is just as persuasive as an opinion by the federal judiciary interpreting the United States Constitution.

After leading the primacy charge on the Oregon Supreme Court for many years, perhaps Justice Linde, in his retirement, said it best:

v. *Town of Wells*, 2000 ME 186, ¶ 10, 760 A.2d 632 (applying 30-A M.R.S. § 4358 (2022), first enacted in 1983).

153. See *Constitutional Structure*, *supra* note 37, at 1311 (“The legitimacy of independent state constitutionalism rests on basic structural postulates, not necessarily on the development of state-centric constitutional discourse. And it is precisely in those areas where state courts do not employ state-specific reasoning that their decisions have influence beyond their borders and contribute to the making of American constitutional law.”).

154. *First Things First*, *supra* note 3, at 392 (“[T]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result.”).

155. See *Price*, *supra* note 32, at 1461–62, 1600–02 (describing how the primacy approach cannot obtain traction unless or until the court demands the parties before it to consistently use the approach, and provides, through that building of precedent, a body of law for those lawyers to cite, and explaining how the Oregon Supreme Court achieved this objective).

156. See, e.g., *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 296 (N.H. 1983) (looking to how the courts of other sister states with similar constitutional language have construed their provisions). *New Hampshire's* interpretation was later cited by Rhode Island. *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 200–01 (R.I. 1984).

So the future of the “new federalism” remains doubtful. There is no reason for confidence that most state courts will systematically decide what their state constitutions require, either adapting someone’s federal analysis or making their own, before deciding whether their state has violated the nation’s Constitution. Perhaps the best we can hope for is that those judges who do not abdicate their responsibility outright will put first things first when the case is properly put to them. How often and how well they do it depends on the professionalism of the younger generation of advocates in constitutional cases as well as on the professionalism of the younger generation of judges.¹⁵⁷

More starkly, to paraphrase Benjamin Franklin, it is a state constitution—if you can keep it.¹⁵⁸ The impossibility of the perfect application of the primacy approach is no reason to avoid the duty under our federalist system to engage in a vigorous, independent review of the state constitution as a primary protector of civil rights.

APPENDIX I

List of state supreme court decisions citing to 51 Imperfect Solutions. Last updated August 4, 2022.

Alabama

Ex parte Collins, No. 1200443, 2021 WL 5143906, at *6 n.2 (Ala., Nov. 5, 2021) (Mitchell, J., concurring) (noting that the Alabama constitution, while “relatively untapped,” may “hold promise for future litigants”), *cert. denied* 142 S. Ct. 2658 (2022).

Arizona

State v. Mixton, 478 P.3d 1227, 1245, 1252–53 (Ariz. 2021) (Bolik, J., dissenting) (arguing that the majority erred in interpreting Arizona constitution in lockstep with the Fourth Amendment, prioritizing “national uniformity even where Arizonans have chosen a markedly different approach”), *cert. denied*, 142 S. Ct. 184 (2021).

157. New Federalism, *supra* note 30, at 261.

158. James McHenry, a Maryland delegate to the Constitutional Convention, recorded the following exchange with Franklin at the close of the Convention: “A lady asked Dr. Franklin Well Doctor what have we got, a republic or a monarchy? A republic replied the Doctor if you can keep it [sic].” PAPERS OF DR. JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, at 952 (1927); *see also* Marshall J. Tinkle, *The Resurgence of State Constitutional Law*, 18 ME. BAR BULL. 257, 257 (1984) (describing the state constitution as “our birthright, which we have sold for a bowl of federal porridge”).

Colorado

People v. McKnight, 2019 CO 36, ¶¶ 38, 48 (holding that a sniff from a drug detection dog for marijuana constitutes a search under article II, section 7 of the state constitution).

Rocky Mountain Gun Owners v. Polis, 2020 CO 66, ¶¶ 35, 79 (upholding regulation on large capacity magazines under article II, section 12 of the state constitution).

Delaware

Capriglione v. State ex rel. Jennings, 279 A.3d 803, 809 n.42, 814 (Del. 2021) (holding “infamous crimes” provision of state constitution only precludes felons from holding state office).

Florida

Washington v. State, 325 So. 3d 306, 308 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring) (quoting Kavanaugh’s concurrence in Jones v. Mississippi, 141 S. Ct. 1307, 1331 (2021)).

Georgia

Elliott v. State, 824 S.E.2d 265, 273, 295 (Ga. 2019) (holding refusal to submit to breath test may not be used against defendant under state constitution).

Indiana

State v. E.R., 123 N.E.3d 675, 677 n.1 (Ind. 2019) (noting that state constitutional argument was not addressed because it was not developed beyond a passing reference).

State v. Katz, 179 N.E.3d 431, 442–43, 461 (Ind. 2022) (upholding revenge porn prohibition under both federal and state constitution).

Iowa

Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 800 (Iowa 2021), *as amended* (Aug. 26, 2021), *reh’g denied* (Aug. 26, 2021) (Appel, J., dissenting) (arguing that Iowa should not have adopted limitations on standing in environmental cases established in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

State v. Wright, 961 N.W.2d 396, 420–21, 424 (Iowa 2021) (Appel, J., concurring specially) (warrantless search of garbage violated the Iowa constitution).

Kansas

Rivera v. Schwab, 512 P.3d 168, 196–97 (Kan. 2022) (Rosen, J., concurring in part and dissenting in part) (questioning the majority’s decision to hold Kansas constitution in lockstep with the Federal Equal Protection Clause).

Kentucky

Commonwealth v. Reed, 647 S.W.3d 237, 254, 256 n.20 (Ky. 2022) (Minton, C.J., concurring) (requesting that the majority reexamine the Court’s practice of interpreting the Kentucky constitution’s search and seizure provision as coextensive with the Fourth Amendment).

Maine

State v. Athayde, 2022 ME 41, ¶ 21, 277 A.3d 387 (discussing reasons to use the primacy approach in general).

Michigan

Council of Orgs. & Others for Educ. About Parochial v. State, 937 N.W.2d 689, 691 (Mich. 2020) (Markman, J., dissenting) (dissenting from adjourning a case pending resolution of constitutional issue by the Supreme Court because Michigan could decide the case under its own constitution).

People v. Pagano, 967 N.W.2d 590, 594, 596 (Mich. 2021) (Viviano, J., concurring) (writing separately to implore the court to consider Michigan constitution in the future, although agreeing that in this case there was a Fourth Amendment violation).

Mays v. Governor of Michigan, 954 N.W.2d 139, 171–72 (Mich. 2020) (McCormack, C.J., concurring) (noting that even if the Supreme Court has “grown sour” with *Bivens* remedies, Michigan is free to retain such remedies under its own constitution).

Nevada

Houston v. State, 482 P.3d 728, 729 (Nev. App. 2021) (unpublished disposition) (Tao, J., concurring in part) (noting confusion in majority’s citing of a Massachusetts case interpreting the Massachusetts constitution in analysis of Fourth Amendment case).

Vasquez v. State, 468 P.3d 886 at *9, *11 (Nev. App. 2020) (unpublished disposition) (Tao, J. concurring) (discussing the possibility that state regulations may conflict with the Nevada Constitution’s separation of powers provisions).

New Jersey

State v. Carter, 255 A.3d 1139, 1162, 1163 (N.J. 2021) (declining to adopt reasonable mistake of law exception from *Heien v. North Carolina*, 574 U.S. 54 (2014), under the New Jersey constitution).

New York

People v. Gordon, 166 N.E.3d 514, 525 (N.Y. 2021) (finding that N.Y. CONST. art. I, § 12 required exclusion of evidence even if some federal cases suggested the opposite result might occur under a Fourth Amendment analysis).

North Carolina

State v. Kelliher, 873 S.E.2d 366, 370, 383 (N.C. 2022) (holding the North Carolina constitution provides greater protection against cruel and unusual punishment than the Eight Amendment by prohibiting 40-year criminal sentences for juvenile offenders as de facto life sentence).

Ohio

State v. Smith, 162 Ohio St. 3d 353, 2020-Ohio-444, 1165 N.E.3d 1123, at ¶¶ 28–29 (“In construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions.”).

Texas

Tex. Dep’t of State Health Servs. v. Crown Distrib. LLC, 647 S.W.3d 648, 674 (Tex. 2022) (Young, J., concurring) (discussing whether the due course of law provision in the Texas state constitution should be treated in lockstep with the federal due process clause).

Utah

State v. Malloy, 2021 UT 61, ¶ 14 n.3, 498 P.3d 358 (noting that the case was analyzed only under the Fourth Amendment because litigant failed to raise claim under state constitution).

State v. Soto, 2022 UT 26, ¶ 38 n.8, 513 P.3d 684 (while federal courts are divided as to when presumption of prejudice attaches with improper jury contact, the Utah constitution is clear that the presumption attaches whenever a court is apprised of the contact).

Wisconsin

State v. Halverson, 2021 WI 7, ¶¶ 50, 57, 395 Wis. 2d 385, 953 N.W.2d 847, 861 (Dallet, J., concurring) (writing separately “to emphasize that the Wisconsin Constitution was never intended to be interpreted in lockstep with the United States Constitution.”).