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ESSAY

CATALYZING JUDICIAL FEDERALISM

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INTRODUCTION

In response to a U.S. Supreme Court that is retrenching many important civil rights, some advocates are turning to state courts and constitutions as alternative means of protection.[1] The Court's regression follows a recent ideological change, a jurisprudential turn towards originalism and a long-standing normalization of judicial supremacy.[2] For some,

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[1] See, e.g., Riley Brennan, ACLU Staffs Up for New Initiative: 'State Supreme Courts Are More Important Now Than Ever,' ALM Law.com (May 2, 2023, 11:29 AM), https://www.law.com/2023/05/02/aclu-staffs-up-for-new-initiative-state-supreme-courts-are-more-important-now-than-ever [https://perma.cc/MN9H-9YRP]; Amy Myrick & Tamar Eisen, Building Protections for Reproductive Autonomy in State Constitutions, Ms. Mag. (May 24, 2022), https://msmagazine.com/2022/05/24/state-constitution-courts-abortion-rights/ [https://perma.cc/CJ8A-A5Q9] ("A more expansive vision for reproductive autonomy is necessary—and state courts can lead the way.").

[2] See, e.g., David Cole, Egregiously Wrong: The Supreme Court's Unprecedented Turn, N.Y. Rev. Books (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/2CMZ-KV4F]; Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. F. 97, 110–11 (2022); Noah Feldman, Opinion, Supreme Court 'Originalists' Are Flying a False Flag, Bloomberg (July 17, 2022, 7:00 AM), https://www.bloomberg.com/opinion/articles/2022-07-17/supreme-court-s-conservative-originalists-are-flying-a-false-flag#xj4y7vzkg

transplanting legal strategies from federal to state courts risks bringing this old soil with it.[3] That is, a pivot to the states risks perpetuating these pathologies and recreating at the state level the same regressive norms and jurisprudence that precipitated the turn in federal courts in the first place.

In this brief Essay, I explore two aspects of this view. First, there are good reasons to believe originalism will not achieve the traction among state supreme courts that it currently enjoys at the U.S. Supreme Court. Briefly stated, several of the theory's bugs and features likely disincentivize its adoption by most state supreme courts. Second, the renewed interest in state courts provides advocates with an opportunity to protect their clients and advance their causes in ways that do not necessarily require the aggressive forms of judicial review that seem characteristic of federal constitutional culture. State-level institutions offer means to protect important rights and liberties that widen the lens beyond a myopic focus on constitutional litigation. In this Essay, I briefly highlight three of these pathways: direct democracy, state courts' non-adjudicative powers, and the common law. To be sure, expansive constitutional protection via judicial interpretation may be necessary for certain rights in certain contexts. But for advocates turning to state-level institutions, that should not necessarily be the default rule. Rather, a meaningful turn to the states should draw on the broader constellation of tools for protecting rights available at the state level that may be more effective and flexible than the predominant federal approach.

[https://perma.cc/FZM8-G2FG] (arguing that the Court relies on selective originalism to "rationalize its activism").

[3] See, e.g., Christopher Jon Sprigman, Congress's Article III Power and The Process of Constitutional Change, 95 N.Y.U. L. Rev. 1778, 1833 (2020) (observing that arguments in favor of placing "a lot of faith in state courts" as an alternative to federal courts "are especially weak" and recreate judicial supremacy); Joseph Fishkin, Courts and Constitutional Political Economy, LPE Project (July 24, 2021), https://lpeproject.org/blog/courts-and-constitutional-political-economy/ [https://perma.cc/M6AN-8VZF] (arguing that "[w]e need the courts, but we also need to understand that the courts are not our friends—and are unlikely ever to be," and cautioning against placing our hopes in them); Zachary Clopton, Commentary, Judges Will Not Save Us. Pushing for Truly Democratic Solutions Will, Chi. Trib. (Aug. 24, 2022, 1:37 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-state-courts-constitution-rights-judicial-supremacy-20220824-ig2eravofbb5rgh3k4ckzdw52a-story.html [https://perma.cc/ZKD9-EFJR] (suggesting excessive reliance on state courts "feeds into the notion of judicial supremacy that created these problems in the first place").

I

For decades, state constitutionalists have encouraged state courts to develop a body of state constitutional law independent from the U.S. Supreme Court's federal jurisprudence. Many courts have heard the call and done just that, finding that their state constitution protects rights not found in the federal Constitution and among the rights that are, these courts offer broader protections of those rights.[4] But these cases have typically been the exception. As political scientists and legal scholars have shown, state courts overwhelmingly interpret state constitutions in so-called "lockstep" with the U.S. Supreme Court.[5]

Lockstepping, of course, has attracted sharp criticism.[6] Among other critiques, scholars have argued lockstepping cedes interpretive authority to the U.S. Supreme Court and undermines the peoples' inherent sovereignty.[7] Some state court judges have echoed these criticisms. Justice Robert Utter of the Washington Supreme Court, for instance, once likened the practice to "rewrit[ing]" the state constitution.[8] For former Chief Justice Shirley Abrahamson of Wisconsin, the approach erroneously assumes "a United States Supreme Court decision on a particular topic [i]s the absolute, final truth."[9] And for then-Justice James Dennis of the Louisiana Supreme Court, interpreting a state constitution this way relegates it to "a blank parchment fit only as a copybook" in which to record the U.S. Supreme Court's "lessons."[10]

[4] See, e.g., Matter of Haw. Elec. Light Co. 526 P.3d 329, 337 (Haw. 2023) (recognizing a right "to a life-sustaining climate system"); Robinson v. Cahill, 355 A.2d 129, 132 (N.J. 1976) (per curiam) (right to a "thorough and efficient education"); State v. Null, 836 N.W.2d 41, 76–77 (Iowa 2013) (extending the state constitution's prohibitions against "cruel and unusual punishment" beyond what the Eighth Amendment provides).

[5] See, e.g., James N.G. Cauthen, Expanding Rights Under State Constitutions: A Quantitative Appraisal, 63 Alb. L. Rev. 1183, 1185 (2000); Barry Latzer, The Hidden Conservatism of the State Court "Revolution," 74 Judicature 190, 194–96 (1991).

[6] See Robert F. Williams, The Law of American State Constitutions 193–232 (2009) (synthesizing the scholarly criticism).

[7] See, e.g., Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 187–90 (2018) [hereinafter 51 Imperfect Solutions]; Ronald K.L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 Tex. L. Rev. 1095, 1111–20 (1984).

[8] State v. Smith, 814 P.2d 652, 661 (Wash. 1991) (en banc) (Utter, J., concurring).

[9] Shirley S. Abrahamson, Reincarnation of State Courts, 36 Sw. L.J. 951, 964 (1982).

[10] State v. Tucker, 626 So. 2d 707, 719 (La. 1993) (Dennis, J., dissenting).

But the method has its defenders. Proponents typically justify lockstepping based on efficiency, authority, and anonymity.[11]

State courts are busy. In 2021, for example, the Montana Supreme Court issued nearly five hundred decisions.[12] That same year, the Georgia Supreme Court handed down more than two hundred.[13] In contrast, the U.S. Supreme Court's workload during its 2021 Term was just a fraction compared to these courts.[14] Additionally, state supreme courts generally have fewer than nine justices, who each rely on fewer law clerks, and typically lack the research and support staff U.S. Supreme Court Justices enjoy.[15] For these judges who have to do more with less, lockstepping offers access to a panoply of ready-made tests and rules they can pull off the shelf. When you are this busy, why reinvent the wheel?

[11] See generally Jeffrey S. Sutton, What Does—and Does Not—Ail State Constitutional Law, 59 U. Kan. L. Rev. 687, 709–10 (2011) (summarizing efficiency rationales); 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, 356 (1984) (noting that many state courts lockstep "not necessarily based on the persuasiveness of the Supreme Court's reasoning, but rather on its position as the highest court in the land"); Katharine Goodloe, A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations, 35 N.Y.U. Rev. L. & Soc. Change 749, 763 (2011) (finding a positive correlation, based on a survey of search and seizure cases, between a judge's electoral accountability and their likelihood to lockstep).

[12] See Montana Supreme Court: Case Processing Measures Oct.–Dec. 2021, Mont. Jud. Branch, https://courts.mt.gov/external/supreme/measures/2021/4th.pdf [https://perma.cc/J6EV-LCXJ] (last visited Apr. 24, 2023).

[13] See Opinion and Summaries, Sup. Ct. Ga., https://www.gasupreme.us/2021-opinions/ [https://perma.cc/G6LK-BNN5] (last visited Dec. 22, 2022).

[14] See Angie Gou, Ellena Erskine & James Romoser, STAT PACK for the Supreme Court's 2021–2022 Term, SCOTUSblog (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/XU6S-R4Q3] (noting 66 opinions for 2021).

[15] Compare, e.g., Mike Scarcella, U.S. Supreme Court Names Latest Lineup for Coveted Clerkships, Reuters (July 2, 2021, 5:13 PM), https://www.reuters.com/legal/government/us-supreme-court-names-latest-lineup-coveted-clerkships-2021-07-02/ [https://perma.cc/8UX9-NEQL] ("Justices each work with four clerks."), and How the Court Works—Library Support, Sup. Ct. Hist. Soc'y, https://supremecourthistory.org/how-the-court-works/library-support/ [https://perma.cc/8RS8-HEFZ] (last visited Apr. 24, 2023) ("The primary mission of the Supreme Court Library is to assist the Justices in fulfilling their constitutional responsibilities by providing them with the best support in the most efficient, ethical and economic manner."), with, e.g., Law Clerk Application Information, Conn. Jud. Branch, https://www.jud.ct.gov/external/supapp/lawclerkapps.html [https://perma.cc/B6CD-E478] (last visited Apr. 24, 2023) (noting that each of the seven justices get one law clerk), and Neil Kent Komesar, Legal Change, Judicial Behavior, and the Diversity Jurisdiction: A Comment, 9 J. Legal Studs. 387, 393–94 (1980) (observing that federal judges are "likely to have as much, if not more, research support staff" than state court judges).

The Supreme Court's perceived status as the country's "highest" court also plays a role.[16] When state courts lockstep, they are adopting rules designed by *the* Supreme Court. In this sense, lockstepping trades on the Court's reputation to accord a level of respect to the state court's decision. Indeed, as one state court sees it, lockstepping enables state judges to associate their decisions with the Supreme Court's "supreme prestige and authority."[17] In the words of a former state supreme court chief justice, if "[t]he [U.S.] Supreme Court said it; it must be right."[18]

This cloak of authority can also offer state court judges political insulation. Unlike their federal colleagues, the majority of state court judges are elected.[19] For those judges, lockstepping can serve as a tool to dull the bite of electoral accountability. As Chief Justice William Rehnquist famously cautioned a room full of state supreme court justices, state judges "who undertake [state constitutional] 'experiments,' . . . must be willing to assume the responsibility for doing so."[20] In other words, when state supreme court justices rely on an independent interpretation of the state constitution for an unpopular decision, they should be ready to face the electoral consequences. But when state court judges import federal rules or frameworks to decide controversial cases,"[t]he blame for any unpopular decision can be laid at the doorstep of the United States Supreme Court."[21]

II

The U.S. Supreme Court's originalist turn may complicate this picture. In its last several Terms, the Court has issued an increasing number of

[16] See David Shapiro, Opinion, US Supreme Court vs. States' Highest Courts: We Are Giving Kids the Wrong Message, Chi. Trib. (Sept. 23, 2022, 3:23 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-supreme-court-state-courts-power-elections-20220923-d7crquqe3vhqfp6jiogbonsava-story.html [https://perma.cc/WF8X-B5N8].

[17] Gore v. State, 218 P. 545, 547 (Okla. Crim. App. 1923).

[18] Abrahamson, supra note 9, at 964.

[19] See, e.g., Judicial Selection: Significant Figures, Brennan Ctr. for Just. (Apr. 14, 2023), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/7ANJ-YUZ7].

[20] Chief Justice William H. Rehnquist, Remarks at the National Conference of Chief Justices, Williamsburg, Virginia (Jan. 27, 1988), *reprinted in* Shirley S. Abrahamson, Divided We Stand: State Constitutions in a More Perfect Union, 18 Hastings Const. L.Q. 723, 727 n.15 (1991).

[21] See Robert A. Schapiro, Identity and Interpretation in State Constitutional Law, 84 Va. L. Rev. 389, 421–22 (1998); Goodloe, supra note 11, at 763.

originalist opinions in highly contentious cases that often roll back constitutional protections. In its most recent Term, the Court eliminated constitutional protection of reproductive rights, expanded its protection of guns, and narrowed the separation of church and state, all ostensibly based on the Constitution's original meaning.[22] Commentators have described October Term 2021 as "the most originalist in American history."[23] And according to some, the Court is "just getting started."[24]

In response to the U.S. Supreme Court's originalist majority, advocates are turning to state constitutions as alternative sources of rights.[25] But since most state supreme courts follow the U.S. Supreme Court when construing state constitutions, some have noted a move to the states risks originalism taking root as a predominant method of state constitutional interpretation, likely recreating at the state level the regressive jurisprudence that necessitated the pivot in the first place.[26]

But for most state courts, the U.S. Supreme Court's increased reliance on originalism may erode some of lockstepping's virtues. Take the economy defense. Lockstepping is supposed to create efficiencies by providing an off-the-rack template for busy courts to fill in. But it is not clear if this benefit persists in a world where the Court's jurisprudence increasingly calls for a methodology that has been described as

[22] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Carson v. Makin, 142 S. Ct. 1987 (2022).

[23] Erwin Chemerinsky, Opinion, Originalism Has Taken Over the Supreme Court, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/NV9P-UB4E].

[24] See, e.g., Alene Bouranova, Supreme Court on Guns, God, Abortion, and Affirmative Action, Bostonia (Nov. 3, 2022), https://www.bu.edu/articles/2022/scotus-guns-god-abortion-and-affirmative-action/ [https://perma.cc/KDD3-9YSV].

[25] See, e.g., Brennan, supra note 1; State Constitutions and Abortion Rights, Ctr. for Reprod. Rts., https://reproductiverights.org/state-constitutions-abortion-rights/ [https://perma.cc/78QK-UNN7] (last visited Apr. 2, 2023) ("Now that the U.S. Supreme Court has taken away the constitutional right to abortion . . . state constitutions and courts matter more than ever.").

[26] See, e.g., Edward Mechmann, State Constitutions and Abortion Rights, Hum. Life Rev. (Feb. 8, 2023), https://humanlifereview.com/state-constitutions-and-abortion-rights/ [https://perma.cc/8VMW-42Q3] ("If state high courts follow originalism, they will hold in virtually every state that there is no constitutional right to an abortion."); Alice Clapman, Abortion Cases Take Originalism Debate to the States, Brennan Ctr. for Just. (Jan. 10, 2023), https://www.brennancenter.org/our-work/analysis-opinion/abortion-cases-take-originalism-debate-states [https://perma.cc/2DNW-LZ6D]; see also Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1161–97 (Idaho 2023) (upholding state abortion ban under *Dobbs*-inspired originalist analysis).

"enormously time-consuming."[27] For example, following the Court's originalist decision in *District of Columbia v. Heller*, rather than engage in the resource-intensive process that opinion seemed to call for, nearly all lower court judges invoked much simpler, non-originalist workarounds.[28] For state courts, would a new, originalist version of *Miranda v. Arizona* that is, in the words of Justice Scalia, "better suited to the historian than the lawyer" really be a timesaver?[29]

The Court's originalist turn could also undermine the respect and authority that is said to come from adopting its jurisprudence. Its recent decisions overruling *Roe v. Wade* and expanding the right to keep and bear arms, among others, have sparked substantial popular backlash. Together with a recent spate of alleged ethical breaches, public perception of the U.S. Supreme Court is at a historic low.[30] In some ways, many of the critiques that have traditionally been leveled at state courts—poorly reasoned opinions and perceptions of bias[31]—perhaps better describe the current U.S. Supreme Court. Thus, for some state court judges, current Supreme Court doctrine perhaps lacks the aura of prestige or respect it once did to justify its wholesale adoption.

Similarly, the negative sentiment surrounding the Court could harm state court judges' electoral chances. Whereas in the past a record of invoking federal precedent in one's opinions may have offered an air of authority, or served as an accountability buffer, it could now prove to be

[27] Akhil Reed Amar, Opinion, What Gorsuch Has in Common With Liberals, N.Y. Times (Mar. 18, 2017), https://www.nytimes.com/2017/03/18/opinion/sunday/what-gorsuch-has-in-common-with-liberals.html [https://perma.cc/ZEX8-5HS6].

[28] See Eric Ruben & Joseph Blocher, From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*, 67 Duke L.J. 1433, 1490–91 (2018).

[29] Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856–57 (1989).

[30] See, e.g., Joshua Kaplan, Justin Elliott & Alex Mierjeski, Clarence Thomas and the Billionaire, ProPublica (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/VN6H-U65H]; Jodi Kantor & Jo Becker, Supreme Court Defends Alito After Breach Allegation, N.Y. Times (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/us/supreme-court-breach-alito.html [https://perma.cc/Y5DQ-V59U]; Steve Eder, At the Supreme Court, Ethics Questions Over a Spouse's Business Ties, N.Y. Times (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html [https://perma.cc/M5F9-B96B]; Lowest Opinion of Trump Among Voters In Seven Years, Quinnipiac University National Poll Finds; Biden Approval Rating Climbs, Quinnipiac Univ. (Dec. 14, 2022), https://poll.qu.edu/poll-release?releaseid=3863 [https://perma.cc/WWN4-SJ3M] (recording the lowest job approval for the Justices "among registered voters since Quinnipiac University began asking the question in 2004").

[31] See Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1121–24, 1127–28 (1977).

a campaign liability. With more attention on state courts in the context of highly salient issues, like bodily autonomy and democracy, voters or members of a state's nomination process might solicit a candidate's views on the influence of U.S. Supreme Court decisions in their approach to interpretating the state constitution. Incumbents may need to justify why they rely on a federal court to determine the content of state law. In light of its current jurisprudence of retrenchment, voters may want a justice who develops doctrine independent of the Supreme Court, not one who imports it.

That said, for some state court judges the Court's originalist turn might be seen as a feature of its jurisprudence and thus invite more lockstepping. This may be particularly true of those judges who fashion themselves as originalists. For these judges, though, the dynamic raises difficult questions, like whether lockstepping is consistent with the original meaning of a state's constitution, or more fundamentally, whether an interpretive method like originalism is consistent with a state—versus the federal—constitution.[32]

But even for non-originalist justices, the U.S. Supreme Court might be hard to quit due to issues of path dependence.[33] State courts have lockstepped in so many cases, for so long, that they might find it hard to overcome doctrinal inertia. For courts that find themselves in this situation, though, there are options to build momentum. For example, state courts might adopt rules or standards that the Supreme Court has narrowed or overruled in subsequent decisions.[34] The Massachusetts Supreme Judicial Court, for instance, has traditionally determined whether a right is "fundamental" for the purposes of substantive due process in lockstep with the Supreme Court's jurisprudence. But in a

[32] See, e.g., Caleb Nelson, The Legitimacy of (Some) Federal Common Law, 101 Va. L. Rev. 1, 25–28 (2015) (suggesting originalism may be inconsistent with state constitutions); William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2399–2400 (2015) (suggesting originalism may be fundamentally inconsistent with state constitutions or might be contingent on a "state's political and legal culture"); see also Douglas A. Hedin, The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past, 30 Wm. Mitchell L. Rev. 241, 261–71 (2003) (arguing originalism is inconsistent with Minnesota's constitution); Linda Ross Meyer, Connecticut's Anti-Originalist Constitutions and Its Independent Courts, 40 Quinnipiac L. Rev. 501, 507–08 (2022) (arguing the Connecticut Constitution "should not be interpreted through an originalist lens").

[33] See Lawrence Friedman, Path Dependence and the External Constraints on Independent State Constitutionalism, 115 Dick. L. Rev. 783, 803–14 (2011); Sutton, supra note 11, at 710.

[34] Cf. Williams, supra note 6, at 374–77 (noting dissenting opinions in U.S. Supreme Court decisions could provide grist for state supreme courts to mill into state constitutional doctrine).

recent decision, the state court rejected the Supreme Court's "unduly restrictive" *Dobbs v. Jackson Women's Health Organization* formulation of fundamental rights in favor of the one it used in *Obergefell v. Hodges*.[35] Courts can also engage in doctrinal reappropriation, using prevailing federal frameworks to reach outcomes under state constitutions that exceed current federal jurisprudence. Recent cases limiting or abolishing juvenile life without parole sentences based on the U.S. Supreme Court's *Miller* factors and framework for excessive punishments are illustrative.[36] Alternatively, courts might shift some of the heavy lifting to litigants. They might specifically ask parties to brief an independent state constitutional analysis or appoint amici on both sides to do the same.

These steps would be stops along the way towards a different view or new conception of state constitutional jurisprudence. Many state courts have attempted similar moves in the past as part of a broader effort to develop and refine their own doctrine. But this time the context is perhaps a bit different. Whereas for state courts, developing an independent body of doctrine previously served as a carrot, the Supreme Court's efforts to originalize and retrench much of its jurisprudence might now serve as a stick.

III

With renewed interest in state constitutions, advocates have an opportunity to develop a more holistic and democratic approach to protecting important rights. Constitutional litigation—the prevailing method—is one of several ways to defend and enhance individual liberties at the state level. Advocates driving these state-based efforts should account for the larger legal ecosystem and the broader role state courts play as institutions of governance at the state level when formulating their strategies. This view would widen the lens beyond constitutional litigation and recognize state courts' policymaking powers, and perhaps beyond litigation entirely, to advance notions of justice, equality, and democracy.

The recent turn to state courts and constitutions is said to follow in part from the U.S. Supreme Court's increasingly ideological turn to the right

[35] See Kligler v. Att'y Gen., 491 Mass. 38, 59–62 (2022).

[36] See, e.g., State v. Comer, 266 A.3d 374 (N.J. 2022); State v. Kelliher, 873 S.E.2d 366 (N.C. 2022); State v. Bassett, 428 P.3d 343 (Wash. 2018); State v. Sweet, 879 N.W.2d 811 (Iowa 2016).

coupled with a long tradition of judicial supremacy.[37] As Ryan Doerfler and Samuel Moyn have argued, regardless of the current "cycle" of the Court's ideological control, a primary cause of much of the current federal retrenchment is the normalization of judicial supremacy vis-à-vis aggressive judicial review.[38] Indeed, for Nikolas Bowie and Daphna Renan, judicial supremacy is its own ideology.[39] Jamal Greene has suggested a pathology of this tradition is that society generally frames intractable social and political issues as constitutional rights disputes and looks to the U.S. Supreme Court to solve them.[40] The Court often views these disputes through a "zero-sum" lens, leading to decisions with a substantial blast radius: wins and losses have enormous consequences, progressing society or setting it back decades.[41] Vindicating rights within this frame chills political engagement from the other branches, which makes rights questions higher stakes and less democratic, and centralizes more power in the Supreme Court.[42] According to this account, we traditionally default to protecting rights with "the heavy weaponry of constitutional law," where decisions begin and end with the courts.[43] As efforts to protect fundamental rights and marginalized groups increasingly turn to state courts and constitutions, some are of the view

[37] See, e.g., Samuel Moyn, The Court Is Not Your Friend, Dissent (2020), https://www.dissentmagazine.org/article/the-court-is-not-your-friend [https://perma.cc/Q8NR-YCDL].

[38] See Samuel Moyn, The Myth of Eternal Return and the Politics of Judicial Review, 86 Mo. L. Rev. 571 (2021) (reviewing Jack Balkin, The Cycles of Constitutional Time (2020)); Ryan Doerfler & Elie Mystal, The Supreme Court Is Broken. How Do We Fix It?, Nation (June 6, 2022), https://www.thenation.com/article/society/how-to-fix-supreme-court/ [https://perma.cc/T43J-UEQC] ("Real progress . . . requires . . . stripping the [C]ourt of its authority and returning our society's most pressing and important questions to the democratic arena—where progressive causes, backed by popular movements, stand the best chance.").

[39] See Nikolas Bowie & Daphna Renan, The Supreme Court Is Not Supposed to Have This Much Power, Atlantic (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/8JX6-AXYB].

[40] See generally Jamal Greene, How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart (2021) (diagnosing this issue and advocating for an attempt at judicial withdrawal from political debates).

[41] See Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 32 (2018).

[42] See, e.g., Bowie & Renan, supra note 39.

[43] Ryan D. Doerfler & Samuel Moyn, The Constitution Is Broken and Should Not Be Reclaimed, N.Y. Times (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html [https://perma.cc/7CJS-QDLW].

that a reflexive pivot could risk perpetuating these norms at the state level.[44]

Other commentators suggest the critiques of federal judicial review are largely a product of the Supreme Court's counter-majoritarian nature, and because state courts are generally more accountable institutions, the defects present at the federal level do not extend to state supreme courts.[45] That may be so, but the majoritarian features of state courts can be modified or overridden in ways that minimize their democratic virtues.[46] These features may also be subject to informal or unwritten norms that can skew court composition in counter-majoritarian ways.[47] So, it is perhaps a bit too quick to suggest the heavy-weapon-approach typical of the federal courts can be justified in state courts based on their facially more democratic design.[48]

This is particularly true because state-level institutions provide additional pathways to meaningfully protect important rights.[49] Thus, a

[44] See, e.g., Sprigman, supra note 3, at 1833 (arguing a reflexive pivot to the states will perpetuate judicial supremacy); Clopton, supra note 3 (similar); Clapman, supra note 26 (discussing the "regressive real-world implications" of state supreme courts following the U.S. Supreme Court's current originalist turn); Mechmann, supra note 26 (similar).

[45] See, e.g., Stefanie A. Lindquist, Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior, 28 Stan. L. & Pol'y Rev. 61, 68–70 (2017) ("[S]tate judiciaries do not implicate the countermajoritarian difficulty to the same extent as the federal judiciary."); Jonathan S. Gould, Puzzles of Progressive Constitutionalism: Against Constitutionalism, 135 Harv. L. Rev. 2053, 2100–05 (2022) (sketching the general outline of this argument). But see Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 788–94 (1995) (suggesting state courts present a "majoritarian" problem).

[46] See, e.g., Jed Handelsman Shugerman, Countering Gerrymandered Courts, 122 Colum. L. Rev. F. 18, 23–27 (2022) (discussing the history and effects of judicial gerrymandering); Patrick Berry, Michael Milov-Cordoba, Douglas Keith & Alicia Bannon, Legislative Assaults on State Courts—December 2022 Update, Brennan Ctr. for Just. (Dec. 12, 2022), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2022-update [https://perma.cc/DH7A-4SBR] (collecting various proposed or enacted bills that undermine the majoritarian features of several state supreme courts).

[47] See Adam Sopko, Constitutional Norms and State Judicial Confirmations, State Democracy Rsch. Initiative (Jan. 19, 2023), https://statedemocracy.law.wisc.edu/featured/2023/constitutional-norms-and-state-judicial-confirmations/ [https://perma.cc/FD3U-Z8B4].

[48] See, e.g., Schapiro, supra note 21, at 420 ("When a state court nullifies governmental action under the state constitution, it confronts the countermajoritarian problem that plagued Bickel and his followers."); Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1887 (2001) (suggesting that looking to state courts to "dilute" the counter-majoritarian "concerns" associated with the federal courts requires more than just differences in judicial selection and retention).

[49] See, e.g., Hershkoff, supra note 48, at 1836–38; Judith S. Kaye, Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23

state-based approach to protecting rights does not need to resemble the binary federal frame or necessarily require perpetuating these norms. In the space available in this Essay, I will briefly discuss three—direct democracy, state courts' non-adjudicative powers, and the common law. But the broader point is that advocates should account for the full state-level ecosystem when developing state-based approaches to protecting their clients and furthering their causes.

Start with direct democracy. Like the federal constitution, most state constitutions reserve for the people and their representatives a means to amend the documents. But amending the federal Constitution through Article V's procedure is effectively an academic exercise. Since 1789, the federal Constitution has been amended twenty-seven times, most recently in the early 1990s.[50] Instead, to change the Constitution's meaning or substance, we typically turn to litigation and ask the Supreme Court to interpret the document to recognize or eliminate certain rights.[51]

In contrast, state constitutions are "characterized by frequent amendment."[52] John Dinan has found that state constitutions are amended approximately ten times more often than the federal Constitution.[53] Empirical studies on the relationship between constitutional amendment and judicial review suggest this higher amendment rate can minimize instances of aggressive judicial review.[54] The meaningful threat of the

Rutgers L.J. 727, 738–44 (1992); see also Miriam Seifter, State Institutions and Democratic Opportunity, 72 Duke L.J. 275, 348 (2022) (arguing state institutions offer a "distinctive democratic opportunity that federal institutions do not" and suggesting how actors might leverage that opportunity to protect "popular rule by the people on equal terms").

[50] John Dinan, State Constitutional Amendments and American Constitutionalism, 41 Okla. City U. L. Rev. 27, 30 (2016).

[51] See, e.g., Amanda Shanor, The Tragedy of Democratic Constitutionalism, 68 UCLA L. Rev. 1302, 1381–82 (2022) ("In a system with open ended constitutional clauses subject to varying interpretations (and interpretive methodologies), an amendment process that is practically insurmountable, and a relatively politically-sensitive judiciary . . . groups of people, from the civil rights and women's rights movements to the National Rifle Association and business-led movements, have significantly altered constitutional meaning."); David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law 8–9 (2016) (arguing that new constitutional rights come from popular movements convincing the U.S. Supreme Court to recognize them rather than formal amendments).

[52] Jonathan L. Marshfield, Amendment Creep, 115 Mich. L. Rev. 215, 260 (2016).

[53] See John Dinan, State Constitutional Developments in 2014, *in* 47 Council of State Governments, The Book of the States 3, 11–12 tbl.1.1 (2015).

[54] See, e.g., Jonathan L. Marshfield, The Amendment Effect, 98 B.U. L. Rev. 55, 62–65 (2018). Marshfield's findings suggest this check persists in a state of equilibrium, where low amendment rates may foster higher judicial engagement, and increased amendments can minimize aggressive forms of judicial review. But there is a "tipping point," when amendment

people or their representatives overriding a judicial decision can temper its strongest forms, especially where there is a significant ideological gap between the court and the citizenry.[55]

We might also consider looking beyond constitutions as additional sources to protect important rights. In all states, the common law is a supplemental source of liberties. Though we typically associate the common law with private law issues—tort, property, contract—many of our most cherished constitutional rights flow from a common law antecedent.[56] It is unsurprising, then, that state courts have relied on the common law to protect many of the rights we generally ascribe to constitutions.[57] For example, the New Jersey Supreme Court has held that common law protections of the incarcerated exceed what the state and federal constitutions provide in certain instances.[58] The supreme courts of Georgia and Michigan recently clarified that their states' common law guarantees a right to resist unlawful arrests.[59] And the high courts in Maryland and New York have developed robust common law rights of bodily autonomy.[60]

Because they occupy a lower rung in the legal hierarchy, common law decisions generally lack the bite we might expect from a constitutional decision. To bring a more democratic approach to rights protections, this is a feature. Common law decisions protect the underlying rights without

becomes "so frequent that it loses its constraining effect on judges and may actually facilitate activism." Id. at 98 (internal quotation marks omitted).

[55] See id. at 118–19.

[56] See, e.g., Ellen A. Peters, Common Law Antecedents of Constitutional Law in Connecticut, 53 Alb. L. Rev. 259, 261 (1989).

[57] See, e.g., Kaye, supra note 49, at 743 ("[A]s the common law once nourished the constitutions, constitutional values—especially the values so meticulously set out in our lengthy state charters—also can enrich the common law."); see also Helen Hershkoff, "Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 Stan. L. Rev. 1521, 1555–58 (2010) (describing this phenomenon as "indirect constitutional effect").

[58] See Avant v. Clifford, 341 A.2d 629, 642–43, 645 (N.J. 1975).

[59] See, e.g., Glenn v. State, 849 S.E.2d 409, 411 (Ga. 2020) ("[T]he common-law right to resist an unlawful arrest includes the right to use proportionate force against government property to escape an unlawful detention following the arrest."); People v. Moreno, 814 N.W.2d 624, 628–29 (Mich. 2012) (protecting the right to "use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" (quoting People v. Krum, 132 N.W.2d 69, 72 (Mich. 1965))).

[60] Stouffer v. Reid, 993 A.2d 104, 120 (Md. 2010) (extending common law right of bodily autonomy to incarcerated people); Fosmire v. Nicoleau, 551 N.E.2d 77, 81 (N.Y. 1990) (noting the common law right is "coextensive" with the liberty interests protected by the state constitution's due process clause).

tying the hands of the legislature, leaving "both courts and legislatures room to adapt principles to changed circumstances."[61] Constitutional decisions, in contrast, are generally less flexible and centralize power in the court. Indeed, as Greene and Bowie have shown, the U.S. Supreme Court's increasingly aggressive form of judicial review creates a monological frame of governance: it stifles policymaking by other branches, positions the Court as the sole arbiter of numerous important issues, and solidifies the Court's decision as the final say on the matter.[62]

But when state courts rely on their inherent lawmaking power, they "open[] a dialogue with the legislature and the people and spur[] the development of shared solutions to important public problems."[63] The common law can limit state action and preserve important rights while "smooth[ing] the path for legislative action."[64] When a court starts with the common law—rather than a constitution—to try and solve many of the difficult questions of public law that we turn to courts for, they can "intervene . . . persistently" to vindicate harms, but without overriding more democratic pathways.[65] In some instances, a broad, sweeping conception of a right may be both more desirable and judicially feasible based on the common law rather than the state constitution.

We might also consider options beyond judicial review. Specifically, "little attention has been paid to state courts' use of the[ir supervisory] powers, particularly as an alternative to a potential state constitutional claim."[66] Indeed, at least one scholar has described state courts'

[61] 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, 16 (1995); Kaye, supra note 49, at 750–51 ("A cast-in-stone constitutional decision ties the hands of the judiciary and other institutions of government, perhaps precluding the development of flexible solutions to complex new policy choices generated by a changing society with an expectation of total justice." (internal quotation marks omitted)).

[62] See Nikolas Bowie, Antidemocracy, 135 Harv. L. Rev. 160, 203–04 (2021); Greene, supra note 41, at 32–34.

[63] Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1169 (1999).

[64] Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 27 (N.J. 1992) (Pollock, J., concurring).

[65] Kaye, supra note 49, at 751 (quoting Jonathan P. Bach, Note, Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform, 98 Yale L.J. 1153, 1159 (1989)).

[66] Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1165 (1985); Thomas Ward Frampton & Brandon Charles Osowski, The End of *Batson*? Rulemaking, Race, and Criminal Procedure Reform,

administrative powers as an "unseen but essential body of law."[67] Michael Pollack has shown these non-adversarial or non-adjudicative aspects of state court business can provide safeguards for individual rights outside of a litigation context.[68] With their policymaking powers, courts can influence the ways the state's justice system functions, which can bear on important fundamental rights, extend protections to marginalized groups, and more readily account for society's evolving notions of justice.

For example, state supreme courts can rely on their policymaking powers to minimize the pernicious effects of racial and gender bias in the state's criminal legal process,[69] create problem-solving courts that provide therapeutic treatments rather than punitive sentences for certain offenders,[70] and bolster democratic guardrails by sharpening rules that govern attorney conduct.[71] Similarly, through their rulemaking authority

Colum. L. Rev. (forthcoming 2024) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419333 [https://perma.cc/4AHL-CAR4].

[67] Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1305 (2018).

[68] See, e.g., Michael C. Pollack, Courts Beyond Judging, 46 B.Y.U. L. Rev. 719, 724 (2021). Pollack is somewhat skeptical as to the normative value of state courts overseeing certain non-adjudicative processes due to what he sees as limited accountability. Id. at 758–59. In this brief Essay, I do not purport to engage with that critique. Rather, my argument proceeds from the positive claim that state courts play a wide range of roles beyond adjudicating legal disputes, and that some of those roles can provide protections for certain rights and marginalized groups.

[69] See, e.g., Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection, ACLU of Wash. (Apr. 9, 2018, 3:45 PM), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [https://perma.cc/MH3D-NG24].

[70] See, e.g., Priya Vijayakumar, Report: Michigan 'Problem-Solving' Courts Lowered Unemployment and Recidivism Rates For 2022, Mich. Radio (Apr. 25, 2023, 4:59 PM), https://www.michiganradio.org/public-safety/2023-04-25/report-michigan-problem-solving-courts-lowered-unemployment-and-recidivism-rates-for-2022 [https://perma.cc/PP52-HBT5] (discussing significant reductions in recidivism and unemployment for graduates of Michigan's problem-solving courts); Bruce J. Winick, Therapeutic Jurisprudence and Problem Solving Courts, 30 Fordham Urb. L.J. 1055, 1055–61 (2003) (noting how problem-solving courts illustrate how state court judicial power goes beyond claim adjudication and includes policymaking); Pollack, supra note 68, at 753–54 (discussing problem-solving and "status" courts).

[71] See, e.g., Michael J. Rossi, The Ethical Boundaries of Zealous Advocacy in Election Suits and Beyond, Mass. Laws. Wkly. (Mar. 3, 2023), https://masslawyersweekly.com/2023/03/03/the-ethical-boundaries-of-zealous-advocacy-in-election-suits-and-beyond/ [https://perma.cc/MD69-NTYX] (noting recent changes to various rules of professional responsibility "designed as an antidote to lawyers who engage in no-holds-barred conduct in the name of zealous advocacy"); see also Renee Knake Jefferson, Lawyer Lies and Political Speech, 131

supreme courts can influence the scope of important rights, like abortion access,[72] prohibitions on excessive sentences,[73] impartial juries,[74] and speedy trials,[75] among others.[76] Just recently, state courts have relied on their rulemaking powers to expand civil legal representation for indigent parties,[77] enhance the right to counsel for indigent criminal defendants,[78] minimize the oppressive effects of debtors' prisons,[79] and reform the use of jailhouse informants.[80] In nearly all of these instances, state courts acting in their administrative capacity used subconstitutional state law to provide protections beyond what state and federal constitutions currently provide, often in contexts where litigation previously failed.[81]

Yale L.J.F. 114, 114–15 (2021) (calling for punishment of lawyers who try to subvert elections via litigation based on falsehoods).

[72] See Pollack, supra note 68, at 781–87.

[73] E.g., State v. Culver, 129 A.2d 715, 719–21 (N.J. 1957) (explaining the role court rules play in challenging excessive sentences).

[74] See generally Frampton & Osowski, supra note 66 (discussing how the Arizona Supreme Court abolished preemptive strikes through their rulemaking authority).

[75] See, e.g., En Banc Order at 1, 3, In re: Miss. Rules of Crim. Proc., No. 89-R-99038-SCT (Miss. Apr. 13, 2023), https://www.courts.ms.gov/research/rules/ruleamendments/2023/Rules%20Order%20Re%20MRCrP%207.2.pdf [https://perma.cc/7SA3-LQK7].

[76] See, e.g., Christine Durham, Foreword: A Great Experiment: State Supreme Courts, Regulatory Reform in the Legal Profession, and Access to Justice, 74 Rutgers U. L. Rev. 1393, 1393–97 (2022); Crespo, supra note 67, at 1305–09.

[77] See, e.g., Michael Karlik, Colorado Supreme Court Enacts Groundbreaking Framework for Legal Representation by Paraprofessionals, Gazette (Mar. 29, 2023), https://gazette.com/news/courts/colorad-supreme-court-enacts-groundbreaking-legal-paraprofessional-framework/article_d202d359-ab68-5cc4-9ea7-bb895bd4ea3c.html [https://perma.cc/MBZ2-4PDP]; see also Aaron West, Mich. High Court Mulls New Rule That Helps Indigent Clients, Law360 (Mar. 23, 2023, 8:29 PM), https://www.law360.com/articles/1588993 [https://perma.cc/7MVP-NV85] (discussing a rule change proposed by the Michigan Supreme Court that would expand access to civil legal representation for certain indigent parties).

[78] Caleb Bedillion & Taylor Vance, Some Are Jailed in Mississippi for Months Without a Lawyer. The State Supreme Court Just Barred That., ProPublica (Apr. 14, 2023, 5:30 AM), https://www.propublica.org/article/mississippi-public-defenders-lawyers-defendants [https://perma.cc/2L9J-KEY4] (reporting the "landmark change in Mississippi's public defense system").

[79] See Jane S. Schacter, Glimpses of Representation-Reinforcement in State Courts, 36 Const. Comment. 349, 367–76 (2021).

[80] See, e.g., Nick Muscavage, NJ Latest State to Probe Use of Jailhouse Informants, Law360 (Feb. 25, 2022, 4:47 PM), https://www.law360.com/articles/1462987/nj-latest-state-to-probe-use-of-jailhouse-informants [https://perma.cc/4F48-4AV7] (listing other states that have taken similar actions).

[81] See, e.g., Order, Proposed Amendment of Rule 6.001 and Proposed Addition of Rule 6.009 of the Michigan Court Rules (Mich. June 1, 2022), https://www.courts.michigan.gov/49b8ab/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-

In many states, supreme court rulemaking powers are significantly more expansive and efficient than the U.S. Supreme Court's rulemaking authority.[82] This allows states to respond faster, sometimes with rules that better advance society's conceptions of justice and equality.[83] In some states, rulemaking decisions may be the functional equivalent of a constitutional rule—they provide structural, system-wide protections that cannot be superseded by legislative action.[84] In other states, where court rules can be overridden by legislation, rulemaking is still valuable, as it takes the important step of identifying and problematizing an issue, framing it in a particular fashion, and necessitating the legislature and governor to engage.[85] Like the common law, this approach widens the lens beyond a constitution as the sole source of protection and can serve as an "opening statement in a public dialogue with the other branches of government and the people."[86]

As this brief discussion shows, there are several features of state-level institutions and democracy that can protect the fundamental rights and marginalized communities we have traditionally relied on federal courts to protect by interpreting the U.S. Constitution. To be sure, these features are not without limitations. In some states direct democracy is unavailable or under threat from the legislature and in others the supreme court may have an uneasy view of their common law power or may be using their rulemaking authority to build a less accountable judiciary.[87] But this only

orders-on-admin-matters/proposed-orders/2021-20_2022-06-01_formor_propamdmcr6.001-add6.009.pdf [https://perma.cc/DK56-JPMQ] (proposing a new court rule that would limit the use of restraints on criminal defendants in the presence of juries); id. at 3–4 (Zahra, J., dissenting) (arguing against the proposed rule because it would offer protections "well beyond the constitutional floor set by [the U.S. Supreme Court]"); Frampton & Osowski, supra note 66 (manuscript at 5–6).

[82] Randall T. Shepard, The New Role of State Supreme Courts as Engines of Court Reform, 81 N.Y.U. L. Rev. 1535, 1539–40 (2006).

[83] Additionally, these actions, like common law decisions, are generally unreviewable by the U.S. Supreme Court. But see Cruz v. Arizona, No. 21–846, slip op. at 2 (U.S. Feb. 22, 2023) (reversing a state rule of criminal procedure as inconsistent with federal law).

[84] See Shepard, supra note 82, at 1540.

[85] See Hershkoff, supra note 63, at 1163–64.

[86] See id. at 1161–66; Kaye, supra note 49, at 751; see also Samuel Moyn, Counting on the Supreme Court to Uphold Key Rights Was Always a Mistake, Wash. Post (June 17, 2022, 1:31 PM), https://www.washingtonpost.com/outlook/2022/06/17/supreme-court-rights-congress-democracy/ [https://perma.cc/8FBB-79PZ]; Aziz Rana, Why Americans Worship the Constitution, Pub. Seminar (Oct. 11, 2021), https://publicseminar.org/essays/why-americans-worship-the-constitution/ [https://perma.cc/WV3J-7MYC].

[87] See, e.g., Quinn Yeargain, Four Ballot Measures Threaten to Undercut Direct Democracy in Arizona and Arkansas, Bolts (Sept. 21, 2022), https://boltsmag.org/ballot-measures-

reinforces the larger point that no one path is the best, and that state-level efforts to protect rights need not—and perhaps should not—follow the familiar approach at the federal level.

CONCLUSION

In light of recent retrenchment by the U.S. Supreme Court, more attention is shifting to state constitutions and supreme courts as alternatives means to protect important individual rights. Though state courts have traditionally followed Supreme Court interpretations of the federal Constitution when interpreting state constitutions, the Court's recent originalist turn is likely to complicate that picture. Many of the theory's bugs and features undermine the key virtues for state courts to follow the Supreme Court's lead. As a result, many state courts will have greater incentives to re-evaluate (and perhaps reconceptualize) their role in interpreting their state constitution and its implications for many of the important questions the Supreme Court is increasingly shifting to the states. But constitutions are not the only state-level means to protect rights and liberties, nor are they necessarily the best. State-level institutions—especially state courts—offer a broader constellation of tools that can protect important rights but in ways that are more flexible and democratic than analogous options at the federal level. For state courts, the pluralistic view sketched in this Essay is consistent with their role as coordinate institutions of state-level governance. Renewed attention on the states presents an opportunity for advocates to view state courts as such and adopt a more holistic view when formulating state-level strategies.

arizona-arkansas-direct-democracy/;%7bDE [https://perma.cc/8YU2-VTMH]; Will Doran, Leaked Document Shows Big Changes Could Be Underway at GOP-Majority NC Supreme Court, WRAL News (Feb. 14, 2023, 11:44 AM), https://legacy.wral.com/leaked-document-shows-big-changes-could-be-underway-at-gop-majority-nc-supreme-court/20716857/ [https://perma.cc/EA9J-M2PA].