ARTICLES

CULTIVATING STATE CONSTITUTIONAL LAW TO FORM A MORE PERFECT UNION—INDIANA'S STORY

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INTRODUCTION

Indiana's Constitution called for Polly Strong's freedom from slavery in 1820—before the Emancipation Proclamation,[1] before ratification of the Thirteenth Amendment, and before other states would enact similar protections.[2]

Polly Strong's mother, Jenny, was a Black slave who had been seized by Native Americans and sold in the territory northwest of the Ohio River.[3] Polly was born into slavery around 1796, and around 1806 she was purchased by Knox County innkeeper Hyacinth Lasselle.[4]

In 1818—about two years after Indiana's Constitution was adopted[5]—a writ of habeas corpus was filed on Polly's behalf in Knox Circuit Court.[6] The writ asserted that under Indiana's new constitution, Polly was being unlawfully held as a slave.[7] The innkeeper Lasselle responded that the ownership of Polly was a vested right protected by the Northwest Ordinance of 1787, which prohibited the expansion of slavery but expressly allowed it where already authorized.[8]

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1. Emancipation Proclamation, 12 Stat. 1267 (1862).

2. *See* State v. Lasselle, 1 Blackf. 60 (Ind. 1820); *cf., e.g.*, Graham v. Strader, 44 Ky. (5 B. Mon.) 173 (1844); Mitchell v. Wells, 37 Miss. 235 (1859); La Grange v. Chouteau, 2 Mo. 20 (1828); Maria v. Surbaugh, 23 Va. (2 Rand.) 228 (1824). *See generally* 2 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1929); 3 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1932); 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall & James J. Hayden eds., 1936); David R. Upham, *The Understanding of "Neither Slavery Nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 137, 142–45 (2017).

3. *Lasselle*, 1 Blackf. at 60–61; *Polly Strong Slavery Case*, IND. HIST. BUREAU, https://www.in.gov/history/markers/4267.htm (last visited Mar. 26, 2019).

4. *Polly Strong Slavery Case*, *supra* note 3.

5. *See* IND. CONST. of 1816. For a collection of documents surrounding Indiana's statehood, see *Road to Indiana Statehood*, IND. UNIV. PURDUE UNIV. INDIANAPOLIS, UNIV. LIBR., ulib.iupuidigital.org/cdm/search/collection/ISC (last visited Mar. 26, 2019).

6. *Polly Strong Slavery Case*, *supra* note 3.

7. *Id.*; *see Lasselle*, 1 Blackf. at 61; Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, 111 IND. MAG. OF HIST. 64, 79–83 (2015).

8. *See* An Ordinance for the Government of the Territory of the United States, North West of the River Ohio, art. VI [hereinafter Nw. Ordinance of 1787] (July 13, 1787) ("There shall be neither Slavery nor involuntary Servitude in the said territory . . . provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."); *Lasselle*, 1 Blackf. at 61; Finkelman, *supra* note 7, at 83–84; *Polly Strong Slavery Case*, *supra* note 3; *Primary Documents in American History: Northwest Ordinance*, THE LIBR. OF CONG., http://www.loc.gov/rr/program/bib/ourdocs/northwest.html (last visited Mar. 26, 2019).

Lasselle claimed that the slave status of Polly's mother, and thus of Polly, existed *before* 1787 on lands where slavery was permitted under Virginia law.[9] And when Virginia ceded to the United States land that was later included in the Northwest Ordinance, that cession preserved slavery.[10]

The Knox Circuit Court denied the writ, but the Indiana Supreme Court reversed.[11] After acknowledging that "it was within the legitimate powers of the convention, in forming our constitution, to prohibit the existence of slavery in the state of Indiana," the Indiana Supreme Court turned to the language of the Indiana Constitution "to learn the nature and extent of our civil rights."[12] The Court emphasized that the constitution declared, "all men are born equally free and independent; and have certain natural, inherent, and unalienable rights," which "shall forever remain inviolable."[13] To ensure those rights, the Court explained, the constitution specifically insisted that "[t]here shall be neither slavery nor involuntary servitude in this state."[14]

The Court held that with this provision, "the framers of our constitution intended a total and entire prohibition of slavery in this state; and we can conceive of no form of words in which that intention could have been more clearly expressed."[15] Because the constitution stood as "the collected voice of the citizens of Indiana, declaring their united will," the Court found it "an irresistible conclusion" that "slavery can have no existence in the state of Indiana; and, of course, the claim of the [innkeeper] Lasselle [to hold Polly as a slave] cannot be supported."[16]

In Polly Strong's case almost two hundred years ago, the Indiana Supreme Court unhesitatingly gave effect to the language of Indiana's first constitution, which had been adopted just four years earlier.[17] This resolute adherence to state constitutional provisions is likewise reflected in Indiana's current jurisprudence. Though it has matured through the years, the Indiana Constitution remains a vibrant guarantor of rights; and it plays a critical role in "secur[ing] the Blessings of Liberty"[18] that flow from federalism's diffusion of power.

This Article seeks to illustrate the vibrancy and independence of Indiana constitutional law, revealing how Indiana sets an example for other states to more thoroughly employ their own state constitutions. It also seeks to convey the value of invoking state constitutional guarantees. This is because although the Indiana Constitution is a wellspring of civil-liberty guarantees—offering a host of protections independent of the United States Constitution[19]—it often goes untapped by litigants and their legal representatives.

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9. *Lasselle*, 1 Blackf. at 60; *Polly Strong Slavery Case*, *supra* note 3.

10. *Polly Strong Slavery Case*, *supra* note 3; *see* Virginia Cession Deed of Oct. 20, 1783 ("That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties."); 26 Journals of the Continental Congress 1774–1789, at 112–17 (1928).

11. *Lasselle*, 1 Blackf. at 61, 63.

12. *Id.* at 62.

13. *Id.* (quoting IND. CONST. of 1816 art. I, §§ 1, 24).

14. *Id.* (quoting IND. CONST. of 1816 art. XI, § 7). The 1816 Constitution provided only one exception: for those "duly convicted" of crimes. *See* IND. CONST. of 1816 art. XI, § 7.

15. *Lasselle*, 1 Blackf. at 62.

16. *Id.*

17. Even though the 1816 Constitution prohibited slavery in Indiana, other laws reflected antipathy towards slaves and free Blacks. *See* Finkelman, *supra* note 7, at 65–67; 5 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 31–48 (Helen Tunnicliff Catterall & James J. Hayden eds., 1937).

18. U.S. CONST. pmbl.

19. For ease of reading, I will often refer to the Constitution of the United States as the "United States Constitution" or the "Federal Constitution."

To those ends, the Article first reiterates the importance of state constitutional law in securing precious liberties—a topic more thoroughly explained by other jurists and scholars. It next samples Indiana constitutional provisions, along with leading cases interpreting and applying them, which reveal the current vitality and independence of Indiana's Constitution. It then takes a rearview look at how Indiana constitutional law acquired its current stature. Finally, it looks ahead: first to issues that provoke litigation and dialogue about the shape of state and federal constitutional protections, and then to ways the legal community can cultivate independent state constitutional jurisprudence.

I. The Importance of Robust State Constitutional Law

State constitutional law across the United States is an underdeveloped area of law generally. But the reasons to foster its development have been adeptly and repeatedly explained by jurists and scholars, many asserting that the subject deserves greater attention.[20] Indeed, the case for well-cultivated state constitutional law stands on numerous compelling and well-established principles that need no additional elaboration here. I'll nevertheless echo a few key points that serve as a backdrop for the glimpses of Indiana constitutional law that I provide in the next section.

First, state constitutions adopted after the Federal Bill of Rights in 1791[21] have a historic independent legitimacy because they reflect the specific intentions of state framers and ratifiers notwithstanding the federal model.[22] To the extent a state has chosen language differing from the Federal Bill of Rights, fealty to state constitutions may require divergence from federal jurisprudence. Even language that is identical to the Federal Constitution may compel a different interpretation, depending on the particular historical context in which the language was selected.

Second, state constitutional law plays an integral role in the division of power between the states and the federal government. This division maintains

20. *See generally, e.g.*, Michael L. Buenger & Paul J. De Muniz, American Judicial Power: The State Court Perspective (Rosalind Dixon et al. eds., 2015); James A. Gardner et al., New Frontiers of State Constitutional Law: Dual Enforcement of Norms (James A. Gardner & Jim Rossi eds., 2011); Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018); Charles G. Douglas, III, *Federalism and State Constitutions*, 13 Vt. L. Rev. 127 (1988); Christian G. Fritz, *Foreword: Out from Under the Shadow of the Federal Constitution: An Overlooked American Constitutionalism*, 41 Rutgers L.J. 851 (2010); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 Temp. L. Rev. 989 (1996); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 Ind. L. Rev. 575 (1989); Jeffrey S. Sutton, *State Constitutions in the United States Federal System*, 77 Ohio St. L.J. 195 (2016); Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165 (2009); Robert F. Williams, *Response: Why State Constitutions Matter*, 45 New Eng. L. Rev. 901 (2011).

21. *See* Sess. 1 Res. 3, 1st Cong., 1 Stat. 97 (1789); 1 Annals of Cong. App. 2034–40 (Joseph Gales ed., 1834); William Waller Hening, 13 The Statutes at Large; Being a Collection of the Laws of Virginia from the First Session of the Legislature in the Year 1619, 327–29 (1823).

22. For information about the number and dates of state constitutions, constitutional conventions, and amendments, see John J. Dinan, The American State Constitutional Tradition 7–9, Table 1-1 (2006); G. Alan Tarr, *Explaining State Constitutional Changes*, 3 J. of Const. Res. 9, 10–14 (2016); Heather Perkins, *Book of the States 2018, Ch. 1: State Constitutions*, Table 1.2, The Council of St. Gov'ts, https://knowledgecenter.csg.org/kc/content/book-states-2018-chapter-1-state-constitutions (last updated Jan. 1, 2018). Massachusetts and New Hampshire are the only states with present constitutions predating the ratification of the Federal Bill of Rights. *See id.* The effective date of Massachusetts's constitution is October 25, 1780, but that constitution has since undergone 120 amendments and three constitutional conventions. *See id.*; Dinan, *supra* note 22, at 8. Similarly, the effective date of New Hampshire's constitution is June 2, 1784, but that constitution was heavily altered in 1792. *See* Perkins, *supra* note 22, at Table 1.2.

our system of dual sovereigns[23]—"one state and one federal, each protected from incursion by the other."[24] As with the separation and balance of powers among the executive, legislative, and judicial branches of government, federalism's "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it,"[25] safeguard against tyrannical concentration of control.

This protection against overconcentration of authority through federalism depends on state constitutions being "strong centers of authority on the rights of the people."[26] This is because rights "cannot be secure if they are protected only by . . . one court . . . a U.S. Supreme Court."[27] And state constitutions can supply protections—a second set of constitutional limitations on state and local government action[28]—that are not subject to review by the Supreme Court of the United States.[29] Rather, state supreme courts are the ultimate interpreters of their state constitutions.[30]

This brings me to a third point: to counterbalance federal authority and provide additional protection of rights, state constitutions—interpreted by state supreme courts—must provide protections that stand independent of federal constitutional guarantees. And that independent stance must be clear, with state supreme courts avoiding both inadequate state-law reasoning and dependence on federal law.

If it is not clear from the face of a court's opinion that the case was decided on a state law ground that is adequate and independent of federal law, then the case is reviewable by the U.S. Supreme Court, which will assume "the state court decided the way it did because it believed that federal law required it to do so."[31] Apart from inadequate reasoning, courts may also strip their decisions of independent state law grounds through more explicit dependence on federal law.[32] This dependence emerges when state courts interpret their constitutions "in 'lockstep' with federal court interpretations of analogous federal provisions."[33]

Ultimately, independent state law grounds for decision-making[34] go hand-in-hand with robust state constitutional law, which supplies far-reaching, inter-

23. "Dualist" conceptions of federalism certainly have their limits and may not accurately capture the complex relationships that compose our federalist system of governance. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009). But federalism's dispersion of authority among multiple centers of government is an indispensable feature of federalism, and splitting power between the state and federal governments is part of that dispersion. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 81–88 (2005).

24. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

25. *Id.*

26. Shepard, *supra* note 20, at 586.

27. *Id.*

28. *See* Gresk for Estate of VanWinkle v. Demetris, 96 N.E.3d 564, 566 (Ind. 2018) ("Public participation is fundamental to self-government, and thus protected by the Indiana *and* United States Constitutions." (emphasis added)).

29. For brevity's sake, this Article will often refer to the Supreme Court of the United States as the "U.S. Supreme Court."

30. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983); Linde, *E Pluribus*, *supra* note 20, at 173.

31. *Long*, 463 U.S. at 1040–41.

32. *See* Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 466 (1996).

33. *Id.*; *see* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1116 (1997) (citing BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991)).

34. Independent state constitutional analysis generally rests on the state constitution's own history, text, structure, purpose, and prior interpretation. *See, e.g.*, Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996). For discussion on theories of state constitutional interpretation, see DINAN, *supra* note 22; GARDNER, *supra* note 23.

related benefits: the enrichment of American constitutional jurisprudence[35] and the protection of civil liberties.

Robust state constitutional law allows states "to participate in the development of [federal] constitutional law by interpreting parallel state constitutional provisions as they will, and not simply by paying blind obeisance to interpretations put forward by the U.S. Supreme Court."[36] That independent interpretation, in turn, allows the U.S. Supreme Court to consider state courts' reasoning when deciding a federal question of first impression. In this way, state constitutions, and the court decisions interpreting them, serve as test laboratories,[37] providing guidance for other states and for the U.S. Supreme Court in interpreting their own constitutional provisions.[38] And even if the U.S. Supreme Court's decision diverges from state supreme court decisions on similar provisions, "state courts can contribute . . . by providing an interpretive counterpoint to the U.S. Supreme Court."[39] Sometimes, this counterpoint may encourage the U.S. Supreme Court to reassess its own decisions.[40]

Robust state constitutional law also plays a significant role in protecting civil liberties. By bringing forth state constitutional claims, litigants not only contribute to the development of state constitutional law—and thereby fortify the balance of powers that secure civil liberties—but also increase their chances of benefiting from constitutional protections. Bringing a constitutional claim creates the possibility of obtaining relief by it. So when litigants bring state constitutional claims alongside federal ones, they double the number of possible bases for obtaining relief, at least when the state and federal provisions diverge. In those cases, even if the Federal Constitution doesn't afford the liti-

35. American constitutional jurisprudence may be understood as having two "sides"—state and federal. *See* SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 20, at 5.

36. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 125 (2000); *see* Ann M. Lousin, *Justice Brennan's Call to Arms–What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 400–07 (2016) (providing examples).

37. Justice Brandeis famously called states "laboratories of democracy." *See* 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."). Although this phrase's precise meaning has been debated, *see, e.g.*, Diane S. Sykes, *The "New Federalism": Confessions of a Former State Supreme Court Justice*, 38 OKLA. CITY U. L. REV. 367, 373 (2013) ("Justice Brandeis's praise for the states as laboratories of democracy was an appeal to judicial restraint, understood as deference to the political branches."), it is relevant in the constitutional realm, *see* Crist v. Bretz, 437 U.S. 28, 40 (1978) (Burger, J., dissenting); BUENGER & DE MUNIZ, *supra* note 20, at 4 (offering a possibly more apt description of state courts as "laboratories of American judicial power"); 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, 550 (1986) (noting that, for individual rights under the state constitutions, "the state laboratories are once again open for business"); Douglas, *supra* note 20, at 127 (describing state constitutions as "rich and varied laboratories for the protection of our rights and liberties"). For more on the origins and limitations of the laboratories metaphor, see James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 476–80 (1996).

38. The dual audience—states and the U.S. Supreme Court—is appropriate since state constitutions were models both for other states' constitutions and for the Federal Constitution. *See* Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1365 (2013–2014); Linde, *First Things First*, *supra* note 20; Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985).

39. Friedman, *supra* note 36, at 129.

40. *Id.* at 126. *See generally* GARDNER, *supra* note 23, at 98–120. This is important because, as Justice Jackson said of the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2012)).

gant relief, the state constitution may.[41] And a litigant may have an easier time obtaining relief under the state constitution than under the federal one.[42]

In other cases, the Federal Constitution may provide protection when the state constitution does not. If a litigant has asserted both a federal constitutional claim that affords relief and a state constitutional claim that does not, the Supremacy Clause ensures that the litigant will receive the relief guaranteed by the Federal Constitution.[43] But that doesn't mean the state constitutional claim lacked value. Raising a state constitutional claim that is unsuccessful in one case may cultivate the independent nature of that state constitutional provision. That independence may then provide a basis for relief in other cases, when the Federal Constitution does not afford it. Indeed, it is only when and because the precise contours of state and federal protections do not coincide that state constitutional protections may go beyond those of the Federal Constitution.

For these reasons, and others explored by other authors, state constitutional law deserves attention nationwide. But whatever the vitality of state constitutional law generally, Indiana's Constitution is alive and strong, as it was in Polly Strong's case. So litigants and other states' supreme courts, alike, may benefit from observing Indiana's robust state constitutional independence. To that end, I'll now provide a sampling of Indiana constitutional law.

II. A Sampling of Indiana Constitutional Law—A Vital and Independent Source of Constitutional Protections

Indiana's Constitution supplies a host of rights and requirements separate from the Federal Constitution. Some provisions lack comparable federal counterparts altogether; others share language with the Federal Constitution but proceed on distinct analytical tracks. I'll survey a small selection from the Indiana Bill of Rights,[44] along with a few leading cases interpreting and applying those provisions. Though not an exhaustive discussion of Indiana constitutional law, these examples illustrate the state constitution's autonomy in securing civil liberties in Indiana.

Article 1,[45] Section 1 is an apt starting point. It articulates principles that were front and center in the Declaration of Independence but were not adopted as part of the Federal Constitution. It reads:

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

This section's predecessor in the 1816 Constitution contributed to the Indiana Supreme Court's holding in Polly Strong's case that the state constitution prohibits slavery in Indiana.[46] And in recent years the court has explained both that Article 1, Section 1 provides "the abstract limiting principle that state

41. Sutton, *Why Teach—and Why Study—State Constitutional Law*, *supra* note 20, at 173.

42. *Id.*

43. U.S. Const. art. VI, cl. 2; *see* Cooper v. Aaron, 358 U.S. 1, 18–19 (1958); State v. Badger, 450 A.2d 336, 346–47 (Vt. 1982); Linde, *E Pluribus*, *supra* note 20, at 179.

44. Ind. Const. art. 1.

45. In contrast to the United States Constitution and Indiana's 1816 Constitution, Indiana's 1851 Constitution enumerated separate articles with Arabic rather than Roman numerals. This Article follows the respective formats used by the framers of each constitution.

46. State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) (quoting Ind. Const. 1816, art. I, §§ 1, 24). The current language of Article 1, Section 1 matches that of the 1816 Constitution, with one excep-

power may only be exercised to advance the peace, safety, and well-being of Hoosiers,"[47] and that "[t]he particular guarantees of liberty in the Indiana Bill of Rights are but concrete manifestations of th[at] abstract limiting principle."[48] So each of the subsequent Bill of Rights guarantees relates back to Article 1, Section 1, with its historically rich recognition of inalienable rights and its express vision for the role of state power.

Turning to some of those concrete manifestations, I'll briefly discuss the Open Courts Clause;[49] the confrontation right;[50] the Proportionality Clause;[51] the reasonable-search-and-seizure provision;[52] the Equal Privileges and Immunities Clause;[53] and the Contracts Clause.[54]

The Open Courts Clause—which resides in Article 1, Section 12—resembles provisions found in many other state constitutions, but absent from the federal one.[55] It mandates that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[56] As interpreted by the Indiana Supreme Court, this Open Courts Clause "guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong."[57] The significance of this demand, and of similar provisions in other state constitutions, is plain in light of the fact that more than 95 percent of cases in the United States are filed in state courts.[58]

Adding to the significance of those numbers, the Indiana Supreme Court confirmed the breadth of Indiana's Open Courts Clause in *Escamilla v. Shiel Sexton Co.*[59] That case asked whether the Open Courts Clause allows undocumented immigrants to pursue tort claims for decreased earning capacity dam-

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tion: where the 1816 Constitution stated, "all men are created equal," the current constitution reads, "all people are created equal." *Compare* IND. CONST. of 1816, art. I, § 1, *with* IND. CONST. art. 1, § 1.

47. *See, e.g.*, Zoeller v. Sweeney, 19 N.E.3d 749, 753 (Ind. 2014) (emphasis omitted) (quoting Whittington v. State, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996)).

48. *Id.*

49. *See* Ind. Const. art. 1, § 12.

50. *See id.* art. 1, § 13.

51. *See id.* art. 1, § 16.

52. *See id.* art. 1, § 11.

53. *See id.* art. 1, § 23.

54. *See id.* art. 1, § 24.

55. *See* Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore, & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 109–10, 109 & n.297 (2018); David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197, 1201 & n.25 (1992). *See generally* Jerome Withered, *Indiana's Constitutional Right to a Remedy by Due Course of Law*, 37 RES GESTAE 456, 456–64 (1994).

56. IND. CONST. art. 1, § 12. Whereas the right to a remedy through open courts is absent from the Federal Constitution, forty state constitutions afford such a right. BUENGER & DE MUNIZ, *supra* note 20, at 31.

57. Smith v. Ind. Dep't of Corr., 883 N.E.2d 802, 807 (Ind. 2008). This interpretation followed the court's earlier assessment of the Open Courts Clause in *Bals v. Verduzco*, 600 N.E.2d 1353 (Ind. 1992). That case presented the question whether the Indiana Constitution guarantees a remedy for injury to reputation resulting from defamatory falsehoods in employee evaluations. The Court concluded that the Open Courts Clause does guarantee Indiana employees a right to a remedy when such defamatory falsehoods are communicated to management personnel within a company. *See Bals*, 600 N.E.2d at 1355–56.

58. NAT'L CTR. FOR STATE COURTS AND CONFERENCE OF STATE COURT ADM'RS, WWW.COURTSTATISTICS.ORG. In 2016, about 84 million trial cases and 257,000 appellate cases were filed in state courts; whereas 354,000 trial cases and 54,000 appellate cases were filed in federal court. *See id.* Disaggregated statistics for 2017 are available at the Court Statistics Project Interactive Tool. *See id.*; *Judicial Facts and Figures 2017: Tables 2.1, 3.1, 6.1*, UNITED STATES COURTS, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2017 (last updated Sept. 30, 2017). For other comparative statistics, see BUENGER & MUNIZ, *supra* note 20, at 9–10.

59. *See* 73 N.E.3d 663 (Ind. 2017).

ages.[60] The Court answered "yes," explaining that "the Open Courts Clause does not permit us to close the courthouse door based solely on the plaintiff's immigration status" when Indiana law affords a remedy, like recovering decreased earning capacity.[61]

In reaching this conclusion, the Court looked to "[o]ur Constitutional history and foundation," which revealed that the "every person" mandate in the Open Courts Clause does not exclude unauthorized immigrants.[62] The Court noted that the U.S. Supreme Court has made a similar, parallel observation concerning the history of the Fifth and Fourteenth Amendments.[63] But the Indiana Supreme Court did not hang its state constitutional analysis on the federal high court's decisions concerning federal law.[64]

The Indiana Supreme Court took a similar approach to Indiana's constitutional right of confrontation in *Ward v. State*.[65] The state confrontation provision—which resembles the Sixth Amendment—resides in Article 1, Section 13, and provides in part that "[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face."[66]

In *Ward*, the defendant had asserted right-of-confrontation claims under both the Sixth Amendment and its state counterpart.[67] The Court addressed the merits of each constitutional claim separately, starting with the state constitutional one.[68] It emphasized that "while the language of Indiana's provision 'has much the same meaning and history as that employed in the Sixth Amendment, it has special concreteness and is more detailed.'"[69] For this reason, although "Indiana's right to a face-to-face meeting is, '[t]o a considerable degree . . . co-extensive' with the federal confrontation right,"[70] the Court's evaluation of the state constitutional claim did not hinge on its evaluation of the accompanying federal claim.

The Indiana Supreme Court's analyses of certain claims invoking the state constitution's Proportionality Clause have proceeded in much the same way—separately from and independent of Eighth Amendment claims.[71] Indiana's Proportionality Clause resides in Article 1, Section 16, which states that "[c]ruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."[72]

The Indiana Supreme Court has explained that this section "sweeps somewhat more broadly than the Eighth Amendment."[73] The Court has reasoned that while "[t]he Eighth Amendment's bar on 'cruel and unusual' punishments

60. *See id.* at 664.

61. *Id.* at 667.

62. *Id.*

63. *See id.* at 667 n.2 (citing Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been . . . guaranteed due process of law by the Fifth and Fourteenth Amendments.")).

64. *See id.* at 666–68.

65. *See* 50 N.E.3d 752 (Ind. 2016).

66. IND. CONST. art. 1, § 13; *cf.* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

67. *See Ward*, 50 N.E.3d at 755.

68. *See id.* at 756–57. The Court first observed that the defendant had not waived the state constitutional claim. *See id.* at 755–56. Courts' approaches to waiver of state constitutional claims may affect the development of state constitutional law. *See infra* note 191 and accompanying text.

69. *Ward*, 50 N.E.3d at 756 (quoting Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991)).

70. *Id.* (alteration in original) (quoting *Brady*, 575 N.E.2d at 987).

71. *See* Shoun v. State, 67 N.E.3d 635, 641–42 (Ind. 2017); Knapp v. State, 9 N.E.3d 1274, 1289–91 (Ind. 2014); Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993); Best v. State, 566 N.E.2d 1027, 1031–32 (Ind. 1991).

72. IND. CONST. art. 1, § 16.

73. *Knapp*, 9 N.E.3d at 1289.

has been held to implicitly prohibit certain 'grossly disproportionate punishments,'"[74] Indiana's Constitution "by its terms *expressly* requires proportionality."[75] Thus, Indiana jurisprudence supplies a distinct analytical framework for as-applied proportionality challenges under Article 1, Section 16—a framework the Court recently outlined in *Knapp v. State*[76] and *Shoun v. State*.[77] The analysis depends "on the type of penalty at issue"—that is, whether the penalty is based on prior offenses or not.[78]

> For habitual-offender enhancements, we assess the "nature and gravity" of the present felony, and then the "nature" of the prior felonies on which the enhancement is based. For penalties not based on prior offenses, we have undertaken a simpler inquiry into whether the penalty is "graduated and proportioned to the nature of [the] offense."[79]

In applying this framework, the Court has not imported Eighth Amendment proportionality analysis.[80]

This theme—that Indiana constitutional provisions may resemble federal constitutional provisions, yet invoke independent analysis—is even more pronounced in Indiana's jurisprudence concerning Article 1, Section 11, which prohibits unreasonable searches and seizures. Although the text of Article 1, Section 11 is virtually identical to that of the Fourth Amendment,[81] the Indiana Supreme Court "utilize[s] a different method of interpretation," which the Court reiterated in *Jacobs v. State*[82]:

> "The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." Accordingly, we consider the following three non-exclusive factors in conducting a reasonableness analysis of warrantless searches: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[83]

As in *Ward* and in *Knapp*, the Court in *Jacobs* addressed the federal and state constitutional claims separately and noted that the scope of the state constitutional right is independent of the federal one.[84]

The Court again and more thoroughly emphasized the independence of Article 1, Section 11 in *Wright v. State*.[85] In determining whether Indiana constitutional law embraces attenuation as part of its exclusionary rule, the Court explained that "just because federal Fourth Amendment jurisprudence accepts

74. *Id.* (quoting Solem v. Helm, 463 U.S. 277, 288 (1983)).

75. *Id.*

76. *Id.*

77. Shoun v. State, 67 N.E.3d 635 (Ind. 2017).

78. *Knapp*, 9 N.E.3d at 1290.

79. *Shoun*, 67 N.E.3d at 641 (quoting *Knapp*, 9 N.E.3d at 1290).

80. *See id.*; *Knapp*, 9 N.E.3d at 1289–91.

81. *Compare* IND. CONST. art. 1, § 11 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

82. 76 N.E.3d 846, 851 (Ind. 2017).

83. *Id.* at 851–52 (internal citations omitted) (quoting Litchfield v. State, 824 N.E.2d 356, 359, 361 (Ind. 2005)).

84. *Id.* at 850–52.

85. 108 N.E.3d 307, 315 (Ind. 2018).

and applies the attenuation doctrine[86] does not necessarily mean Indiana's Article [1], Section 11 jurisprudence will follow suit. The Indiana Constitution demands from this Court independent analysis considering that charter's uniqueness."[87]

The *Wright* Court proceeded to "reflect upon Indiana's distinctive approach to securing Hoosiers' rights against unreasonable searches or seizures."[88] Based on the "similar origins and histories"[89] of the state and federal exclusionary rules, plus the "theoretical and practical differences between Article 1, Section 11 and the Fourth Amendment,"[90] the Court reasoned that Indiana's attenuation doctrine would "parallel (but not parrot) the federal exception."[91] The Court concluded that Indiana's attenuation doctrine would "begin with the federal three-part test but not necessarily end there," since "[e]very case must be considered on the totality of the circumstances."[92]

While *Jacobs* and *Wright* make clear that analysis under Article 1, Section 11 is distinct from Fourth Amendment analysis, Indiana's Equal Privileges and Immunities Clause is arguably even more detached from the federal provision it most closely resembles.

Found in Article 1, Section 23, Indiana's Equal Privileges and Immunities Clause provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[93] To determine a statute's validity under this provision, the Indiana Supreme Court employs a two-part standard that it articulated in *Collins v. Day*[94]:

> First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.[95]

Collins and its progeny make clear that Article 1, Section 23 analysis does not follow the federal equal-protection analytical methodology. Instead, the Court is guided by circumstances of Article 1, Section 23's adoption and its application in subsequent Indiana cases. For example, in *Whistle Stop Inn, Inc. v. City of Indianapolis*,[96] the Court conducted the *Collins* two-part analysis and relied exclusively on Indiana authorities to conclude that the statute at issue did not violate Article 1, Section 23.[97] It neither leaned on nor even mentioned the federal equal-protection analytical framework.[98]

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86. As the Court explained in *Wright*, the attenuation doctrine's "concept, accepted within federal Fourth Amendment jurisprudence, holds that 'not . . . all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police[;]' rather, the objected-to evidence will be excluded as fruit of the poisonous tree if police obtained it by exploiting the primary illegality. Alternatively, evidence will be admitted if it is attenuated from the illegality—if it is obtained 'by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 314–15 (omission and alteration in original) (internal citations and quotation marks omitted) (quoting Wong Sun v. United States, 371 U.S. 471, 487–88 (1963)).

87. *Wright*, 108 N.E.3d at 315.

88. *Id.*

89. *Id.* at 317.

90. *Id.* at 318.

91. *Id.*

92. *Id.*

93. IND. CONST. art. 1, § 23.

94. 644 N.E.2d 72 (Ind. 1994).

95. Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269, 1273 (Ind. 2014) (quoting *Collins*, 644 N.E.2d at 80).

96. 51 N.E.3d 195 (Ind. 2016).

97. *Id.* at 197–204.

98. *Id.*

Indiana's Contracts Clause jurisprudence exhibits comparable autonomy. Found in Article 1, Section 24, the Contracts Clause provides that "[n]o *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."[99] Addressing this provision in *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*, the Indiana Supreme Court recalled that "[w]e have held that provision protects vested contract rights—including contract rights arising under a deed."[100] In concluding that the statute at issue was unconstitutional as applied, the Court did not lean on federal analysis[101]—similar to its approach in *Whistle Stop Inn*.

Though not an exhaustive list,[102] these provisions and cases illustrate the current vitality and autonomy of the Indiana Constitution.[103] But to fully understand the vibrancy of Indiana constitutional law and its stature as a powerful source of civil liberty protections, one must delve into a rich history. I'll next briefly trace the road that led to the current state of Indiana constitutional law.

III. A Look Back: How Indiana Constitutional Law Developed

Indiana has been governed by two constitutions. The first one coincided with Indiana's statehood.[104] Before becoming a state, Indiana was a United States territory governed under the Northwest Ordinance of 1787.[105] Shortly after Indiana's population exceeded 60,000,[106] President James Madison signed an Enabling Act authorizing the citizens of the Indiana territory to hold a constitutional convention and enact a constitution that was "not repugnant" to the Northwest Ordinance.[107] On June 10, 1816, delegates from throughout the Indiana territory assembled at Corydon[108]—then the territorial capital[109]—completed their work in less than one month, and transmitted it to Congress.[110] On December 11, 1816, Congress adopted, and President Madison approved, a resolution admitting Indiana to statehood.[111]

Indiana's first constitution called for a statewide referendum every twelve years on whether there should be a new constitutional convention to revise, alter, or amend the constitution.[112] The first referendum of this sort was voted

99. Ind. Const. art. 1, § 24.

100. 988 N.E.2d 250, 255 (Ind. 2013) (internal citation omitted).

101. *Id.* at 255–58.

102. *See, e.g.*, State v. Econ. Freedom Fund, 959 N.E.2d 794, 805 (Ind. 2011) ("Claims that a statute violates the free speech clause of the Indiana Constitution are evaluated under a different standard than claims based on the First Amendment of the U.S. Constitution.").

103. It is important to note that in the cases surveyed in Part II, the Court undertook to address the state constitutional law questions because the litigants raised them, either alone or in conjunction with federal claims. *See infra* Section IV.B.

104. *See* Nw. Ordinance of 1787, *supra* note 8 ("[W]henever any of the said States shall have sixty thousand free Inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government . . . .").

105. *See id.*

106. *See* Memorial of the Legis. Council of H.R. of Ind. Territory (Admission into the Union as an Independent State) (Dec. 28, 1815), http://ulib.iupuidigital.org/cdm/ref/collection/ISC/id/33.

107. Act of Apr. 19, 1816, ch. 57, § 4, 3 Stat. 289, 290.

108. *See* Ind. Const. of 1816 pmbl.

109. *See* Act of Mar. 11, 1813, Acts of Assembly of the Indiana Territory, ch. 15, 51, *reprinted in* The Laws of Indiana Territory 1809-1816, at 335–36 (Louis B. Ewbank & Dorothy L. Riker eds., 1934).

110. *See* Ind. Const. of 1816, art. VIII, § 1; Charles Kettleborough, 1 Constitution Making in Indiana 79–83, 126 (reprt. 1971); H.R. 114, 14 Cong., 3 Stat. 399, 399 (Ind. 1816).

111. Res. for Admitting the State of Ind. into the Union, *supra* note 110, at 399–400.

112. However, Article VIII of the 1816 Constitution prohibited alteration of the constitution to introduce slavery in the state: "no alteration of this constitution shall ever take place so as to introduce

on in 1823, but it was not until after the fifth such referendum, in 1849, that a constitutional convention was approved and called.[113] The result was the Constitutional Convention of 1850–51, which produced Indiana's present constitution.[114] Factors influencing the Convention included the popularity of Jackson democracy, dissatisfaction with abuses from special legislation, an unpopular banking system, an internal improvement system that had plunged the state into debt, and the need for a common school system.[115]

Until the mid-twentieth century, the only individual-liberty claims to come before the Indiana Supreme Court were those that arose under Indiana's Constitution—either the 1816 or the 1851 charter—not the Federal Bill of Rights. During this time—after adoption of Indiana's 1816 Constitution, but before the U.S. Supreme Court's "selective incorporation" decisions[116]—the Indiana Supreme Court on numerous occasions construed the Indiana Bill of Rights to afford individual-liberty protections equal to or greater than those secured by the Federal Constitution.

One such occasion was the Indiana Supreme Court's 1854 decision in *Webb v. Baird*.[117] The Court held that Indiana's Bill of Rights affords indigent criminals a right to an attorney at the public's expense.[118] This was more than eighty years before the U.S. Supreme Court construed the Sixth Amendment to secure a comparable right to indigent defendants in federal courts,[119] and more than a hundred years before it held that the Fourteenth Amendment incorporates that right against the states.[120]

On another occasion, in 1893, the Indiana Supreme Court issued a landmark decision in *In re Leach*, permitting women to practice law.[121] Relying on Sections 1 and 23 of the Indiana Bill of Rights, the Court held that, as citizens, women "are within the letter and spirit of this provision [Article 1, Section 23]."[122] The Court's state-constitutional reasoning was especially notable in light of the U.S. Supreme Court's decision in *Bradwell v. People of State of Illinois*,

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slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." IND. CONST. of 1816 art. VIII, § 1.

113. *See* INDIANA ELECTION RETURNS 1816-1851, at 367–77 (Dorothy Riker & Gayle Thornbrough eds., 1960).

114. The Constitution of 1851 has been altered by judicial decision and amended from its original form. *See* Smith v. Moody, 26 Ind. 299 (1866) (declaring Article 13 of the 1851 Constitution unconstitutional under Article IV of the United States Constitution); *see also* IND. CONST. art. 1, § 39 (adopted Nov. 8, 2016).

115. *See* DONALD F. CARMONY, THE INDIANA CONSTITUTIONAL CONVENTION OF 1850-1851, at 9–15 (2009). *See generally* 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850 (1850).

116. In the landmark decision of Barron v. Baltimore, 32 U.S. 243 (1833), the U.S. Supreme Court held that the Federal Constitution's Bill of Rights restricted only the powers of the federal government and not those of the state governments. *Barron*'s holding has since been chipped away through the U.S. Supreme Court's selective incorporation decisions, which the U.S. Supreme Court recounted in *McDonald v. City of Chicago*, 561 U.S. 742, 763–66, 764 n.12 (2010).

117. 6 Ind. 13, 18 (1854).

118. *Id.* at 15. The Court reasoned that,

> [i]t is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.

Id. at 185. The Court relied on Section 21 of Indiana's Bill of Rights to conclude that counsel for an indigent defendant must be provided at the public's expense. *Id.* at 12–15; *see* IND. CONST. art. 1, § 21 (amended 1984) ("No man's particular services shall be demanded without just compensation . . . .").

119. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

120. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

121. 34 N.E. 641 (Ind. 1893).

122. *Id.* at 642. The Court explicitly acknowledged that its decision diverged from those of courts in other states, noting that "[i]n some instances the holding[s] ha[ve] been upon constitutional

holding that the privileges and immunities guaranteed by the Fourteenth Amendment did not prohibit a neighbor state, Illinois, from excluding women from the practice of law.[123]

Later, in 1920, the Indiana Supreme Court held that Section 13 of Indiana's Bill of Rights affords an accused person the right to counsel pre-trial, before arraignment.[124] This decision preceded the U.S. Supreme Court's recognition that the Sixth Amendment right to counsel applies at arraignment and at all critical stages of criminal proceedings.[125]

Likewise applying the state Bill of Rights, the Indiana Supreme Court adopted the exclusionary rule in *Callender v. State*,[126] long before the U.S. Supreme Court's *Mapp v. Ohio* decision made the Fourth Amendment exclusionary rule enforceable against the states.[127]

A shift in focus occurred with the advent of the U.S. Supreme Court's selective incorporation decisions, enforcing various guarantees of the Federal Bill of Rights against state governments. Litigators began to assert, and courts began to concentrate on, such federal claims, often without attention to similar protections embodied in state constitutions.[128] As ensuing federal decisions were perceived to pull back from expanding civil rights, Justice Brennan published his 1977 clarion call to invigorate resort to state constitutions,[129] urging "state courts to step into the breach."[130] Leading state judges responded with a flurry of law-review articles to "repeat, emphasize, and refine" Brennan's message.[131] Among them was Indiana Chief Justice Randall T. Shepard's significant 1989 contribution, "Second Wind for the Indiana Bill of Rights."[132] And it was even before "Second Wind" that the Indiana Supreme Court first determined the distinct, independent analyses that accompany the Indiana Bill of Rights' proportionality requirement and right to confront witnesses.[133]

In the years that immediately followed these calls for increased attention to state constitutionalism, the Indiana Supreme Court continued to issue opinions

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provisions unlike that of this state, and in others upon what we are constrained to believe an erroneous recognition of a supposed common-law inhibition." *Id.*

123. Bradwell v. Illinois, 83 U.S. 130 (1872); *see also* AT&T Corp. v. Hulteen, 556 U.S. 701, 725 n.7 (2009) (Ginsburg, J., dissenting) (addressing *Bradwell*, including Justice Bradley's "exorbitant concurring opinion").

124. Batchelor v. State, 125 N.E. 773 (Ind. 1920).

125. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (tracing Sixth Amendment jurisprudence); United States v. Wade, 388 U.S. 218, 227–28 (1967); Massiah v. United States, 377 U.S. 201, 204–05 (1964); Powell v. Alabama, 287 U.S. 45, 57 (1932) (establishing that the Sixth Amendment guarantees a defendant the right to have counsel present at time of arraignment).

126. 138 N.E. 817 (Ind. 1923).

127. 367 U.S. 643 (1961).

128. *See* GARDNER, *supra* note 23; Linde, *E Pluribus*, *supra* note 20, at 177; Tarr, *supra* note 33, at 1100.

129. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

130. *Id.* at 503. Although Justice Brennan's message has been criticized for having a narrow focus based on ideological motivations, *see, e.g.*, James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 358 (2016), there is little doubt that it spurred broader interest in state constitutions and federalism.

131. Gardner, *supra* note 130, at 362; *e.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Linde, *First Things First*, *supra* note 20; Mosk, *supra* note 38; Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986); 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 (1985).

132. *See* Shepard, *supra* note 20.

133. *See* Miller v. State, 517 N.E.2d 64, 69 (Ind. 1987), *superseded by statute on other grounds*, IND. CODE 35-37-4-6 (2018) (noting that "[w]hile the Indiana courts have relied" on federal precedent "in reviewing both state and federal confrontation claims, this action does not preclude us from forming an independent standard for analyzing claims under the Indiana confrontation clause"); Mills v. State, 512 N.E.2d 846 (Ind. 1987); Taylor v. State, 511 N.E.2d 1036 (Ind. 1987).

signaling its willingness to address claims under the Indiana Bill of Rights and to interpret the Indiana Constitution as providing separate and more extensive protection of individual liberties than the Federal Bill of Rights. For example, in *Price v. State*, the Indiana Supreme Court separately and independently construed the free-speech guarantees under the Federal First Amendment and Section 9 of the Indiana Bill of Rights. In that comprehensive opinion, the Court reversed a disorderly conduct conviction not under the First Amendment but as protected political speech under the Indiana Constitution.[134] Shortly thereafter, the distinct equal-privileges-and-immunities analysis for Article 1, Section 23 of the Indiana Constitution crystalized in the Court's *Collins v. Day* decision discussed above.[135]

Other decisions around this time clearly signaled that the Indiana Supreme Court was serious about construing and applying the Indiana Bill of Rights. In *Campbell v. State*, for instance, the appellant raised only a federal constitutional issue, and the Court ordered supplemental briefs addressing the applicability of Section 13 of the Indiana Bill of Rights,[136] which assures the accused the right "to be heard by himself and counsel."[137] The Court's opinion noted that Section 13 placed a "unique value upon the desire of an individual accused of a crime to speak out personally."[138]

Likewise, the Court in the mid-1990s emphasized the different state and federal constitutional protections against unreasonable searches and seizures. In *Moran v. State*—a precursor to *Jacobs*, discussed above—the Court explained that "the reasonableness of the official behavior must always be the focus of our state constitutional analysis,"[139] and expressly declared that the Federal Fourth Amendment's "reasonable expectation of privacy" test of *Katz v. United States*[140] does not govern the state constitutional claim.[141] This distinction was again evidenced in *Brown v. State*.[142] There, the Court reversed a conviction, applying the search-and-seizure clauses of both constitutions but remarking that the "use of a valid warrant does not necessarily result in a search which is reasonable in the [Indiana] constitutional sense, and the failure to use a warrant does not necessarily result in a search which is unreasonable."[143]

Over the next ten years, Indiana Supreme Court opinions repeatedly employed the distinct reasonableness standard of Section 11 of the Indiana Bill of Rights, culminating in *Litchfield v. State*.[144] In that case, the Court again declined to adopt the Federal Fourth Amendment's "reasonable expectation of privacy" methodology. Instead, the Court unanimously declared, as reiterated in *Knapp* and *Shoun*, discussed above, that under the Indiana Constitution, the reasonableness of a search or seizure generally turns "on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[145]

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134. 622 N.E.2d 954 (Ind. 1993).

135. *Collins*, 644 N.E.2d 72; *see supra* note 94 and accompanying text.

136. 622 N.E.2d 495, 497–98 (Ind. 1993), *abrogated on other grounds by* Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

137. IND. CONST. art. 1, § 13.

138. *Campbell*, 622 N.E.2d at 498.

139. Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994), *abrogated on other grounds by* Belvedere v. State, 889 N.E.2d 286 (Ind. 2008).

140. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

141. *Moran*, 644 N.E.2d at 540.

142. 653 N.E.2d 77 (Ind. 1995).

143. *Id.* at 79.

144. 824 N.E.2d 356 (Ind. 2005).

145. *Id.* at 361; *see supra* note 83 and accompanying text.

In addition to issuing opinions during this period, the Court also encouraged resort to the Indiana Constitution through the Court's involvement in other state constitutional law endeavors. In 1992, the Indiana bar exam began distinctly labeling constitutional law questions as either state or federal.[146] About this same time, Justices Jon D. Krahulik and Brent E. Dickson began serving two Indiana law schools as adjunct professors teaching Indiana constitutional law.[147] In 1994, these justices, along with Chief Justice Shepard, also served as faculty for a full-day, continuing-legal-education seminar on litigation under the Indiana Bill of Rights.[148] The following year, the Indiana Judicial Conference for all state-court judges devoted three days to the Indiana Constitution.[149] In sum, the Indiana Supreme Court was clearly open to claims calling for the independent analysis and application of the Indiana Constitution's Bill of Rights.

IV. Looking Ahead: Future Opportunities and Ways to Cultivate State Constitutional Law

As time brings new situations, problems, legislation, and litigation, these dynamics will bring opportunities to recast state constitutional law in the landscape of American jurisprudence. But while the waves of change are inevitable, their effects on the role of each state's constitution are not quite as certain.

Rather, whether a state's constitution is a powerful balancing force in "secur[ing] the Blessings of Liberty" or whether it atrophies from disuse depends in large part on how the bench and bar cultivate state constitutional law. For this reason, I'll point out how forthcoming situations may invoke state constitutional law, creating occasions to foster it. I'll also offer ways in which the bench and bar can shore up their state constitutional law against erosion from the tides of time.

A. *Types of State Constitutional Law Questions on the Horizon*

Beginning with situations on the horizon that may invoke state constitutional law, I'll limit my discussion to general observations and insights. It is neither possible nor prudent for me to forecast the precise state constitutional dimensions of forthcoming issues. But past patterns in American law and society reveal a number of broad forms that constitutional questions—state or federal—may take.

To start, technological innovations and scientific advancements prompt questions about how preexisting constitutional provisions apply to previously unknown situations. These types of questions have been answered in the federal context, for example, in the U.S. Supreme Court's decisions in *Riley v. California*[150] and *Carpenter v. United States*.[151] In each of those cases, advancements

146. *See* State Bd. of Law Exam'rs of Ind., One Hundred and Thirty First Examination, First Session: Feb. 20, 1992, 6–7 (on file with author); *cf.* State Bd. of Law Exam'rs of Ind., One Hundred and Thirtieth Examination, Second Session: July 19, 1991, 13 (on file with author).

147. Ind. Supreme Court, Justices of the Indiana Supreme Court 1, 106, 108, https://www.in.gov/judiciary/supreme/files/justice-bios.pdf (last visited Jan. 3, 2019).

148. *See* Seminar Booklet, Litigation Under the Indiana Bill of Rights, Ind. Civil Liberties Union (May 20, 1994) (on file with author).

149. *See* Brochure and Final Agenda for Annual Meeting of the Judicial Conference of Indiana, Ind. Judicial Ctr., (Sept. 13-15, 1995) (on file with author).

150. 134 S. Ct. 2473, 2484 (2014) ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones.").

in cell phone technologies—and their widespread use—prompted questions about how Fourth Amendment guarantees against unreasonable searches and seizures apply to modern technological realities. As technology continues to advance and take on different roles in society, more questions about how state and federal constitutional provisions apply to those new circumstances are sure to follow.[152] State supreme courts may be called upon to answer those questions.

In answering the federal constitutional questions, a state supreme court is bound by U.S. Supreme Court precedent. If the U.S. Supreme Court has not spoken on the precise issue at hand, then if the case cannot be resolved on grounds other than the federal constitution, the state court must decide the federal constitutional question, consistent with the precedent that exists.

In answering the state constitutional questions, however, the state supreme court stands on different footing. Although state law may not violate a provision of federal law—and federal review is appropriate to determine whether such a violation exists[153]—federal authority is merely persuasive for determining the metes and bounds of state law.[154] If a state provision lacks a comparable federal counterpart, then the state supreme court must chart new state constitutional ground without the aid of a federal map. But if the state provision resembles a federal one, then the state supreme court will face one of two scenarios: either the U.S. Supreme Court has already determined how the federal provision applies to the new technological reality at issue, or it has not.

In the first scenario, the state supreme court may conclude that the state constitution's history, text, structure, and doctrine lead the state provision to diverge from the federal one in the new factual situation. This is true whether or not the state analysis has paralleled the federal framework in previous contexts. Or the state supreme court may determine that the state provision's history and text lead it to parallel the federal track. Either way, the new technological reality gives state supreme courts an opportunity to discuss how state constitutional protections apply to novel circumstances, building up the independent body of state constitutional law.

In the second scenario—in which the U.S. Supreme Court has not yet decided the analogous issue under federal law—the state supreme court may contribute to the U.S. Supreme Court's later federal constitutional decision by construing the similar state constitutional provision.[155] So no matter the development of federal constitutional precedent, new technological and scientific realities offer opportunities to incubate and actuate state constitutional law.

Even without new situations created by science and technology, there is plenty of room for state constitutional law to flourish. Particularly fertile

151. 138 S. Ct. 2206, 2214 (2018) ("This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents.").

152. *See id.* at 2220–21, 2221 n.4 (responding to "Justice Gorsuch fault[ing] us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology," and explaining that "we 'do not begin to claim all the answers today,' and therefore decide no more than the case before us." (internal citation omitted) (quoting *id.* at 2268 (Gorsuch, J., dissenting))).

153. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79–80 (1980).

154. Montana v. Wyoming, 563 U.S. 368, 377 n.5 (2011) ("Our assessment of the scope of these [state] water rights is merely a federal court's description of state law."); *see also* West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940); State v. Kennedy, 666 P.2d 1316, 1320–21 (Or. 1983); State v. Badger, 450 A.2d 336, 448 (Vt. 1982).

155. Douglas, *supra* note 20, at 136–37 ("The significance of [*Michigan v.*] *Long* is that it requires state judges to stand up and be counted. No longer can they be lazy and use the United States Supreme Court as an excuse to avoid thought and analysis about issues the drafters of the Bill of Rights never even considered—like car trunks or mobile homes.").

ground may lie in areas left undeveloped by federal constitutional law—either because the Federal Constitution does not address a topic covered by the state constitution,[156] or because the U.S. Supreme Court has not thoroughly construed the federal provision that covers like subject matter.

In the first instance, many state constitutions supply long lists of subject matter absent from the Federal Constitution.[157] These often include legal-recourse rights, certain religious-liberties guarantees, protections against monopolies, power-over-government provisions, state separation-of-powers clauses, and public-education provisions.[158] The disproportionate scope of federal and state constitutional subject matter reflects the different characters of federal and state government power: federal government powers are limited to those enumerated by the Federal Constitution; state government power is plenary, subject only to limitations imposed by the state and federal constitutions.[159] This, along with the relative ease and frequency of state constitutional amendments, generates state constitutional charters that exceed the scope and detail of the Federal Constitution, creating space for state constitutional law to develop.[160]

In the second instance, a topic is common to both the state and federal constitutions, but the U.S. Supreme Court has not provided thoroughgoing guidance for the federal provision. A prime example is prohibition of excessive fines. Both the Eighth Amendment and the Indiana Constitution prohibit excessive fines. Many other state constitutions have similar provisions, as well. But the U.S. Supreme Court has provided scant precedent on Eighth Amendment excessive-fines analysis,[161] long withholding a test to determine excessiveness under that constitutional provision.[162] This has largely left the design of excessive-fines analyses to state and lower federal courts.[163]

Even in these open-season circumstances, though, a court's opportunity to interpret and apply a state constitutional provision often depends on whether a party has raised it.[164] The Indiana Supreme Court highlighted this in *State v.*

156. *See Kennedy*, 666 P.2d at 1320 (observing that principled arguments on issues new to the state's law "are more common when a case has no direct analogues in decisions of the United States Supreme Court or other high courts").

157. *See generally* Calabresi et al., *supra* note 55.

158. *See id.* at 57–62, 105–10, 133–50.

159. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475–76 (2018); State v. Gunwall, 720 P.2d 808, 814–15 (Wash. 1986); BUENGER & DE MUNIZ, *supra* note 20, at 20–31; G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1179–81 (1992).

160. *See generally* DINAN, *supra* note 22, at 29–63; GARDNER, *supra* note 23, at 26–28.

161. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 327 (1998) ("This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause."); Austin v. United States, 509 U.S. 602 (1993).

162. *See Austin*, 509 U.S. at 622–23 ("Prudence dictates that we allow the lower courts to consider that question [i.e., what factors should inform a decision about whether a forfeiture is constitutionally excessive] in the first instance."); von Hofe v. United States, 492 F.3d 175, 182 (2d Cir. 2007).

163. A similar situation occurs when the U.S. Supreme Court bases the federal analysis on standards that evolve with societal norms, which may be influenced by or reflected in state constitutional law. *See* GARDNER, *supra* note 23, at 108 (observing the U.S. Supreme Court's holding that the Eighth Amendment's bar of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society" as "virtually an open invitation to states to influence the meaning of the national prohibition by developing state standards of capital punishment" (internal quotations omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))); *see also* Miller v. California, 413 U.S. 15, 24–25 (1973) (listing basic guidelines for identifying obscene material, which is unprotected by the First Amendment).

164. Whereas federal courts' jurisdiction is constrained by Article III of the Federal Constitution, which conditions jurisdiction on a "case or controversy," *see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978), state courts' jurisdiction is not so restricted. Some states feature advisory opinions as part of their state judicial systems, BUENGER & DE MUNIZ, *supra* note 20, at 17, and

Timbs.[165] Since the defendant raised only an excessive-fines challenge under the Eighth Amendment, the Court did not address whether the state's action was potentially problematic under other provisions of state or federal law, including the excessive-fines provision of the Indiana Constitution.[166]

Adding to state constitutional questions induced by scientific and technological advancements and by issues left unresolved by federal law are those arising from recent enactment or enforcement of legislation. Each piece of legislation carries the potential for a challenge to its constitutionality. For example, an amendment to the Indiana Sex Offender Registration Act quickly prompted challenges to its constitutionality under state and federal *ex post facto* provisions.[167] The Indiana Supreme Court addressed those challenges in *Tyson v. State*, maintaining that "although federal authority may assist in our analysis, we may find our Indiana provision dictates a different outcome."[168] Likewise, the enactment of Indiana's Seatbelt Enforcement Act triggered litigation about its constitutionality under the state and federal constitutions, which the Indiana Supreme Court addressed in *Baldwin v. Reagan*.[169] As in *Tyson*, the Court acknowledged that the state constitutional analysis may or may not parallel the federal one.[170]

Undoubtedly, state legislatures have produced a plethora of fresh legislation that may supply ripe opportunities to cultivate state constitutional law. During their 2017 sessions alone, state legislatures passed more than 21,000 new laws.[171] Some topics were common in every state; others have been receiving increased, though not universal, legislative attention. For example, since 2012, every state legislature has addressed pretrial policy, resulting in nearly 700 enactments on that subject alone.[172] Every state in the past two years has also enacted some provision addressing opioids.[173] Over forty states have enacted renewable energy bills in the past few years,[174] and there has been an uptick in the number of state bills dealing with immigration.[175] This influx of legislation may carry with it questions about whether certain measures violate the state's constitution, facially or as applied.

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certified questions often ask state supreme courts to answer questions of state constitutional law detached from the facts of a particular case, *see* Cantrell v. Morris, 849 N.E.2d 488, 498 (Ind. 2006).

165. 84 N.E.3d 1179 (Ind. 2017), *vacated sub nom.* Timbs v. Indiana, 139 S. Ct. 682 (2019).

166. *See id.* at 1184; *cf.* State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983).

167. *See* Tyson v. State, 51 N.E.3d 88 (Ind. 2016).

168. *Id.* at 92. While observing the independence of Indiana's Constitution from federal authority, the Indiana Supreme Court observed a way in which the jurisprudence on Indiana's *ex post facto* provision merged with the federal *ex post facto* analysis. *See id.* at 93.

169. 715 N.E.2d 332, 335 (Ind. 1999); *cf.* Snyder v. King, 958 N.E.2d 764 (Ind. 2011) (addressing constitutionality of disenfranchisement statutes as applied to convicted prisoner during incarceration, under the Infamous Crimes Clause of the Indiana Constitution); Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999) (addressing constitutionality of statute of limitations that had been enacted the previous year).

170. *Baldwin*, 715 N.E.2d at 337.

171. Julie Lays, *The Road Ahead Is Packed with Big Issues, and Here Are 10 of the Biggest*, ST. LEGISLATURES MAG. (Jan. 1, 2018), http://www. ncsl.org/book store/state -legislatures-magazine/federalism-hot-legislative-issues-2018.aspx.

172. NAT'L CONFERENCE OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE (2018).

173. Lays, *supra* note 171, at 10.

174. *See Renewable Energy Legislative Update 2017*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 10, 2018), http://www.ncsl.org/research/energy/renewable-energy-legislative-update-2017.aspx; *Renewable Energy Legislative Update 2016*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 6, 2017), http://www.ncsl.org/research/energy/renewable-energy-legislative-update-2016.aspx; *Renewable Energy Legislative Update 2015*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 13, 2016), http://www.ncsl.org/research/energy/renewable-energy-legislative-update-2015.aspx.

175. Lays, *supra* note 171, at 11.

Whether or not legislation is new, its later enforcement may incite constitutional challenges. For example, the challenged Indiana statutes in *Snyder v. King*—concerning disenfranchisement of criminals—weren't particularly new.[176] But their enforcement against the plaintiff provoked a question about whether they were unconstitutional as applied to him, under the Infamous Crimes Clause[177] of the Indiana Constitution.[178]

Constitutional questions may also emerge from fluctuations in the composition and treatment of various populations. For example, overcrowding in California prisons generated questions about whether prisoners' Eighth Amendment rights were violated.[179] Similarly, disparate economic conditions of wealthy and indigent arrestees have generated litigation on the constitutionality of bail systems in various jurisdictions.[180] Populations shift, public awareness escalates for certain issues, and legislation reshapes the government's interaction with people. These changes may implicate state constitutional rights and limitations, and state supreme courts may be called upon to determine whether those rights or limitations have been breached.

The scenarios profiled above exemplify a broad array of possible state constitutional questions for which U.S. Supreme Court precedent on federal law may not dictate an answer. They are thus opportunities to cultivate independent state constitutional law. But opportunities, alone, do not create state constitutional vitality. In closing, I'll explore some ways state supreme courts and the bar can take those opportunities and nourish state constitutional law.

B. *Ways to Nourish State Constitutional Law*

The steps I'll mention here are not products of my own ingenuity; they have been set forth, recounted, practiced, and repeatedly advanced by other jurists, scholars, and organizations over the years.[181] Nor are they a comprehensive list of factors that contribute to the identity of state constitutional law in any given state. Instead, they are a handful of ways that state supreme courts and other members of the legal community can reinforce state constitutional law as a component of federalism.

Each stems from the premise that healthy state constitutional law depends largely on two things: (1) state constitutional issues coming before the state supreme court, and (2) good lawyering on those state constitutional issues.[182]

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176. 958 N.E.2d 764, 768–69 (Ind. 2011); *see* IND. CODE § 3-7-13-4 (1995); IND. CODE § 3-7-13-5(a) (2007); IND. CODE § 3-7-46-1 (2014); IND. CODE § 3-7-46-2 (1995).

177. IND. CONST. art. II, § 8 ("The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime.").

178. *Snyder*, 958 N.E.2d at 769; *cf.* State v. Thakar, 82 N.E.3d 257 (Ind. 2017) (assessing an unconstitutional-as-applied challenge to Indiana's Dissemination Statute, IND. CODE § 35-49-3-3(a)(1) (2008)).

179. *See* Brown v. Plata, 563 U.S. 493 (2011).

180. *See* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018); ODonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018); Schultz v. Alabama, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), *appeal docketed*, No. 18-13898 (11th Cir. Sept. 13, 2018); Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018); Plaintiffs' Motion for Summary Judgment, Buffin v. City of San Francisco, 2016 WL 6025486 (N.D. Cal. Oct. 14, 2016) (No. 4:15-cv-04959-YGR).

181. *See, e.g.*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FED. SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES, RECOMMENDATIONS (1989); BUENGER & DE MUNIZ, *supra* note 20; SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 20; Fritz, *supra* note 20; Linde, *First Things First*, *supra* note 20.

182. *See* Linde, *E Pluribus*, *supra* note 20, at 175–76; Linde, *First Things First*, *supra* note 20, at 391; Shepard, *supra* note 20, at 584 ("The ability of our court and other Indiana courts to write good law about the Indiana Bill of Rights depends in important part upon good lawyering by those who appear before us."); *see also* State v. Kennedy, 666 P.2d 1316, 1320 (Or. 1983) ("Legal claims raised but not substantially briefed are burdensome to meet and difficult to decide correctly.").

The state supreme court, as final arbiter of state law, is singularly positioned to develop an independent body of state constitutional law.[183] But the ingredients that go into good lawyering on state constitutional issues are many.

To start, lawyers need to know about and be adept with state constitutional law. This makes law schools and continuing legal education programs key in building a community of legal practitioners who facilitate principled, independent discourse on state constitutional law. State supreme courts can urge law schools to include state constitutional law in their course offerings or required curriculum—for example, by integrating state constitutional law into a two-semester course on American constitutional law or by offering separate state constitutional law courses. State supreme courts can also work with bar associations or other organizations to provide continuing legal education programs that raise practitioners' awareness of and dexterity with state constitutional issues.

To ensure that all members of the legal profession possess a certain level of familiarity with state constitutional law, state supreme courts can include state constitutional law on the bar exam. That benchmark may contribute to the setting of another one: if raising and sufficiently arguing state constitutional claims is a prevailing professional norm, then unreasonably failing to do so may be a basis for ineffective-assistance-of-counsel claims[184] or actions for professional negligence. In this way, educational requirements may propel a professional standard that feeds state constitutional law.

State supreme courts can reinforce and refine that standard in their opinions and court rules. Their opinions can inform attorneys about how the court will treat state constitutional claims and how it expects attorneys to present those claims. For example, by addressing state constitutional claims separately from accompanying federal constitutional claims, the court can model respect for the independent authority of the state and federal constitutions.[185] And by addressing state constitutional issues before federal ones—deciding the federal issue only if relief is not granted under the state constitution—opinions can appropriately reflect the state supreme court's position or role in our federalist system.[186] As the New Hampshire Supreme Court explained in *State v. Ball*, since the state supreme court is the final authority on state law, "initial resolution of State constitutional claims insures that the party invoking the protections of the [State] Constitution will receive an expeditious and final resolution of those claims."[187] Resolving state constitutional claims before addressing federal claims can also guard against "lockstepping" the state constitutional analysis with federal analysis.[188]

State courts of last resort can also explain in their opinions why an attorney's presentation of a state constitutional claim was inadequate for the court to appropriately consider it.[189] This communicates expectations for invoking the

183. *See* West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236 (1940).

184. *See* Strickland v. Washington, 466 U.S. 668, 688–89 (1984).

185. *See* State v. Badger, 450 A.2d 336, 346–47 (Vt. 1982).

186. *See* State v. Ball, 471 A.2d 347, 351 (N.H. 1983); Douglas, *supra* note 20, at 141; Linde, *E Pluribus*, *supra* note 20, at 178–79; Linde, *Without "Due Process," supra* note 20, at 135.

187. *Ball*, 471 A.2d at 351; *see also* West v. Thomson Newspapers, 872 P.2d 999, 1005 n.6 (Ut. 1994).

188. *See* Williams, *supra* note 20, at 906 ("Too many state courts fail to acknowledge the possible differences between state and federal rights protections, and as Professor Lawrence Friedman states, others engage in 'lockstepping,' in which they purport to prejudge future cases by announcing that, in the future, the state and federal rights provisions will be interpreted identically or similarly.").

189. *See, e.g.*, State v. Timbs, 84 N.E.3d 1179, 1184 (Ind. 2017) (explaining that "[o]ur narrow holding here is confined to the Court of Appeals' reliance on a provision of the United States Constitution—the Excessive Fines Clause . . . ." and declining to address other potential problems based on

court's serious consideration of state constitutional claims.[190] Alternatively, under some circumstances, the court may find it appropriate to waive procedural default, or ask for additional memoranda or argument, for state constitutional claims that were not fully developed in trial or appellate proceedings.[191]

Beyond written opinions, state supreme courts may establish court rules requiring state constitutional issues be asserted and briefed separately from—and possibly before—federal ones.[192] Even without formalized rules, judges and practitioners may compile practice guidelines for bringing state constitutional claims.[193] Judges may also issue other writings and deliver speeches or other presentations calling attention to the state constitution.[194]

Finally, state supreme courts can encourage federal courts to acknowledge and honor independent state constitutional jurisprudence. Federal courts can dignify state law in a number of ways. Two of them are abstention and certification, which give state courts opportunities to answer questions of state law before a federal court addresses them. Another way is for federal courts to address state constitutional issues before and separately from federal counterparts, inducing attorneys to do the same. State courts can urge these practices by modeling independent resolution of state constitutional issues before turning to federal constitutional claims, and by accepting and promptly answering certified questions when appropriate.[195]

CONCLUSION

This Article illustrates how state constitutional law—if it is invoked and nourished—can be a powerful, independent source of civil-liberties protections. In our federalist system of governance, attorneys and state supreme courts have responsibilities for cultivating the constitutional law of their states. My hope is that this glimpse of Indiana's experience may inspire jurists and the greater legal community to fulfill those responsibilities, leading us toward "a more perfect Union."[196]

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other provisions of state or federal law because the plaintiff had "raised only an excessive-fines challenge under federal law"); St. John v. State, 523 N.E.2d 1353, 1355 (Ind. 1988) (explaining that the litigant had waived his state due-course-of-law claim because he had "provide[d] no authority or argument for a separate and independent standard under the Indiana Constitution"); Stroud v. State, 517 N.E.2d 780, 783 (Ind. 1988) (explaining that the litigant neither identified the provision in the Indiana Constitution upon which he relied to claim the state constitution required a warrant, nor cited any Indiana case or other authority on the meaning of the Indiana Constitution).

190. *See* Shepard, *supra* note 20, at 584.

191. *See, e.g.*, State v. Kennedy, 666 P.2d 1316, 1321–22 (Or. 1983); *see also* Michael A. Berch, *Reflections on the Role of State Courts in the Vindication of State Constitutional Rights: A Plea for State Appellate Courts to Consider Unraised Issues of State Constitutional Law in Criminal Cases*, 59 U. KAN. L. REV. 833 (2011).

192. *See generally* SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 20, at 193; Linde, *Without "Due Process," supra* note 20, at 135.

193. *See, e.g.*, COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION (G. Alan Tarr ed., 2011); RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION (G. Alan Tarr ed., 2d ed. 2017); GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION (G. Alan Tarr ed., 2011); OREGON STATE BAR, OREGON CONSTITUTIONAL LAW (Hon. Jack L. Landau et al. eds., 2013); ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION (2d ed. 2012).

194. *See, e.g.*, Linde, *Without "Due Process," supra* note 20; Shepard, *supra* note 20; Sutton, *Why Teach—and Why Study—State Constitutional Law*, *supra* note 20; Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992).

195. *See, e.g.*, Cantrell v. Morris, 849 N.E.2d 488, 498 (Ind. 2006); SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 20, at 198.

196. U.S. CONST. pmbl.