A CONSTELLATION OF CONSTITUTIONS: DISCOVERING & EMBRACING STATE CONSTITUTIONS AS GUARDIANS OF CIVIL LIBERTIES

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In the 1980s and 90s, a message to reinvigorate reliance on state constitutions gathered momentum,[1] producing a now-familiar refrain: state constitutional law plays an important role in securing the liberties that flow from federalism, and it deserves greater attention.[2]

Despite the swell of state constitutionalism in the late twentieth century, and notwithstanding academic and judicial attention to the topic since then,[3] appreciation of state constitutions hasn't attained

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[1] Once the Supreme Court of the United States entered its era of selective incorporation (enforcing selected guarantees of the Federal Bill of Rights against the states), litigators and courts began focusing on federal constitutional claims. At the same time, they often disregarded similar state constitutional protections. Then, as federal decisions portrayed a pulling back from expanded civil rights, a call emerged for state courts to "step into the breach." *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); *see also* Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 455–56 (1970); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 135–42 (1969). The response was a flurry of law review articles and a significant increase in the number of rights-affirming judicial decisions based on state constitutions. Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141, 141–42 (1986); *e.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); 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); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

[2] *See* Davenport v. Garcia, 834 S.W.2d 4, 11–12 (Tx. 1992); State v. Jewett, 500 A.2d 233, 234 (Vt. 1985); Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 372–77 (1984).

[3] The *Albany Law Review* provides a prime example, having begun an annual tradition in 2007 of hosting a *State Constitutional Commentary* symposium. *See* Vincent Martin Bonventre, *Editor's Foreword*, 75 ALB. L. REV. 1631, 1631–32 (2011). Notre Dame Law School recently hosted a similar event. *See* Symposium, NOTRE DAME J.L., ETHICS, & PUB. POL'Y (forthcoming 2019); *see also* Jeffrey S. Sutton, *Symposium Introduction: State Constitutions in the United States Federal System*, 77 OHIO ST. L.J. 195, 196 n.5 (2016) (providing additional examples of state constitutional law symposia).

a level of traction that reflects these charters' great value as guarantors of civil liberties.

Today, litigants still fail to bring or adequately argue state constitutional claims that offer potential relief.[4] Courts accordingly decline to clarify the nature and extent of state constitutional protections. And law schools still exclude state constitutional law from the standard curriculum, offering few courses to equip new attorneys with the knowledge and knowhow to identify and argue state constitutional claims effectively.[5]

As a result, powerful liberty protections sit latent from disregard. This creates a high risk that individuals' rights are trampled without redress—simply because the rightsholders or their attorneys didn't argue a state constitutional claim. In other words, state constitutionalism presents a use-it-or-lose-it situation: either use the state constitution or lose the protections it provides.

To be sure, the entire legal community is responsible for realizing the value of state constitutions. And I'll offer some ways actors in various capacities can fulfill this crucial obligation. But one thing judges can do is issue writings, in cooperation with law-review journals, highlighting the import of state constitutional law. This article seeks to be one of those contributions.

The immediate goal is to instill greater understanding of and appreciation for state constitutional law as a powerful protector of civil liberties. The intermediate goal is for state constitutional law to become more readily invoked by litigants, so that state courts may illuminate and apply state constitutions' shields against encroachment on rights. And the ultimate goal is for state constitutional law to better facilitate the beneficence of federalism while enhancing the development of constitutional law throughout the United States.

To those ends, this article begins by reviewing the roles that state and federal constitutional law play in federalism's diffusion of power. It next surveys various factors that contribute to the individual identities of state constitutions. Then, to illustrate similarities and differences among constitutions, it draws cross-state comparisons of

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[4] *See, e.g.*, State v. Timbs, 84 N.E.3d 1179, 1184 (Ind. 2017), *vacated*, 139 S. Ct. 682, 691 (2019); State v. Strieff, 2012 UT App. 245, ¶ 6 n.3, 286 P.3d 317, 321 n.3, *rev'd*, 2015 UT 2, ¶ 4, 357 P.3d 532, 536, *rev'd*, 136 S. Ct. 2056, 2064 (2016).

[5] *See State Constitutional Law — 6816*, U. MINN. L. SCH., https://www.law.umn.edu/course/6816/state-constitutional-law (last visited May 21, 2019) ("[T]his class is taught in very few law schools. This means that this class is a unique experience in learning more about a body of law that will have a dramatic and direct impact upon a lawyer's daily practice of law.").

state constitutions' origins, contents, and interpretations by respective supreme courts, anchoring those comparisons in Indiana constitutional law. And finally, it offers ways the bench, bar, and academy can embrace state constitutional law and appreciate the constellation of state constitutions that can shine as a result.

I. HOW STATE CONSTITUTIONAL LAW—THROUGH FEDERALISM—PLAYS AN INTEGRAL ROLE IN SECURING CIVIL LIBERTIES

The importance of state constitutional law in protecting civil liberties is nothing new. When state constitutions were first adopted, their significance to people's rights was readily apparent. "[I]ndividuals looked to state constitutions and state courts, not the federal courts, for protection of their constitutional rights," and the contents of state constitutions fueled considerable debate.[6]

But the landscape of American law has shifted over the years, obscuring some areas of state constitutionalism and raising new questions about its function and importance, particularly relative to federal constitutional law.[7] Scholars and jurists have offered helpful insights with empirical data, in-depth jurisprudential theories, and thorough inspection of state- and federal-law interactions.[8] These writings expose both the continuing importance of state constitutionalism and the compelling reasons to cultivate it in this day and age.

I won't recapitulate in detail why state constitutional law deserves greater attention. But I'll reiterate some key points, for a couple of reasons. First, they simply bear repeating because the role of state constitutional law "in the struggle to protect the people of our nation from governmental intrusions on their freedoms"[9] remains underappreciated and precious liberties hang in the balance. And second, these points lay a foundation for perceiving a state constitution's place among other charters, which is a later focus of this article.[10]

Starting with the most fundamental point, state constitutional law

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[6] ROSCOE POUND FOUND. & YALE L. SCH., PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM: REPORT OF THE 1992 FORUM FOR STATE COURT JUDGES 9 (Barbara Wolfson ed., 1992) [hereinafter FORUM FOR STATE COURT JUDGES].

[7] Collins, *supra* note 2, at 382–84.

[8] *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

[9] Brennan, *supra* note 1, at 503.

[10] *See infra* Part III.

supplies a counterweight to federal authority.[11] Just as separation and balance of powers among the three branches of government—executive, legislative, and judicial—guard against overconcentration of authority, so does federalism's diffusion of power between the federal and state governments.

Federal and state government power is restricted by laws—the highest of which are the federal and state constitutions. For each constitution, the ultimate interpretive authority resides with the respective supreme court: for each state constitution, the state's supreme court; and for the Federal Constitution, the Supreme Court of the United States.[12] Since federal interpretive authority is concentrated in the one and only U.S. Supreme Court, and since rights "cannot be secure if they are protected only by . . . one court . . . a U.S. Supreme Court," state constitutions must be "strong centers of authority on the rights of the people,"[13] counterbalancing the consolidated weight of federal constitutional authority. And since state supreme courts are the final word on matters of state constitutional law, they have a responsibility to regard and clarify the independent authority of their state constitutions.[14]

This leads to a second, related point: to maintain the independence of their state constitutions, state supreme courts must clearly acknowledge protections that are adequate and independent of federal constitutional guarantees, thus allowing the state constitutions to counterbalance federal authority. In other words, when state constitutional grounds for a judicial decision are insufficient on their own—and the decision instead relies on federal law—the state constitution does not fortify federalism's design.

The self-sufficiency and independence of state-law grounds for a decision must be clear. The reason lies in the U.S. Supreme Court's decision in *Michigan v. Long*.[15] In that case, the Court explained that if a judicial opinion on its face does not clearly indicate that the case was decided on an adequate state-law ground independent of federal

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[11] *See* SUTTON, *supra* note 8, at 173; Shepard, *supra* note 1, at 586.

[12] For ease of reading, I will often refer to the Supreme Court of the United States as the "U.S. Supreme Court."

[13] Shepard, *supra* note 1, at 586.

[14] *See* FORUM FOR STATE COURT JUDGES, *supra* note 6, at 38 ("To see state constitutions as merely supplemental or interstitial is, in my view, an outright rejection of the state's sovereign authority and an abdication of judicial responsibility."); Collins, *supra* note 2, at 376–77 (asserting that a model of state sovereignty under which state courts rely less on federal case law "demonstrates both due respect for the present and fitting regard for the past . . . in order to build upon the opportunities it provides for the future").

[15] Michigan v. Long, 463 U.S. 1032 (1983).

law, then the U.S. Supreme Court will assume that "the state court decided the case the way it did because it believed that federal law required it to do so," and the case is reviewable by the U.S. Supreme Court.[16]

Thus, when state constitutional decisions depend on federal law, decisional authority is funneled to the U.S. Supreme Court. This dependence may manifest in several ways: state courts may explicitly acknowledge reliance on federal constitutional law; they may interpret their state constitutional provisions "in 'lockstep' with federal court interpretations of analogous federal provisions";[17] or they may fail to clearly base their decisions exclusively on separate, adequate, and independent grounds under state constitutional law.[18] As these practices strip a state constitution of its autonomous

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[16] *Id.* at 1040–41. Notably, Justice Stevens, dissenting in *Long*, disagreed with the majority's choice not to presume that adequate state grounds are independent unless the opposite is clearly apparent. *Id.* at 1066 (Stevens, J., dissenting). He would have maintained "the traditional presumption" that

> [w]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

Id. at 1066–67 (quoting Lynch v. New York, 293 U.S. 52, 54–55 (1934)). He reasoned the traditional approach would better "enable[] this Court to make its most effective contribution to our federal system of government." *Long*, 463 U.S. at 1067. Later, Justice Ginsburg voiced a similar opinion in a dissent joined by Justice Stevens:

> The *Long* presumption, as I see it, impedes the States' ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that [the state's] Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion.

Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

[17] Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 466 (1996). This does not mean that state supreme courts, in conducting independent state constitutional analysis, should not "borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful." Davenport v. Garcia, 834 S.W.2d 4, 20 (Tx. 1992). Indeed, federal precedent may provide persuasive "guideposts" for interpreting similar state provisions. Brennan, *supra* note 1, at 502 ("[S]tate court judges . . . do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."). But the federal precedent is not binding on the state court in its interpretation of the state constitution. *See Long*, 463 U.S. at 1040. To prevent lockstepping when federal jurisprudence informs—but does not compel—the result, the state court must make "a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.* at 1041.

[18] *See Long*, 463 U.S. at 1040–41.

authority, they weaken the federalism framework that wards off overconcentration of authority.

By contrast, state constitutional law that is independently decisive—without reliance on federal law—bolsters federalism's diffusion of power, strengthening its shield against domineering power. This does not mean that a state constitution will always produce a result different from the federal constitution—only that the result will derive from a different source of sovereign authority.[19]

This brings up a third and final point: independent state constitutional law reinforces federalism in two dimensions.[20] It reinforces "vertical federalism"—the dispersal of power between the state and federal governments;[21] and it reinforces "horizontal federalism"—the dispersal of power among the states.[22] This happens because independent constitutional decision-making allows states to engage in cross-jurisdictional dialogue about how to interpret similar constitutional provisions. And in that dialogue, vertical and horizontal planes of federalism intersect.

Specifically, when a state court interprets one of its state constitutional provisions differently from a similar provision in another constitution (state or federal), it invites other courts—state and federal—to consider that reasoning when construing their own constitutional provisions.[23] Courts can scrutinize, refine, reject, or adopt another court's reasoning based on the similarities and

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[19] In addition to bolstering the federalism apparatus, independent state constitutional law offers some litigants an additional basis for relief. If a litigant brings similar claims—one under the state constitution and one under the federal one—the state constitution may afford relief even if the Federal Constitution does not. And it may be easier for the litigant to obtain relief under the state constitution than under the federal one, in part because of jurisdictional differences between the U.S. Supreme Court and state supreme courts. Whereas the U.S. Supreme Court's decisions reach nationally—across all fifty states and to over 325 million people—a state supreme court's decisions are more localized. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited May. 21, 2019). The broader reach of U.S. Supreme Court decisions makes the risks associated with those decisions generally higher than those of state supreme court decisions. *See* SUTTON, *supra* note 8, at 16–17. So, the U.S. Supreme Court may be less likely than a state supreme court to grant relief on an innovative constitutional claim. *See id.*

[20] Federalism arguably operates across more than two dimensions. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

[21] Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494, 501–02 (2008).

[22] *Id.* at 494, 501–03.

[23] *See* Collins, *supra* note 2, at 409. The inter-state dialogue about fundamental powers of government and limitations on those powers may be termed "American constitutional discourse." *See, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005). And the practice of looking to other states' decisional law for guidance may be termed "horizontal influence." Collins, *supra* note 2, at 409.

differences between their respective charters and those constitutions' historical underpinnings.

In this vetting process, some reasoning will be adopted across state lines, while other reasoning will not.[24] Regardless of whether particular reasoning is adopted, independent state constitutional decisions serve a vital purpose when informing other courts' decisions about government power and constitutional protections: they function as cultivation centers[25] for the development of American constitutional law. In this way, they advance the collective endeavor "to form a more perfect Union."[26]

Because state constitutions' independence reinforces both vertical and horizontal federalism, it plays an integral role in securing the blessings of liberty that flow from federalism's design. But while it is one thing to acknowledge the importance of this independence, it is quite another to explain why a state constitution has its particular profile.

How and why a constitution is similar to or different from others are questions of constitutional interpretation, which is both a core function of state supreme courts and the subject of often complex, nuanced theories expounded in academia. But we don't need to venture into the intricacies of interpretive methods to appreciate a state constitution's unique identity. We need only observe that various factors contribute to each state constitution's characteristics. So, I'll survey a number of factors that may contribute to the makeup of a state constitution, and then compare various aspects of the federal and state constitutions.

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[24] I refer here only to the spreading of constitutional reasoning from one state to others, not incorporation of a federal constitutional right against state governments. Whereas incorporation applies a federal limitation to all state governments at once, the spreading of constitutional reasoning through inter-state dialogue occurs incrementally, through each state's supreme court. The incremental nature of this process has a stabilizing effect, resisting rapid proliferation of one court's decisions across state lines.

[25] Although the meaning of Justice Brandeis's famous "laboratories of democracy" metaphor has been debated, the metaphor is relevant to American constitutional law discourse among the states. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Diane S. Sykes, *The "New Federalism": Confessions of a Former State Supreme Court Justice*, 38 OKLA. CITY U. L. REV. 367, 373 (2013); *see also* MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE 4 (Rosalind Dixon et al. eds., 2015) ("If states are the laboratories of democracy, state courts have been and continue to be the laboratories of American judicial power."); Charles G. Douglas, III, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 127 (1988) ("[S]tate constitutions [are] rich and varied laboratories for the protection of our rights and liberties."); James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 476–80 (1996) (discussing the meaning of Justice Brandeis's "state-as-laboratories" metaphor).

[26] U.S. CONST. pmbl.

II. FACTORS THAT CONTRIBUTE TO A STATE CONSTITUTION'S IDENTITY

Constitutional interpretation may involve a complex chemistry of factors, but courts generally turn to familiar considerations when determining the shape or strength of a constitutional provision. Many of those considerations are common among high courts. But they are grouped and labeled in a variety of ways, and their exact bounds—and the paths courts take to navigate them—are not universal.[27]

One typology, for example, recognizes six "constitutional modalities."[28] These are (1) historical: the intent of the draftsmen and those who adopted the constitutional provision; (2) textual: the present sense of the provision's words; (3) structural: the constitutionally created structures or relationships among the people and their government; (4) prudential: practical wisdom concerning the court's role with respect to the provision; (5) doctrinal: principles derived from precedent or related commentary; and (6) ethical: moral commitments or values that are reflected in the constitution.[29] The Vermont Supreme Court added two more approaches for litigants to think about: (7) economic and sociological angles; and (8) a "sibling state approach," which involves "seeing what other states with identical or similar constitutional clauses have done."[30] And yet another consideration is the particular method a court uses when addressing a state constitutional provision that resembles one in the Federal Constitution.[31]

Many of these factors or approaches overlap, as evidenced in

[27] *Compare* Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991), *with* Price v. State, 622 N.E.2d 954, 957 (Ind. 1993).

[28] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 246 (1982).

[29] *See id.* at 7, 246; *cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993) (observing the "doctrine of unique state sources"—i.e., that "the interpretation of a state constitution must rely on unique state sources of law," which "include the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community").

[30] State v. Jewett, 500 A.2d 233, 237 (Vt. 1985).

[31] *See* Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 525 n.3 (7th Cir. 2018) ("The Illinois Supreme Court applies 'a "limited lockstep" approach when interpreting cognate provisions of [the Illinois] and federal constitutions.'" (quoting City of Chicago v. Alexander, 2017 IL 120350, ¶ 31, 89 N.E.3d 707, 713)). For an overview of various approaches or methods, see Robert F. Utter & Sanford E. Pitler, *Presenting a Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645–52 (1987). *See also* GARDNER, *supra* note 23. In general, a court's analytical process or methodology falls into one of two camps: the "primacy" model or the "interstitial" model. *See Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982); *infra* Part IV.

guidelines that some courts have set forth for parties bringing state constitutional claims. The Supreme Court of Pennsylvania, for example, has recognized caselaw as part of a provision's history, instructing that litigants should brief and analyze at least these four factors: "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; [and] 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[32] The Indiana Supreme Court has organized its guidance differently, explaining that "[i]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."[33]

No matter what factors give a constitutional provision its identity or how those factors are named, grouped, or analyzed, they lead to a wealth of diversity and familiarity among American constitutions. Those differences and similarities can, in turn, shed additional light on the meaning of the charters' provisions. For instance, if a state constitutional provision has a distinct feature unlike those of sibling-state constitutions, that uniqueness may inform the court's analysis of the provision.[34] Likewise, if a provision closely resembles those of other constitutions, that resemblance may indicate kinship with them.

I'll turn now to more specific comparisons, anchoring them in Indiana constitutional law.

III. CROSS-STATE COMPARISONS

Each constitution has an origin story, which is a great place to start in discovering and appreciating the charter's existence and traits. At least 145 separate constitutions have operated across the fifty states since 1776.[35] And they have regularly impacted the creation and contents of one another.

The first constitutions were those of the original states.[36] By the time the Federal Constitution was drafted in 1787, the states had already created at least fifteen constitutions,[37] including the first

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[32] *Edmunds*, 586 A.2d at 895.
[33] Price v. State, 622 N.E.2d 954, 957 (Ind. 1993).
[34] *See* Utter & Pitler, *supra* note 31, at 637 & n.13.
[35] *See* HEATHER PERKINS, THE BOOK OF THE STATES 4 tbl.1.2 (2018).
[36] *See* PERKINS, *supra* note 35, at 4 tbl.1.2; *see also* William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 201–32 (1893).
[37] *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 58

constitutions for Delaware, Maryland, New Hampshire, New Jersey, North Carolina, South Carolina, Pennsylvania, Virginia, Georgia, New York, Vermont, and Massachusetts.[38] These early charters provided the groundwork for the Federal Constitution,[39] and drafters of the federal charter came from state governments operating under those inaugural state constitutions.[40] And after framing the Federal Constitution, some convention delegates participated in the conventions for other state constitutions.[41] So cross-pollination among American constitutions was common from the outset of the nation's independence and unification.

By 1800, sixteen states had adopted at least twenty-four constitutions,[42] with seven of those states operating under a second or third constitution.[43] For these and later constitutions, drafters looked not only to the federal charter, but also to other state constitutions for guidance.[44] Insofar as the Federal Constitution was geared toward national concerns, national goals, and national government, drafters of state constitutions may have found their "best model[s]" among other state constitutions[45]—as the states were more similarly situated to one another than to their federal union.

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tbl.1 (1982).

[38] *See* PERKINS, *supra* note 35, at 4 tbl.1.2. Three of the other charters composed by this time were the second state constitutions for New Hampshire, South Carolina, and Vermont. *See id*. In Connecticut, the colonial charters of 1638 and 1662 served as the state's primary governing documents, with the charter of 1662 serving as the state's first constitution. *Id.* at 4 tbl.1.2(f); *see* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 257 (2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. Rhode Island operated under the charter of 1663 until it wrote its own constitution of 1842. *See id.* at 1603.

[39] *See* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993).

[40] *See* Benjamin Fletcher Wright, *Consensus and Continuity - 1776-1787*, 38 B.U. L. REV. 1, 20 (1958).

[41] *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 13 (2006).

[42] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 60, 61 tbl.3.1 (1998). This does not include Connecticut's colonial charter of 1662 and its 1776 constitution, which continued the 1662 charter in force as the organic law of the state. *See* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 257–58. The nature of Connecticut's 1776 constitution is debatable. *See* State v. Peeler, 140 A.3d 811, 860 & nn.17–18 (Conn. 2016) (Zarella, J., dissenting).

[43] Sturm, *supra* note 37, at 57.

[44] DINAN, *supra* note 41, at 14–15.

[45] *Id.* at 14. For example, Oregon and Washington "cho[se] the Indiana Constitution as a model, rather than the federal Bill of Rights." Utter & Pitler, *supra* note 31, at 635 n.1. Delegates of other state constitutional conventions, however, believed proceeding from the U.S. Constitution's example was "[t]he best plan" for drafting a new state constitution. *See* DINAN, *supra* note 41, at 14. Others rejected the idea of working off another state's constitution, reasoning that constitutions adapted to other states' wants, habits, and character may be unsuitable for the delegates' state. *Id.* at 15.

As each state adopted a new constitution, it grew the supply of charters[46] that drafters could draw upon when crafting another constitution. And the drafters could take guidance not only from pre-existing texts, but also from people's experiences with those charters, specific circumstances facing particular states, and individuals' varying views on constitution-making.[47] As a result, later constitutions could reflect this accumulated knowledge and experience.[48]

The stockpile of state constitutions continued to amass in the nineteenth century. Between 1800 and 1825, nine state constitutions were adopted, including the first state constitutions for Ohio (1802), Indiana (1816), and Illinois (1818).[49] Like many states, these three were part of a territory before they were admitted to the union as states on equal footing with the original states.[50] They came from the territory northwest of the Ohio River, which operated under the Northwest Ordinance of 1787—a law that established certain governing procedures, rights, and a path to statehood.[51]

The Northwest Territory produced, in total, five states: Ohio, Indiana, Illinois, Michigan, and Wisconsin.[52] The first to acquire

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[46] This stockpile includes a state's own prior constitution. *See supra* notes 42–43 and accompanying text.

[47] DINAN, *supra* note 41, at 15–17.

[48] *See, e.g.*, Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980) ("For example, Oregon's constitution in 1859 adopted Indiana's copy of Ohio's version of sources found in Delaware and elsewhere."); Utter & Pitler, *supra* note 31, at 635 & nn.1–2.

[49] PERKINS, *supra* note 35, at 4 tbl.1.2. Also included in those nine constitutions were the first constitutions for Louisiana (1812), Mississippi (1817), Maine (1819), Alabama (1819), and Missouri (1820); and Connecticut's first constitution to succeed its colonial charters. *Id.*

[50] *See* An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 1 Stat. 51 n.a (1789) [hereinafter Nw. Ordinance of 1787]; Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 286 (2016).

[51] *See* Nw. Ordinance of 1787, *supra* note 50. The Confederation Congress adopted the Northwest Ordinance contemporaneously with the drafting of the Federal Constitution in 1787. Delegates to the Constitutional Convention first met on May 14, 1787, and they signed the federal-constitution document September 17, 1787. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24, 151 (Max Farrand ed., 1911). The Northwest Ordinance was adopted while the delegates convened that summer, on July 13, 1787. *See* Nw. Ordinance of 1787, *supra* note 50, at 53 n.a ("Done by the United States in Congress assembled, the thirteenth day of July, in the year of our Lord one thousand seven hundred and eighty-seven . . . ."). The First Congress then reenacted it in 1789. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The Ordinance provided that once the population of a region in the northwest territory reached "sixty thousand free Inhabitants," the region would be "at liberty to form a permanent constitution and State government" meeting certain requirements—namely, the constitution and state government had to conform to republican principles. *See* Nw. Ordinance of 1787, *supra* note 50, at 53. The region would then be admitted to the union as a state "on an equal footing with the original States." *Id.* at 52.

[52] Conway W. Noble, *History of the Supreme Court of Ohio*, 17 MEDICO-LEGAL J. 155, 155 (1899); Steinglass, *supra* note 50, at 286.

statehood was Ohio, in 1803.[53] Indiana followed in 1816,[54] and Illinois was close behind, gaining statehood in 1818.[55] Although "virtually everything about Ohio's first constitutional convention . . . was rushed," with delegates hammering out the state's constitution in twenty-five working days,[56] Indiana's and Illinois's later constitutional conventions were even shorter. Indiana's charter was drafted in a span of nineteen days,[57] and Illinois's was drafted in three weeks.[58] The haste reflected the residents' urgency to become more self-governed—less reliant on and subservient to a distant sovereign.[59]

The acts that enabled the formation of these constitutions and state governments required that the state constitutions be republican and not repugnant to the Northwest Ordinance.[60] And each of the state constitutions drew from other charters, including pre-existing state constitutions and the Northwest Ordinance. Ohio's first constitution "[b]orrow[ed] liberally from constitutions adopted in 1790 by Pennsylvania, in 1796 by Tennessee, and in 1799 by Kentucky."[61] Similarly, Illinois's "main provisions [were] taken from the then-existing constitutions of Kentucky, Ohio, New York, and Indiana."[62] And Indiana's first constitution not only resembled portions of the Northwest Ordinance,[63] but also echoed parts of

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[53] *See* Act of Feb. 19, 1803, ch. 7, 2 Stat. 201 ("An Act to provide for the due execution of the laws of the United States, within the state of Ohio.").

[54] *See* Act of Dec. 11, 1816, 14 Pub. Res. 1, 3 Stat. 399 ("Resolution for admitting the State of Indiana into the Union.").

[55] *See* Act of Apr. 18, 1818, ch. 67, 3 Stat. 428 ("An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states."). Michigan was admitted as a state in 1837. *See* Act of Jan. 26, 1837, ch. 6, 5 Stat. 144 ("An Act to admit the State of Michigan in the Union, upon an equal footing with the original States."). Wisconsin was admitted in 1848. *See* Act of May 29, 1848, ch. 50, 9 Stat. 233 ("An Act for the Admission of the State of Wisconsin into the Union.").

[56] Steinglass, *supra* note 50, at 289.

[57] *See* WILLIAM W. THORNTON, *The Constitutional Convention of 1850*, *in* REPORT OF THE SIXTH ANNUAL MEETING OF THE STATE BAR ASSOCIATION OF INDIANA 152 (1902).

[58] James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 294 (2010).

[59] *See generally* Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. INT'L L. 315 (1981).

[60] *See* Act of Apr. 18, 1818, ch. 67, 3 Stat. 428, 430; Act of Dec. 11, 1816, 14 Pub. Res. 1, 3 Stat. 399, 399; Act of Apr. 30, 1802, ch. 40, 2 Stat. 173, 174.

[61] Steinglass, *supra* note 50, at 290; *see also* Linde, *supra* note 48, at 381 (observing Ohio incorporated versions of sources found in Delaware's constitution).

[62] Rita M. Kopp, *The Illinois Constitution: An Orientation*, 17 DEPAUL L. REV. 480, 481 (1968).

[63] *Compare* IND. CONST. of 1816 art. I, *with* Nw. Ordinance of 1787, *supra* note 50, at 51, 52 n.a. For a collection of documents surrounding Indiana's statehood, including Indiana's first

Ohio's, Kentucky's, Tennessee's, and Pennsylvania's constitutions.[64] In fact, it "had antecedents dating back at least to the time of the early state constitutions of the Revolutionary era."[65] This borrowing, plus the short time it took delegates to draft and edit Indiana's Bill of Rights, led one scholar to conclude that "[a]pparently the process was to pick and choose among the various existing constitutions for the most suitable provisions."[66]

Notwithstanding this appropriation and the close proximity of these states—both geographically and in the timing of their admission to the union—their constitutions did not replicate one another. Rather, the specific concerns, culture, and other circumstances facing each state gave its respective charter a different profile.[67]

One example lies in Indiana's and Illinois's provisions concerning slavery—a topic that heated not only campaigns for constitutional convention delegates but also debate at the conventions.[68] The resulting provisions appeared in Article XI of the Indiana Constitution and in Article VI of the Illinois Constitution.

For Indiana:

> There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state.[69]

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constitution, see *Road to Indiana Statehood*, IND. U., http://ulib.iupuidigital.org/cdm/search/collection/ISC (last visited May 22, 2019).

[64] Peter S. Onuf, *Democracy, Empire, and the 1816 Indiana Constitution*, IND. MAG. HIST., Mar. 2015, at 5, 5.

[65] Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 655 (1983). At least one section was "patterned after a provision of the New Hampshire Constitution of 1783." *Id.* And parts adopted from Ohio's constitution drew from Delaware's, which predated the Federal Bill of Rights. *See* Linde, *supra* note 48, at 381.

[66] Robert Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211, 212 (1945).

[67] *See* Utter & Pitler, *supra* note 31, at 636 ("[D]espite borrowing from earlier state charters, each state constitution reflects, in its wording and protections, the unique concerns and history of its state.").

[68] JAMES E. DAVIS, FRONTIER ILLINOIS 165 (1998); Hilliard, *supra* note 58, at 294–95.

[69] IND. CONST. of 1816, art. XI, § 7.

For Illinois:

> Neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any . . . person . . . be held to serve any person as a servant, under any indenture hereafter made, unless such person shall enter into such indenture while in a state of perfect freedom . . . .
>
> Each and every person who has been bound to service by contract or indenture in virtue of the law of Illinois territory heretofore existing . . . shall be held to a specific performance of their contracts or indentures . . . Provided however, that the children hereafter born of such person, negroes or mulattoes, shall become free . . . .[70]

Though these provisions use similar vocabulary, the distinct language of Indiana's Constitution proved critical in the case of Polly Strong.[71] Polly Strong was born into slavery in the Northwest Territory around 1796.[72] She was purchased around 1806 by an innkeeper who kept Polly as a slave on land that, ten years later, became the state of Indiana.[73] In 1818, about two years after Indiana's Constitution was adopted, a writ of habeas corpus was filed on Polly's behalf,[74] asserting that under Indiana's new constitution, the innkeeper's holding of Polly as a slave was unlawful.[75] The innkeeper 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.[76] He reasoned that Polly's mother was a slave before

[70] ILL. CONST. of 1818, art. VI, §§1, 3.

[71] *See* State v. Lasselle, 1 Blackf. 60 (Ind. 1820).

[72] *See id.* at 60–61; *Polly Strong Slavery Case*, IND. HIST. BUREAU, https://www.in.gov/history/markers/4267.htm (last visited May 23, 2019).

[73] *See Polly Strong Slavery Case*, *supra* note 72.

[74] *Id.*

[75] *Lasselle*, 1 Blackf. at 61; Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, IND. MAG. HIST., Mar. 2015, at 64, 80; *Polly Strong Slavery Case*, *supra* note 72.

[76] *Lasselle*, 1 Blackf. at 61; *see* Nw. Ordinance of 1787, *supra* note 50, at 51, 53 n.a (1789) ("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."); Finkelman, *supra* note 75, at 83–84; *Polly Strong Slavery Case*, *supra* note 72.

1787 on lands where slavery was permitted and preserved when the Northwest Ordinance was enacted.[77]

The Indiana Supreme Court disagreed.[78] After recognizing that the state constitution could legitimately prohibit slavery, the court turned to the language of the charter to see whether it included such a prohibition.[79] The court emphasized that the Indiana Constitution specifically insisted, "[t]here shall be neither slavery nor involuntary servitude in this State,"[80] and 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."[81] So, the court held, the innkeeper's claim to hold Polly as a slave could not be supported.[82]

Several years later, the Illinois Supreme Court also faced a case implicating its state constitutional provision concerning slavery.[83] Importantly, the Illinois Constitution's provision differed from Indiana's by permitting indentures that existed prior to the constitution's adoption in 1818.[84] But it required those indenture contracts to have been "in virtue of the laws of Illinois Territory."[85]

The Illinois Supreme Court adhered to this demand in *Cornelius v. Cohen*—the first case concerning the indenture system to reach the state's high court.[86] In 1805, a girl named Betsy was born to Rachel, who was an indentured servant to Joseph Cornelius.[87] Cornelius claimed that Betsy, like her mother, was his indentured servant.[88] He reasoned that, prior to Illinois's statehood in 1818, a law governing the territory provided that children born to indentured servants were bound to serve the master until they reached a certain age.[89] Reviewing the case after the Illinois Constitution was adopted,

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[77] *See Lasselle*, 1 Blackf. at 61; *Polly Strong Slavery Case*, *supra* note 72.

[78] *See Lasselle*, 1 Blackf. at 61, 63.

[79] *See id.* at 61–62.

[80] *Id.* at 62 (quoting IND. CONST. of 1816 art. XI, § 7). The 1816 Constitution provided only one exception: for those "duly convicted" of crimes. IND. CONST. of 1816 art. XI, § 7.

[81] *Lasselle*, 1 Blackf. at 62.

[82] *Id.*

[83] *See* Cornelius v. Cohen, 1 Ill. (1 Breese) 131, 131–32 (1825).

[84] *See* Hilliard, *supra* note 58, at 294–95. When Congress allowed Illinois to form its state government and constitution, "it was not clear whether Illinois would enter the Union as a free or a slave state." *Id.* at 293. The indenture system, including Article VI of the Illinois Constitution, was a compromise. *See id.* at 294–95.

[85] ILL. CONST. of 1818, art. VI, § 3, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 445–46.

[86] *Cornelius*, 1 Ill. (1 Breese) at 131; FRANK CICERO JR., CREATING THE LAND OF LINCOLN: THE HISTORY AND CONSTITUTIONS OF ILLINOIS, 1778–1870, at 77 (2018).

[87] *Cornelius*, 1 Ill. (1 Breese) at 131.

[88] *See id.*

[89] *See id.* at 132.

the Illinois Supreme Court acknowledged that this territorial law remained effective.[90] But the court focused on the law's requirement that an indenture be "according to law"—which meant, in part, that indenture contracts had to be signed by both parties.[91] Since the indenture contract that Rachel signed in 1804 had not been signed by Cornelius, the indenture was invalid and void.[92] So, Betsy was not Cornelius's indentured servant.[93]

These early state constitutional cases illustrate two points. First, state constitutions may offer protections that are not provided by other sources. And second, neighboring state constitutions conceived within a few years of one another may have similar, yet distinct, provisions.

Another wave of constitution-making occurred in the mid-nineteenth century. Between the financial panics of 1837 and 1857, nearly every state north of Kentucky—including Indiana—and some southern states, attempted to revise or replace their state constitutions.[94]

This sweeping constitutional change was motivated by "the financial, the industrial, [and] the economic conditions through which the people were passing, [along with] their changed ideas of the duties of the State, their juster conceptions of the social and political rights of man, [and] their struggles for a better life."[95] With these issues thrust front and center by the conditions of the times, certain topics—such as indebtedness, education, and public confidence and participation—often predominated constitutional conventions and revisions.[96]

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[90] *See id.* at 131–32.

[91] *Id.* at 132.

[92] *See id.*

[93] *See id.*; *see also* Choisser v. Hargrave, 2 Ill. (1 Scam.) 317, 318–19 (1836) (concluding that because Barney Hargrave's indenture was not entered within thirty days of the time he was brought into the territory—as required by law—his indenture was not permitted by Illinois's constitution); CICERO, *supra* note 86, at 78.

[94] The following states, which already had a state constitution, held constitutional conventions during that time: Delaware (1852–53), Georgia (1839), Illinois (1847), Indiana (1850–51), Iowa (1846), Kentucky (1849–50), Louisiana (1845, 1852), Maryland (1850–51), Massachusetts (1853), Michigan (1850), Mississippi (1851), Missouri (1845–46), New Hampshire (1850–51), New York (1846), Ohio (1850–51), Pennsylvania (1837–38), Vermont (1843, 1850), Virginia (1850–51), and Wisconsin (1847–48). DINAN, *supra* note 41, at 8–9 tbl.1-1; *see* THORNTON, *supra* note 57, at 26. *See generally* JOHN E. RUSSEL, THE PANICS OF 1837 AND 1857 (1896) (providing historical background).

[95] 7 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 162 (1910).

[96] *See* DINAN, *supra* note 41, at 9; MCMASTER, *supra* note 95, at 162–65; Frederick L. Paxson, *A Constitution of Democracy—Wisconsin, 1847*, 2 MISS. VALLEY HIST. REV. 3, 4 (1915); Sturm, *supra* note 37, at 63–66.

The Indiana Constitutional Convention of 1850–51 was no exception, and, in particular, it responded to Hoosier's problems and values.[97] As a result, dissatisfaction with special state legislation, growing government indebtedness, lacking funding for Indiana public schools, and the need to prescribe terms for elected state officials were among the key factors that shaped Indiana's second constitution.[98]

Unsurprisingly, then, the length of Indiana's charter grew, as did the length of many other state constitutions during the Jacksonian Era.[99] Whereas the first state constitutions rarely exceeded 5,000 words, the mid-nineteenth-century charters covered more topics and provided greater detail about the metes and bounds of the government machinery.[100] But delegates at the Indiana Constitutional Convention of 1850–51 did not focus solely on particularizing the responsibilities and limits of government; they also reconsidered the state's Bill of Rights.[101]

Like other framers of state constitutions in the mid-nineteenth century, the Indiana delegates could not depend on the Federal Constitution to supply civil-liberty protections against state and local governments.[102] This is because in 1833 the U.S. Supreme Court firmly held that the protections of the Federal Bill of Rights applied only to the federal government; they did not operate as limitations on state government.[103] It wasn't until many decades later that those federal rights became incorporated against the states.[104] So, when state bills of rights were drafted in the mid-nineteenth century, the drafters understood that those provisions would be the only

[97] *See* THORNTON, *supra* note 57, at 4–21.

[98] *See* DONALD F. CARMONY, THE INDIANA CONSTITUTIONAL CONVENTION OF 1850–1851, at 11–12 (1931); THORNTON, *supra* note 57, at 9, 26–27; 1–2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850).

[99] *See* Sturm, *supra* note 37, at 66. *Compare* IND. CONST. of 1816, *with* IND. CONST. Despite this expanded length, Indiana's Constitution is currently the fourth shortest, at 11,476 words—surpassing only Vermont's (8,565 words), Iowa's (11,089 words), and Rhode Island's (11,407 words). PERKINS, *supra* note 35, at 4 tbl.1.2.

[100] Sturm, *supra* note 37, at 66. The disproportionate scopes of subject matter found in state constitutions and the Federal Constitution reflect another difference between the federal and state governments: whereas the powers of the federal government are limited to those enumerated by the Federal Constitution, the powers of state governments are plenary, limited only by the restrictions imposed by the federal and state constitutions. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475–76 (2018); BUENGER & DE MUNIZ, *supra* note 25, at 22–23; TARR, *supra* note 42, at 16–17.

[101] *See* Twomley, *supra* note 66, at 213.

[102] *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

[103] *See* Barron *ex rel.* Tiernan v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

[104] *See McDonald*, 561 U.S. at 759–66 (tracing the history of incorporation).

constitutional protections against state and local government encroachment on individual rights.[105]

The result in Indiana was Article 1 of Indiana's Constitution[106]—a Bill of Rights that served as a model for other states' inaugural constitutions, especially those of Washington and Oregon.[107] Article 1 had thirty-seven sections when Indiana's 1851 Constitution was adopted; it now has thirty-eight.[108] Many sections corresponded to provisions in the 1816 constitution;[109] other sections were pulled into

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[105] *See* State v. Baldon, 829 N.W.2d 785, 808–09 (Iowa 2013) (Appel, J., specially concurring).

[106] Indiana's 1851 Constitution enumerated separate articles with Arabic rather than Roman numerals. *See* Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 518 n.2 (Ind. 2009). The United States Constitution and Indiana's 1816 Constitution, by contrast, relied on Roman numerals. This article follows the respective formats used by the framers of each constitution.

[107] Utter & Pitler, *supra* note 31, at 635 & n.1 ("Delegates to the Oregon convention considered the Indiana Constitution to be the best of all the state constitutions in existence at that time."). Washington's and Oregon's constitutions—because their drafters relied on Indiana's second, 1851 constitution as a model—are examples of state constitutions incorporating collected knowledge and experience, which has been compounded and refined through the years. Westward migration made more states—such as Iowa and Wisconsin—eligible for statehood while existing states were replacing or revising their constitutions. *See* Paxson, *supra* note 96, at 4; Sturm, *supra* note 37, at 75–76 tbl.3. This timing allowed the new states to learn from other states' revisions. States with inaugural constitutions between 1825 and 1860 include Arkansas (1836), California (1849), Florida (1839), Iowa (1846), Kansas (1859), Michigan (1835), Minnesota (1857), Oregon (1857), Rhode Island (1842), Texas (1836), and Wisconsin (1848). Sturm, *supra* note 37, at 75–76 tbl.3. New Mexico did not have a constitution as an admitted state until 1911, despite holding seven constitutional conventions before that time: in 1848, 1849, 1850, 1872, 1889–90, 1907, and 1910. *See id.* at 82 tbl.5; *see also* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846–1912, at 4–5 (1968) (discussing the origins of the Organic Law of the Territory of New Mexico).

[108] One significant difference between Indiana's first constitution and its 1851 charter is the provision regarding constitutional amendments. Indiana's first constitution did not supply an amendment procedure. Instead, it provided for a vote every twelve years on whether a constitutional convention should be called. *See* IND. CONST. of 1816 art. VIII, § 1. Indiana's 1851 Constitution, however, prescribes an amendment procedure. *See* IND. CONST. art. 16, §§ 1–2.

[109] *Compare* IND. CONST. of 1816 art. I, §§ 1–2 (unalienable rights; power inherent in the people), *with* IND. CONST. art. 1, § 1 (inalienable rights; power inherent in the People); *compare* IND. CONST. of 1816 art. I, § 3 (religion), *with* IND. CONST. art. 1, §§ 3–4 (religion); *compare* IND. CONST. of 1816 art. I, § 5 (civil jury trial), *with* IND. CONST. art. 1, § 20 (civil jury trial); *compare* IND. CONST. of 1816 art. I, § 6 (suspension of laws), *with* IND. CONST. art. 1, § 26 (suspension of laws); *compare* IND. CONST. of 1816 art. I, § 7 (just compensation), *with* IND. CONST. art. 1, § 21 (just compensation); *compare* IND. CONST. of 1816 art. I, § 8 (searches and seizures), *with* IND. CONST. art. 1, § 11 (searches and seizures); *compare* IND. CONST. of 1816 art. I, § 9 (free speech), *with* IND. CONST. art. 1, § 9 (free speech); *compare* IND. CONST. of 1816 art. I, § 10 (libel; jury to determine law and facts), *with* IND. CONST. art. 1, §§ 10, 19 (libel; jury to determine law and facts); *compare* IND. CONST. of 1816 art. I, § 11 (open courts; remedy by due course of law; justice without delay), *with* IND. CONST. art. 1, § 12 (open courts; remedy by due course of law; justice without delay); *compare* IND. CONST. of 1816 art. I, § 12 (rights of the criminally accused), *with* IND. CONST. art. 1, § 15 (rights of the criminally accused); *compare* IND. CONST. of 1816 art. I, § 13 (criminal procedure), *with* IND. CONST. art. 1, §§ 13–14 (criminal procedure); *compare* IND. CONST. of 1816 art. I, § 14 (bail), *with* IND. CONST. art. 1, § 17 (bail); *compare* IND. CONST. of 1816 art. I, §§ 15–16 (proportional penalties), *with* IND. CONST. art. 1, § 16 (proportional penalties); *compare* IND. CONST. of 1816 art. I, § 17 (no imprisonment for debt), *with* IND.

Article 1 from later articles;[110] and some had no forerunner in the 1816 constitution.[111]

I'll soon examine a couple of these current sections individually, along with relevant caselaw. This will underscore similarities and differences among various charters and illustrate how, as a result, state supreme courts may interpret analog provisions differently. Since I anchor these comparisons in Indiana's Constitution, it's worth first pointing out a handful of the charter's general features.

First, as already mentioned, some of the text in Indiana's Constitution has roots in the colonial era and the first decades of the Union; and some of its roots can be dated back even further, to English common law and Magna Carta.[112]

Second, Indiana's Constitution is one of the shortest constitutions in the nation. The Federal Constitution is the shortest at 7,591 words.[113] Vermont's is second, at approximately 8,565 words, followed by Iowa's and Rhode Island's, and then Indiana's, which is about 11,475 words.[114] On the other end of the spectrum is Alabama's constitution, at approximately 388,880 words, and Texas's—the second longest—at about 86,935 words.[115]

Third, Indiana is one of ten states operating under its second

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CONST. art. 1, § 22 (no imprisonment for debt); *compare* IND. CONST. of 1816 art. I, § 18 (no ex post facto laws or impairment of contracts; no conviction to work corruption of blood or estate forfeiture), *with* IND. CONST. art. 1, §§ 24, 30 (no ex post facto laws or impairment of contracts; no conviction to work corruption of blood or estate forfeiture); *compare* IND. CONST. of 1816 art. I, § 19 (assembly and petition), *with* IND. CONST. art. 1, § 31 (assembly and petition); *compare* IND. CONST. of 1816 art. I, § 20 (bear arms; subordination of military), *with* IND. CONST. art. 1, §§ 32–33 (bear arms; subordination of military); *compare* IND. CONST. of 1816 art. I, § 21 (quartering of soldiers), *with* IND. CONST. art. 1, § 34 (quartering of soldiers); *compare* IND. CONST. of 1816 art. I, § 22 (no nobility titles or hereditary distinctions), *with* IND. CONST. art. 1, § 35 (no nobility titles or hereditary distinctions); *compare* IND. CONST. of 1816 art. I, § 23 (emigration), *with* IND. CONST. art. 1, § 36 (emigration).

[110] For example, prohibition of involuntary servitude, IND. CONST. art. 1, § 37, appeared in Article XI of Indiana's first constitution, IND. CONST. of 1816 art. XI, § 7. And a provision stating that the penal code shall be founded on principles of reformation, not vindictive justice, IND. CONST. art. 1, § 18, appeared in Article IX of the first constitution, IND. CONST. of 1816 art. IX, § 4.

[111] *E.g.*, IND. CONST. art. 1, §§ 6, 23 (funds for religious institutions; equal privileges or immunities).

[112] *See* David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 38–41 (1986); Jerome L. Withered, *Indiana's Constitutional Right to a Remedy by Due Course of Law*, 37 RES GESTAE 456, 456 (1994) (tracing Article 1, Section 12 of Indiana's Constitution to Magna Carta); *cf.* Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 PUBLIUS 19, 19 (1992) [hereinafter Lutz, *State Constitutional Pedigree*]; Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 251–52 (1992).

[113] Jefferson A. Holt, *Reading Our Written Constitution*, 45 CUMB. L. REV. 487, 487 (2015).

[114] PERKINS, *supra* note 35, at 4 tbl.1.2.

[115] *Id.*

constitution.[116] All but two states have had between one and seven constitutions, while Georgia and Louisiana have had ten and eleven, respectively.[117] But like all fifty-one current constitutions, Indiana's has been amended—with about forty-eight adopted alterations.[118]

Fourth, although Indiana's Constitution has some stand-out provisions—such as its six separate sections on religion or conscience,[119] and a section that authorizes the Indiana Supreme Court to review and revise sentences[120]—many provisions are variations on themes found in constitutions across the nation. For example, topics common to Indiana's Constitution, the Federal Constitution, and other state constitutions include free speech,[121] religion,[122] penal treatment,[123] equal privileges and immunities,[124] search and seizure,[125] due process,[126] quartering of soldiers,[127] bearing arms,[128] property,[129] and involuntary servitude.[130] Topics

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[116] The other nine are California, Connecticut, Iowa, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, and West Virginia. *See id.*

[117] *Id.*

[118] *Id.*

[119] *See* IND. CONST. art. 1, §§ 2–7.

[120] IND. CONST. art. 7, § 4; Taylor v. State, 86 N.E.3d 157, 164 (Ind. 2017). This provision is reminiscent of sentencing under the English judicial scheme. *See* Cooper v. State, 540 N.E.2d 1216, 1218 (Ind. 1989).

[121] *See* U.S. CONST. amend. I; IND. CONST. art. 1, § 9; Steven Gow Calabresi et al., *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, 73 & n.106, 76 & n.120 (2018) (listing provisions of all fifty state constitutions addressing freedom of press and speech).

[122] *See* U.S. CONST. amend. I; IND. CONST. art. 1, §§ 2–8; Calabresi et al., *supra* note 121, at 54, 55 & n.13, 62 & n.56 (listing provisions of all fifty state constitutions addressing anti-establishment and free exercise of religion).

[123] *See* U.S. CONST. amend. VIII; IND. CONST. art. 1, §§ 15–18; Calabresi et al., *supra* note 121, at 117 & n.332 (listing provisions from forty-eight state constitutions prohibiting excessive bail).

[124] *See* U.S. CONST. amend. XIV; IND. CONST. art. 1, § 23; Calabresi et. al., *supra* note 121, at 106 & n.283 (listing state constitutional provisions prohibiting privileges and immunities that are not equally granted to all).

[125] *See* U.S. CONST. amend. IV; IND. CONST. art. 1, § 11; Calabresi et. al., *supra* note 121, at 86 & n.168 (listing provisions from all fifty state constitutions addressing searches and seizures).

[126] *See* U.S. CONST. amends. V, XIV; IND. CONST. art I, § 12; Calabresi et al., *supra* note 121, at 100 & n.245 (listing provisions from forty-nine state constitutions regarding due process, with New Jersey the only state lacking a comparable provision).

[127] *See* U.S. CONST. amend. III; IND. CONST. art. 1, § 34; Calabresi et al., *supra* note 121, at 84 & n.162 (listing provisions from forty-two state constitutions prohibiting quartering of soldiers).

[128] *See* U.S. CONST. amend. II; IND. CONST. art. 1, § 32; Calabresi et al., *supra* note 121, at 80 & n.139 (listing provisions from forty-four state constitutions that protect the right to bear arms).

[129] *See* U.S. CONST. amend. V; IND. CONST. art. 1, § 21; Calabresi et al., *supra* note 121, at 103 & n.262 (listing provisions from forty-nine state constitutions containing takings clauses).

[130] *Compare* IND. CONST. art. 1, § 37, *with* U.S. CONST. amend. XIII, *and* ALA. CONST. art.

common to Indiana's Constitution and other state constitutions—but not to the Federal Constitution—include remedy guarantees, class-based legislation, the People's innate rights and power over the government, and separation of powers.[131]

This fourth feature, in particular, highlights the familial relationship of state constitutions to one another and to the Federal Constitution—a relationship characterized by resemblances mixed with variety. It is this relationship that makes charter comparisons highly valuable, because similarities and differences between various charters may affect a state supreme court's analysis of a specific constitutional provision. Certain Indiana constitutional provisions and associated caselaw illustrate this dynamic. They also show how state jurisprudence is indispensable, not only for determining the precise contours of individual rights secured by state charters but also for giving effect to those constitutions' protections.

Indiana's Constitution addresses topics common to other constitutions, but subtle differences may separate Indiana constitutional provisions from similar ones in other charters. While those subtle differences reflect a diversity of ways to balance competing values, they also may be difficult to discern.

This makes Indiana jurisprudence essential for interpreting and upholding the state's constitution, including rights secured by the Indiana Bill of Rights. Polly Strong's case is a prime example.[132] There, the Indiana Supreme Court interpreted a provision that was only four years old, lacked a federal counterpart, and included text that the court determined "clearly expressed" the framers' intentions.[133]

In other cases, though, additional realities—such as the passage of time, the existence of federal analogues, and decisions by the U.S. Supreme Court and other courts—may complicate the analysis.[134] No

II, § 32, *and* IOWA CONST. art. I, § 23, *and* KAN. CONST., Bill of Rights, § 6, *and* OHIO CONST. art. I, § 6, *and* WIS. CONST. art. I, § 2. *See generally* Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73 (2017).

[131] *See* IND. CONST. art. 1, §§ 1, 12, 35; *id.* art. 3, §1; Calabresi et al., *supra* note 121, at 133–42; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198 (1992).

[132] *See supra* notes 71–85 and accompanying text. Other examples include *In re Leach*, 34 N.E. 641, 642 (Ind. 1893), and *Batchelor v. State*, 125 N.E. 773, 775–76 (Ind. 1920). In *In re Leach*, the Indiana Supreme Court held in 1893 that Sections 1 and 23 of Indiana's Bill of Rights permitted women to practice law. 34 N.E. at 642–43. In *Batchelor*, 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. 125 N.E. at 777–78. This was before the U.S. Supreme Court's decision in *Kirby v. Illinois*, 406 U.S. 682, 688–90 (1972), that the Sixth Amendment affords a comparable right.

[133] State v. Lasselle, 1 Blackf. 60, 61, 62 (Ind. 1820).

[134] These realities may also facilitate the analysis by providing more information for the

matter the analytical complexity, discerning the meaning of constitutional provisions and preserving the constitutional rights of individuals—whether they are in the political majority or minority—are quintessential functions of the judiciary.[135] To carry out these functions, however, courts depend on litigants to bring constitutional claims.

So, I'll turn now to constitutional provisions that secure individual rights. Specifically, I'll address two types: open-courts or remedy guarantees, and protections against unreasonable searches and seizures. The first type lacks a federal counterpart. The second type, by contrast, has a federal analogue that has undergone extensive interpretation by the U.S. Supreme Court.

Starting with open-courts or remedy guarantees,[136] these provisions are common, though not universal, features of state constitutions.[137] Although they do not have a federal analogue, they dovetail due process rights, which the Federal Constitution explicitly guarantees in the Fifth and Fourteenth Amendments.[138]

State constitutional remedy guarantees have been traced back to Magna Carta.[139] And yet, many of these provisions went decades without receiving any insightful or coherent interpretation from the respective state high court.[140] If a court did address the provision, it

interpreting court to consider.

[135] *See* THE FEDERALIST NO. 78, at 231–32 (Alexander Hamilton) (Michael G. Kammen ed., 1986) ("Th[e] independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."). This *Federalist* paper is among the most often cited in U.S. Supreme Court decisions. *See* Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403, 407–08 (1998).

[136] I refer to open-courts and remedy guarantees collectively. Some constitutions, like Indiana's, explicitly address open-courts and the right to a remedy; other state constitutions mention only one. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 284–288 (1991) (supplying the texts of state constitutions' remedies provisions).

[137] At least thirty-eight state constitutions include one of these guarantees. *See id.* at 284; Schuman, *supra* note 131, at 1201 n.25 (listing right-to-a-remedy provisions in thirty-seven constitutions).

[138] *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). All but one state constitution also has a due process provision. Calabresi et al., *supra* note 121, at 100 & n.245 (listing due process provisions of forty-nine state constitutions).

[139] *See* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995); Schuman, *supra* note 131, at 1199.

[140] *See* Hoffman, *supra* note 139, at 1282.

may have done so without considering why the constitution's drafters included it, generating sharp criticism of the court's reasoning.[141]

Indiana's Open Courts Clause was one of the remedial guarantees that went many years without judicial insight.[142] Found in Article 1, Section 12, it provides, "All 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. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."[143]

This language is similar to that of other state constitutions[144] and almost identical to the wording of Indiana's first constitution of 1816.[145] Although it appeared in Indiana caselaw in the twentieth century,[146] the Indiana Supreme Court in 2008 recognized that the court had not yet shed light on its meaning.[147]

When the court undertook this task in *Smith v. Indiana Department of Correction*, it turned to the text and its derivation from Magna Carta.[148] Indiana's Open Courts Clause, the court determined, "guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong."[149] The

[141] *See id.*; Schuman, *supra* note 131, at 1199–1201 (criticizing the majority opinion in Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989)).

[142] *See* Twomley, *supra* note 66, at 229–30 (recognizing that, in 1945, "Indiana cases throw no light on the meaning of" the Open Courts Clause).

[143] IND. CONST. art. 1, § 12. The originally adopted provision stated, "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. 1, § 12 (amended 1984).

[144] *See* ALA. CONST. art. I, § 13 ("That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."); COLO. CONST. art. II, § 6 ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."); *cf.* CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; ILL. CONST. art. I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Declaration of Rights, art. XIX; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

[145] *See* IND. CONST. of 1816 art. I, § 11 ("That all Courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation shall have remedy by the due course of law; and right and justice administered without denial or delay.").

[146] *See* Martin v. Richey, 711 N.E.2d 1273, 1282 (Ind. 1999); Bals v. Verduzco, 600 N.E.2d 1353, 1355 (Ind. 1992); Square D Co. v. O'Neal, 72 N.E.2d 654, 657 (Ind. 1947).

[147] *See* Smith v. Ind. Dep't of Corr., 883 N.E.2d 802, 807 (Ind. 2008); Twomley, *supra* note 66, at 229–30.

[148] *See Smith*, 883 N.E.2d at 806, 807.

[149] *Id.* at 807; *see also* Gibson v. W. Va. Dep't of Highways, 406 S.E.2d 440, 447–49 (W. Va.

court also explained that while the provision was aimed at the judiciary, it also imposed limitations on the legislative and executive branches.[150] This differed from decisions in other jurisdictions that "have taken a more restrictive view of their open courts provisions."[151]

The Indiana Supreme Court's decision in *Smith* became part of the foundation for the court's decision in *Escamilla v. Shiel Sexton Co.*[152] In that case, the court faced the question whether the Indiana Open Courts Clause allows undocumented immigrants to pursue tort claims for decreased earning capacity damages.[153] The court observed similarities among Indiana's Open Courts Clause, other states' remedies provisions, and the due process guarantees of the Federal Constitution.[154] The court concluded that "[o]ur Constitutional history and foundation demonstrate that the Open Courts Clause applies in full force to unauthorized immigrants," and so when Indiana law affords a remedy, like recovering decreased earning capacity, "the Open Courts Clause does not permit us to close the courthouse door based solely on the plaintiff's immigration status."[155]

Notably, another state supreme court—the Supreme Court of Mississippi—reached a similar conclusion for that state's remedies provision, but in a slightly different way.[156] It relied less on the history of its remedies provision and more on logic and a "well established body of law" across the states regarding non-citizen immigrants' rights of access to the courts.[157]

1991) (discussing courts' various interpretive approaches to state constitutional remedies provisions), *modified by* Neal v. Marion, 664 S.E.2d 721, 728 (W. Va. 2008); Schuman, *supra* note 131, at 1203–04 (same); *cf.* Lamb v. Wedgewood S. Corp., 302 S.E.2d 868, 882 (N.C. 1983) ("[T]he remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not."); Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) ("The General Assembly has the power to create new rights and abolish old ones so long as they are not vested." (quoting Dunn v. Felt, 379 A.2d 1140, 1141 (Del. Super. Ct. 1977))).

[150] *Smith*, 883 N.E.2d at 807.

[151] *Id.*; *see, e.g.*, Meech v. Hillhaven W., Inc., 776 P.2d 488, 493 (Mont. 1989) (concluding that the similar section of Montana's Constitution is a mandate aimed exclusively at the courts and does not constrict legislative powers).

[152] Escamilla v. Shiel Sexton Co., 73 N.E.3d 663 (Ind. 2017).

[153] *Id.* at 664.

[154] *See id.* at 666–67 (first citing Plyler v. Doe, 457 U.S. 202, 210 (1982); then citing McKean v. Yates Eng'g Corp., 2013-CT-01807-SCT (¶ 15), 200 So. 3d 431, 436 (Miss. 2016) (en banc); then citing Arteaga v. Literski, 265 N.W.2d 148, 150 (Wis. 1978); and then citing *Smith*, 883 N.E.2d at 807).

[155] *Escamilla*, 73 N.E.3d at 667.

[156] *See McKean*, 2013-CT-01807-SCT (¶ 18), 200 So. 3d at 437.

[157] *Id.* ¶ 16, 200 So. 3d at 436 (quoting Rosa v. Partners in Progress, Inc., 868 A.2d 994, 997

In cases of other states, remedy clauses have been invoked to address guest-passenger statutes, statutes of limitation and repose, statutory-damages caps, workers-compensation schemes, statutory immunities, and closed hearings.[158]

As these cases demonstrate, state constitutional provisions that lack a federal analogue may offer wide-reaching protections in a variety of contexts.

But what about provisions that have comparable guarantees in the Federal Constitution? As discussed in Part I, these provisions may lockstep with federal constitutional law, parallel federal jurisprudence without being tethered to it, or depart from the federal track. Independence and departure are possible even if the language in the state and federal constitutions is virtually the same. Giving perhaps the best illustration are prohibitions against unreasonable searches and seizures.

All fifty states' constitutions include a search-and-seizure provision.[159] Before becoming part of the Federal Constitution, protection against searches and seizures appeared in Article 39 of Magna Carta, then as a protected right of the colonists,[160] and then as parts of the first state constitutions.[161]

As for state constitutions adopted after the federal one,[162] some have language that is clearly distinguishable from the Federal

(N.H. 2005)). The quoted language originated in *Montoya v. Gateway Insurance Co.*, which cited various states' decisions with holdings that "are premised on the Fifth and Fourteenth Amendments to the United States Constitution, both of which use the word 'person,' not 'citizen,' to describe the beneficiaries of the described rights and receive further support from congressional recognition in 42 U.S.C.A. § 1981." Montoya v. Gateway Ins. Co., 401 A.2d 1102, 1104 (N.J. Super. Ct. App. Div. 1979)).

[158] *See* Heck v. Schupp, 68 N.E.2d 464, 466 (Ill. 1946); Lamb v. Wedgwood S. Corp., 302 S.E.2d 868, 882 (N.C. 1983); Oregonian Publ'g Co. v. O'Leary, 736 P.2d 173, 175 (Or. 1987) (en banc); Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978); Hoffman, *supra* note 139, at 1279–80; Schuman, *supra* note 131, at 1202.

[159] Calabresi et al., *supra* note 121, at 86.

[160] *See* Lutz, *State Constitutional Pedigree*, *supra* note 112, at 21 tbl.1.

[161] *See id.*; MD. CONST. of 1776, Declaration of Rights, § XXIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 819; MASS. CONST. of 1780, pt.1, art. XIV, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 959; N.H. CONST. of 1784, pt.1, art. XIX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 1282; N.C. CONST. of 1776, Declaration of Rights, art. XI, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 1409; PENN. CONST. of 1776, Declaration of Rights, art. X, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 1542; VT. CONST. of 1777, ch. I, art. XI, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 1860; VA. CONST. of 1776, art I, § 10, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 1909.

[162] Massachusetts and New Hampshire are the only two states whose present constitutions predate the Federal Constitution. *See* PERKINS, *supra* note 35, at 4 tbl.1.2. These constitutions, though, have been amended. Massachusetts's has undergone 120 amendments, and New Hampshire's has undergone 145. *Id.*

Constitution's counterpart in the Fourth Amendment.[163] But others have nearly identical language.[164] Indiana's Article 1, Section 11 falls into this second camp, providing,

> 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.[165]

Despite state constitutional language mirroring Fourth Amendment text,[166] the Indiana Supreme Court "utilize[s] a different method of interpretation."[167] Whereas Fourth Amendment analysis turns on a reasonable expectation of privacy, the analysis for Article 1, Section 11,

> turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. Accordingly,

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[163] *See, e.g.*, MD. CONST., Declaration of Rights, art. XXVI ("That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."); N.C. CONST. art. I, § 20 ("General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."); VA. CONST. art. I, § 10 ("That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[164] *See, e.g.*, KY. CONST., § 10; NEV. CONST. art. I, § 18; OHIO CONST. art. I, § 14.

[165] IND. CONST. art. 1, § 11. Indiana's first constitution of 1816 similarly tracked the Fourth Amendment language, providing the following:

> The rights of the people, to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, 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 persons or things to be seized.

IND. CONST. of 1816, art. I, § 8.

[166] *Compare* IND. CONST. art. 1, § 11, *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.").

[167] Jacobs v. State, 76 N.E.3d 846, 851 (Ind. 2017).

> 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.[168]

With this analytical framework, the Indiana Supreme Court in *Litchfield v. State* determined that although searches of garbage will generally not invoke the Fourth Amendment's warrant requirement, the Indiana Constitution imposes two constraints on police officers who seek to search garbage without a warrant: (1) the garbage must be retrieved "in substantially the same manner as the trash collector would take it," and (2) officers must have "articulable individualized suspicion" of criminality to justify the seizure.[169] Two other state supreme courts, Montana's and Alaska's, reached similar holdings,[170] while other state supreme courts addressing seizure of garbage followed Fourth Amendment reasoning in interpreting their analogous state constitutional provisions.[171]

Indiana's *Litchfield* analysis is just one example of how a state constitution's search-and-seizure provision may differ from the federal analogue. In fact, many other states have demonstrated a more common departure from federal search-and-seizure jurisprudence by declining to follow the U.S. Supreme Court's lead concerning a good-faith exception to the exclusionary rule.[172] Other

[168] *Id.* at 851–52 (internal citations and quotation marks omitted) (quoting Litchfield v. State, 824 N.E.2d 359, 361 (Ind. 2005)).

[169] *See Litchfield*, 824 N.E.2d at 358, 363–64.

[170] *See* Beltz v. State, 221 P.3d 328, 338–39 (Alaska 2009) (citing *Litchfield*, 824 N.E.2d at 363–64); State v. 1993 Chevrolet Pickup, 2005 MT 180, ¶¶ 19–21, 328 Mont. 10, 17–18, 116 P.3d 800, 805–06 (citing *Litchfield*, 824 N.E.2d at 363–64).

[171] *See* State v. Kimberlin, 984 P.2d 141, 144–45 (Kan. 1999) ("The Fourth Amendment of the United States Constitution and Section 15 of the Bill of Rights of the Kansas Constitution prohibit unreasonable searches and seizures. The wording and the scope are identical for all practical purposes. If conduct is prohibited by the one, it is prohibited by the other."); State v. McMurray, 860 N.W.2d 686, 689 n.3 (Minn. 2015) (listing courts that have followed U.S. Supreme Court Fourth Amendment reasoning); State v. Schmalz, 2008 ND 27, ¶ 25, 744 N.W.2d 734, 742 ("When evaluating the constitutionality of a search and seizure under the Constitution of North Dakota, this Court employs the same test used by the United States Supreme Court.").

[172] *See* State v. Marsala, 579 A.2d 58, 66–68 (Conn. 1990); Gary v. State, 422 S.E.2d 426, 428–29 (Ga. 1992); State v. Lopez, 896 P.2d 889, 902–03 (Haw. 1995); State v. Guzman, 842 P.2d 660, 671–73 (Idaho 1992); State v. Ochoa, 792 N.W.2d 260, 285 (Iowa 2010); State v. Novembrino, 519 A.2d 820, 854, 857 (N.J. 1987); State v. Gutierrez, 863 P.2d 1052, 1068 (N.M. 1993); Commonwealth v. Edmunds, 586 A.2d 887, 905–06 (Pa. 1991); State v. Oakes, 598 A.2d 119, 127 (Vt. 1991); State v. Scull, 2015 WI 22, ¶¶ 35, 45, 361 Wis. 2d 288, 306, 310, 862 N.W.2d

points of departure are possible as well. For example, the Indiana Supreme Court has recognized that the attenuation doctrine in Indiana would "begin with the federal three-part test but not necessarily end there."[173]

So, even if constitutional provisions exhibit similar or nearly identical text, the shape of their protections may differ. But to illuminate and effectuate these protections, litigants must seize opportunities for invoking the state constitution. I'll conclude by observing opportunities for litigants to invoke constitutional protections and ways for individuals and institutions to engage state constitutions as guarantors of rights.

IV. OPPORTUNITIES AND WAYS TO EMBRACE STATE CONSTITUTIONAL LAW

Opportunities to invoke state constitutional law are plentiful, and they come in a variety of forms. I'll point out just four scenarios that present them.

First, advancements in science and technology prompt questions about how constitutional provisions apply to previously unknown realities.[174] For example, technological innovations in thermal imaging, cell phones, and global positioning systems have raised questions about what governmental intrusions are constitutionally prohibited.[175]

Second, new legislation may raise questions about its own constitutionality. State legislatures pass thousands of laws each cycle, many of them responding to current conditions or lobbying efforts.[176] For example, in the last eight years, every state legislature has addressed pretrial policy and opioids.[177] Most states have

562, 570, 572.

[173] Wright v. State, 108 N.E.3d 307, 318 (Ind. 2018) (emphasis omitted).

[174] *See* Carpenter v. United States, 138 S. Ct. 2206, 2214–17 (2018) (addressing whether the government may access historical cell phone location information without a warrant, under the Fourth Amendment); Riley v. California, 573 U.S. 373, 385–86 (2014) (addressing how much of a cell phone police may search, incident to arrest and without a warrant, under the Fourth Amendment); Commonwealth v. Jones, 117 N.E.3d 702, 706, 709–16 (Mass. 2019) (addressing whether the state's constitutional right against self-incrimination protects a defendant from being compelled to produce password to decrypt a cell phone).

[175] *See Carpenter*, 138 S. Ct. at 2214–16; *Riley*, 573 U.S. at 378; Kyllo v. United States, 533 U.S. 27, 29 (2001); Zanders v. State, 118 N.E.3d 736, 738 (Ind. 2019).

[176] *See* 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/bookstore/state-legislatures-magazine/federalism-hot-legislative-issues-2018.aspx.

[177] *See id.*; Amber Widgery, *Trends in Pretrial Release: State Legislation Update*, NAT'L CONF. ST. LEGISLATURES (Apr. 1, 2018), http://www.ncsl.org/research/civil-and-criminal-justice

enacted renewable-energy bills, and the number of state bills dealing with immigration have increased.[178] The influx of new legislation carries with it the potential that the legislation infringes state constitutional provisions.

Third, laws that have been on the books for years may be subject to constitutional challenges induced by shifts in the population, governmental responses to those shifts, or escalating public awareness and concern for certain issues.[179] These fluctuations may cause old laws to be enforced differently over time.[180] Or, old laws may be enforced consistently, but they receive heightened public attention. Either situation may highlight potential violations of constitutional rights. For example, prison overcrowding and disparate economic statuses among arrestees have generated questions about the constitutionality of prison conditions and bail systems, respectively.[181]

Finally, some areas of state constitutional law simply haven't been thoroughly explained by the courts. So, it is yet to be determined how those parts of a constitution apply to many situations. True, if an undecided state constitutional issue resembles a federal constitutional issue that the U.S. Supreme Court has extensively analyzed, then the U.S. Supreme Court's analysis may be persuasive, suggesting that the state constitution would be interpreted similarly. But the U.S. Supreme Court has not prescribed detailed analytical frameworks for all provisions of the Federal Constitution.[182] And even for the ones it has, differences between the state and federal constitutions may warrant a different analysis for the state

/trends-in-pretrial-release-state-legislation.aspx.

[178] *See* Lays, *supra* note 176; *Renewable Energy Legislative Update 2017*, NAT'L CONF. ST. LEGISLATURES (Aug. 10, 2018), http://www.ncsl.org/research/energy/renewable-energy-legislative-update-2017.aspx.

[179] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 499, 502–03, 511 (2011).

[180] *See, e.g.*, ODonnell v. Harris Cty., 892 F.3d 147, 157–63 (5th Cir. 2018).

[181] *See Brown*, 563 U.S. at 499, 502–03; Walker v. City of Calhoun, 901 F.3d 1245, 1251–52 (11th Cir. 2018); *ODonnell*, 892 F.3d at 152–54.

[182] For example, the U.S. Supreme Court has provided little precedent on the excessive fines clause of the Eighth Amendment. *See* Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019); 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."). This has left federal excessiveness analysis open for elaboration by state and lower-federal courts. *See* Austin v. United States, 509 U.S. 602, 622–23 (1993) ("Prudence dictates that we allow the lower courts to consider that question [about what factors should inform a decision on whether a forfeiture is constitutionally excessive] in the first instance."); *see also* State v. Baldon, 829 N.W.2d 785, 790 (Iowa 2013) ("The United States Supreme Court has not yet directly weighed in on the issue [whether a parole agreement containing a consent-to-search clause renders suspicionless and warrantless searches of parolees reasonable] to direct an outcome under the Fourth Amendment or to aid us in our resolution under our state constitution.").

constitutional provision.[183]

Still, these opportunities to engage the state constitution cannot alone invoke state constitutional law as a guarantor of rights. It is up to the legal community to ensure state constitutional protections are activated appropriately.[184] Judges, bar associations, educators, and advocates all have a role to play.

The state supreme court—as the final arbiter of state constitutional law—supplies interpretation of the charter's provisions. But the court also relies on attorneys to bring state constitutional claims and well-reasoned arguments. To do this, attorneys need to "discover the richness" of the state constitution and learn how to effectively present state claims under it.[185] Attorneys' familiarity and dexterity with state constitutional law depend in part on what judges, law schools, and bar associations do to cultivate state constitutionalism.

Starting with judges, state supreme courts can—in a number of ways—encourage litigants and their attorneys to raise and aptly argue state constitutional claims.

In judicial opinions, state courts can decide state constitutional claims separately from federal constitutional claims and turn to federal claims only if the state constitutional claim does not afford relief. That approach honors the independent authority of the state, and it prompts attorneys to argue state constitutional claims before, and separately from, similar federal claims.[186] At the same time, state supreme courts can develop a principled decision-making process faithful to the constitution's history and function. If circumstances deem it appropriate, the court can waive procedural default or order additional briefing on state constitutional arguments.[187]

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[183] Some scholars have observed that certain state constitutional property protections, for example, are distinct from the Federal Takings Clause. *See, e.g.*, Josh Blackman, *Popular Constitutionalism After Kelo*, 23 GEO. MASON L. REV. 255, 257, 269–70 (2016); Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 403–05 (2016).

[184] *See* Utter & Pitler, *supra* note 31, at 638 ("[O]ne of the major reasons for state court reluctance to interpret and to apply state constitutions is the failure of litigators to claim state constitutional errors."); *id.* at 677.

[185] *Id.* at 638–39; *see* SUTTON, *supra* note 8, at 191–97.

[186] *See, e.g.*, State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); *Kennedy*, 666 P.2d at 1318 (providing that federal courts can likewise regard the independent authority of states and draw attention to state constitutional claims—for example, by addressing state claims separately from and before federal ones, or by abstaining from deciding questions of state constitutional law and certifying those questions, welcoming the state supreme court to answer them before the federal court does so).

[187] *See Kennedy*, 666 P.2d at 1321–22.

In court rules, too, courts can communicate the expectation that lawyers bring well-developed state constitutional claims alongside analogous federal ones. They can even require that the state claim be argued first. Caution must be applied, however, so as not to require counsel to make obviously nonmeritorious or nondeterminative state claims wasteful of the court's and the client's resources.

Judges may also issue writings, give presentations, or teach courses on state constitutional law. These activities often involve law schools and bar associations, who can host symposia or CLE courses and publish articles[188] or practice guides[189] on the topic. Law schools may also include state constitutional law as a standard or required part of the curriculum. And state supreme courts can encourage education on state constitutional law by including the subject on the bar exam.

If it becomes the norm for attorneys to raise and argue appropriate state constitutional claims, that norm will help sustain attention on state constitutional law. Regular presentation of state constitutional claims alongside federal counterparts would make state constitutionalism more prevalent in the state caselaw. In turn, failure to raise or adequately argue a relevant state constitutional claim could affect whether an attorney supplied ineffective or negligent representation.[190]

Finally, if state constitutional law flourishes in one state, that vitality can demonstrate for other states' courts, advocates, and educators how to enliven state constitutional law in their home states.

CONCLUSION

The civil-liberty protections that flow from federalism depend in significant part on the vitality and independence of state constitutions. Each state constitution offers a second set of constitutional protections—additional to those supplied by the Federal Constitution—that also bolster federalism's safeguard against overconcentration of authority.

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[188] *Albany Law Review* deserves congratulations for annually publishing an issue on state constitutional law.

[189] For examples of practice guides on state constitutions, see COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION (2011); RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION (2017); GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION (G. Alan Tarr ed., 2011); and ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION (2d ed. 2012).

[190] *See* Strickland v. Washington, 466 U.S. 668, 687–89, 691–92 (1984); State v. Jewett, 500 A.2d 233, 234 (Vt. 1985).

But state constitutions are not automatically effective. They need to be appreciated, invoked, and properly applied. Observing a state charter's familial relationship to the Federal Constitution and to other state constitutions can expose the charter's individual identity, which is the source of its authority and its distinctive role in our federalist system.

For these reasons, I urge members of the legal community to discover and embrace state constitutional law. Our civil liberties are better protected if state charters shine bright in the constellation of American constitutions.