

Symposium Introduction

State Constitutions in the United States Federal System

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Before the members of the U.S. Constitutional Convention gathered in Philadelphia in the summer of 1787, all but one of the young states of the fledgling country had already proposed, debated, and ratified their own constitutions.¹ No bestselling books, movies, or for that matter musicals tell the story, the story of the creation of our state constitutions. None, it seems likely, ever will. But the most inspired constitution writing in this country, indeed perhaps at any time anywhere, occurred before 1787, and it occurred in the states. Think of it: “The office of our governors, the bicameral legislatures, tripartite separation of powers, bills of rights, and the unique use of constitutional conventions were all born during the state constitution-making period between 1775 and the early 1780s, well before the federal constitution of 1787 was created.”² What we now consider the cornerstone principles of the U.S. Constitution and of American government—all of the structural guarantees of liberty (save for federalism) and all of the specific guarantees of liberty found in the first eight provisions of the Bill of Rights—originated

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¹ CONN. CONST. of 1776, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 257–58 (Ben Perley Poore ed., 2d ed. 1878) [hereinafter CONSTITUTIONS]; DEL. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 273–78; GA. CONST. of 1777, *reprinted in* CONSTITUTIONS, *supra*, at 377–83; MD. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 817–28; MASS. CONST. of 1780, *reprinted in* CONSTITUTIONS, *supra*, at 956–73; N.H. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra*, at 1279–80; N.J. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 1310–14; N.Y. CONST. of 1777, *reprinted in* CONSTITUTIONS, *supra*, at 1328–39; N.C. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 1409–14; PA. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 1540–48; S.C. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 1615–20; VA. CONST. of 1776, *reprinted in* CONSTITUTIONS, *supra*, at 1910–12. Rhode Island, the one State not on the list, operated under a charter from 1663 until it created its constitution in 1842. *See* R.I. CHARTER of 1663, *reprinted in* CONSTITUTIONS, *supra*, at 1595–1603; R.I. CONST. of 1842, *reprinted in* CONSTITUTIONS, *supra*, at 1603–13. When Rhode Island finally got around to writing its own constitution, that did not happen without some controversy, a controversy that made its way to the Supreme Court. *See* *Luther v. Borden*, 48 U.S. (7 How.) 1, 1–2 (1849). Vermont, however, not recognized as a state at the time, held a convention and adopted its own constitution in 1777. *See* VT. CONST. of 1777, *reprinted in* CONSTITUTIONS, *supra*, at 1857–65.

² Gordon S. Wood, Foreword, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993). *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

elsewhere, namely in the state constitutions drafted before 1787.³ Nor were the authors of these original documents inconsequential men. They included James Madison, John Adams, Benjamin Franklin, Robert Livingston, George Mason, and Thomas Johnson.⁴ They just are celebrated for other reasons, usually for their role in drafting the federal charter or for offices they held in the federal government. In some cases, the winners write the history; in other cases, the creators of the bigger sovereign are remembered only for that.

Even though the state constitutional conventions remain largely uncelebrated and even though that's likely to remain their fate, something new is afoot with respect to state constitutional law. Over the last five years, at least eight law journals have devoted a symposium to the topic.⁵ At least two law journals now publish annual issues on the subject.⁶ More professors are writing about it. More law schools, including many of the elite ones, now are teaching it. And more and more U.S. Supreme Court opinions invoke state constitutional law as part of their reasoning.⁷

³ See, e.g., Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 989 (1996) ("State charters are the foundation of American constitutional law.").

⁴ Most of these men need no explanation. Thomas Johnson, however, may need one. After serving as a Maryland delegate to the Continental Congress, helping draft the state's first constitution, and serving as the state's first Governor, Johnson (reluctantly) accepted a seat on the U.S. Supreme Court. TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 25–27 (2001); Herbert Alan Johnson, *Thomas Johnson*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 149, 149–58 (Leon Friedman & Fred L. Israel eds., 1969). But he left his seat only 163 days after he was sworn in, making him the shortest serving Justice to date. *Id.* at 25, 27. He left an impression nonetheless, authoring the first signed opinion in U.S. Supreme Court history. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792) (opinion of Johnson, J.).

⁵ Symposium, *State Constitutional Change: Traditions, Trends and Theory*, ARK. L. REV. (forthcoming 2016); Symposium, *State Constitutions in the United States Federal System*, 77 OHIO ST. L.J. 195 (2016); *State Constitutional Law Symposium in Honor of Justice Robert F. Utter*, 91 WASH. L. REV. ONLINE 23 (2016); Symposium, *A Wave of Change: Celebrating the 50th Anniversary of Michigan's Constitution and the Evolution of State Constitutionalism*, 60 WAYNE L. REV. 1 (2014); Symposium, *Federalism as the New Nationalism*, 123 YALE L.J. 1889 (2014); Symposium, *State Constitutional Law Steps Out of the Shadows*, 59 U. KAN. L. REV. 687 (2011); Symposium, *State Constitutionalism in the 21st Century*, 115 PENN. ST. L. REV. 779 (2011); see also, e.g., Symposium, *State Constitutions*, 62 STAN. L. REV. 1513 (2010); Symposium, *One Hundred Fifty Years of Oregon Constitutional Law: Reflecting Back and Looking Forward*, 87 OR. L. REV. 715 (2009); Symposium, *Tomorrow's Issues in State Constitutional Law*, 38 VAL. U. L. REV. 317 (2004).

⁶ *Albany Law Review* and *Rutgers Law Journal*. See, e.g., Vincent Martin Bonventre, *Editor's Foreword*, 75 ALB. L. REV. 1631, 1631 (2012); *State Constitutional Law*, RUTGERS SCHOOL OF LAW, <http://lawjournal.rutgers.edu/state-constitutional-law> [<https://perma.cc/272N-YVX5>]. *Temple Law Review* also previously published annual issues on state constitutional law from 1992–2001. See, e.g., Robert N.C. Nix, Jr., *Foreword, Emerging Issues in State Constitutional Law*, 65 TEMP. L. REV. 1119 (1992).

⁷ See, e.g., *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016); *id.* at 648 (Sotomayor, J.,

What's going on?

Part of the explanation is that several of the most interesting “constitutional” debates in recent times started at the state level, and a few ended there. In some cases, state constitutional law debates set the stage for later debates about the meaning of federal constitutional law at the U.S. Supreme Court. Take same-sex marriage. It is difficult to imagine the U.S. Supreme Court's decision in *Obergefell* in 2015⁸ without the Massachusetts Supreme Judicial Court's decision in *Goodridge* in 2003.⁹ There is no way to tell that story without accounting for the essential role of the state courts in initially giving recognition to this new right. At other times, those debates happened in the state courts because the U.S. Supreme Court left the field. Think of *Kelo*, *Smith*, and *Rodriguez*.¹⁰ In each of these cases, the U.S. Supreme Court rejected the federal claim and gave the state courts the green light to do the same. In the aftermath of those decisions, however, many state courts (and sometimes state legislatures) granted relief where the High Court would not.¹¹ In these latter settings, it is even fair to ask whether the plaintiffs over the long term won the federal cases by losing them.¹² Did the litigants, in other words, gain more in the state courts (and state and even federal legislatures) than they ever could have won in the U.S. Supreme Court? I don't know the answer. But the question is worth asking.

The dueling perspectives of two civil rights advocates and prominent professors, Burt Neuborne and William Rubenstein, offer another marker of change. Nearly forty years ago, Professor Neuborne wrote *The Myth of Parity*, which argued that, even with the end of the Warren Court, the federal courts remained the best venue, and the federal constitution the best source of law,

dissenting); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1968 n.6 (2015) (Thomas, J., dissenting); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in the judgment); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring in part and concurring in the judgment); *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1636–38 (2014) (plurality opinion); *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part); *McDonald v. City of Chicago*, 561 U.S. 742, 777 & n.27 (2010); *Doe v. Reed*, 561 U.S. 186, 222–23 (2010) (Scalia, J., concurring in the judgment); *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting); *Florida v. Powell*, 559 U.S. 50, 56 (2010); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 349 (2009) (Kennedy, J., dissenting); *Arizona v. Gant*, 556 U.S. 332, 347 n.8 (2009); *District of Columbia v. Heller*, 554 U.S. 570, 584–86, 600–03 (2008).

⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁰ *Kelo v. City of New London*, 545 U.S. 469, 484 (2005); *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

¹¹ See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006).

¹² Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1978–85 (2008).

for obtaining relief in individual-rights cases.¹³ More recently, Professor Rubenstein rebutted the point in *The Myth of Superiority*.¹⁴ Based on his experiences as a gay-rights advocate, he explained how state courts often were welcoming venues for his clients, “reveal[ing] *institutional* advantages of state courts in protecting individual rights that are missing from Neuborne’s depiction of these competing fora.”¹⁵

Today’s competing theories for interpreting *federal* constitutional law also have increased the salience of state constitutional law. Start with originalism. Anyone interested in understanding the original meaning of the U.S. Constitution *must* consider the state constitutions. What better way to learn how the federal guarantee was understood in 1789, 1791, or 1868? The early state constitutions after all provided the template for each of the liberty guarantees in the federal charter and much of its structure. Consider *Heller*. Littered throughout that debate about the meaning of the Second Amendment, whether in the majority opinion or the dissent, is the subject of state constitutional law. Both the majority and dissenting opinions use state constitutional decisions to understand the original meaning of the federal right.¹⁶ So too in many other areas of the law, including religious liberty,¹⁷ other Bill of Rights guarantees,¹⁸ separation of powers,¹⁹ and even *federal* judicial power.²⁰

Originalism does not stand alone in this respect. Living constitutionalism looks to evolving norms in permitting constitutional guarantees to grow (and I suppose sometimes shrink) over time. But where does the judge engaged in this form of interpretation look for evidence of a new liberty? An inward-looking inquiry sounds solipsistic, and at any rate that perspective will not provide the credibility needed to justify nullifying the democratic processes in a given area.²¹ One outward-looking inquiry that provides evidence of

¹³ Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–16 (1977).

¹⁴ William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599 (1999).

¹⁵ *Id.* at 600.

¹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 580 n.6, 584–86, 600–03 (2008); *id.* at 662 n.29 (Stevens, J., dissenting); *id.* at 683–88 (Breyer, J., dissenting).

¹⁷ *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring in part and concurring in the judgment); *City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in part).

¹⁸ *See, e.g.*, *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) (First Amendment); *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (Eighth Amendment); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 349 (2009) (Kennedy, J., dissenting) (Sixth Amendment).

¹⁹ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in the judgment).

²⁰ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1968 n.6 (2015) (Thomas, J., dissenting).

²¹ *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2490 (2012) (Alito, J., dissenting).

evolving norms is activity in the states, including perhaps most relevantly state constitutional decisions that supply evidence of a change—or not.²²

So too for pragmatism. If the goal is to figure out what works best in today's world,²³ whether through a cost-benefit analysis or something else, judges must anchor any democracy-denying constitutional rule in something that goes beyond their own policy convictions. Here, too, the states' experiences wait to be examined. What better way to see whether constitutionalizing an area works than to see what happened when the state courts did just that? This bottom-up approach allows judges to see how ideas work on the ground, not just in theory.²⁴ Experimentation at the state level thus not only allows each state to chart its own course in a given policy area, but it also allows the Supreme Court to learn from the experience *before* it occupies, or chooses not to occupy, the field.

Something else has helped—a growing appreciation of the difficulty of interpreting so many issues of federal constitutional law. Read a slate of five-to-four U.S. Supreme Court decisions about the meaning of “equal protection,” “due process,” “cruel and unusual punishment,” “unreasonable searches and seizures,” and other general constitutional phrases, and one begins to appreciate the difficulty of being a Supreme Court Justice. Some point to these difficult disputes to show the “indeterminacy” of much of the Supreme Court's work,²⁵ or worse to argue that it is all “political.”²⁶ It is not always easy to give specific content to general language. In a country of dual sovereigns, however, why not think of the problem as an opportunity? We have fifty-one constitutions in this country, and there is nothing to prevent the state courts from offering their own interpretations of these guarantees. Properly understood and properly implemented, American constitutional law should engage a debate about the best answers to difficult constitutional problems undertaken by a range of constitutional courts. The answer to indeterminacy often is many imperfect solutions, not just one.

²² See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005); see also Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More—Or Less?*, 127 HARV. L. REV. 1419, 1442–43 (2014) (book review).

²³ See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010).

²⁴ Sutton, *supra* note 22, at 1427.

²⁵ Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341 (1996) (“Where the Court persistently divides five-to-four over some proposition, it seems fair to call the proposition indeterminate.”); see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 224–25 (2002); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 43–45 (2013).

²⁶ E.g., RICHARD A. POSNER, *HOW JUDGES THINK* 277–78 (2008) (“Evidence of the powerful influence of politics on constitutional adjudication in the Supreme Court lies everywhere at hand.”); *id.* at 15, 269, 287, 346, 369, 372; see also Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 861–64 (2010) (book review) (disagreeing).

Until recently, something else has held state constitutionalism back: a tendency by the state high courts to tether interpretations of their constitutions to the U.S. Supreme Court's interpretations of similar federal guarantees—what has come to be known as “lockstepping.” At one point in time, that may have made sense. It was hard enough for the state courts to keep up with the innovations of the Warren Court. Who could blame them in the 1950s and 1960s for not considering going further? But the aftermath of that period created an unfortunate cycle: (1) Attorneys wrote briefs that relied on state and federal constitutional claims but that relied almost exclusively on federal precedent in doing so; (2) the judges increasingly lockstepped their interpretations of the state constitution to federal precedents; (3) scholars wrote increasingly about just federal constitutional law; (4) law schools increasingly neglected state constitutional law in their course offerings; and (5) new generations of lawyers learned to focus on the federal constitution, not its state counterparts. Then the cycle repeated itself.

Something is breaking the cycle, though, and I have little doubt that symposiums (symposia if you prefer) like this one are part of the explanation. Lawyers, judges, and scholars cannot make state constitutional law relevant if no one writes about it or talks about it. And today's locksteppers will never become tomorrow's Luddites if the law schools do not devote energy and time to the enterprise.

For these reasons (and many others), I congratulate the student organizers of the *Ohio State Law Journal's* 2014–2015 Symposium on State Constitutions in the United States Federal System: Calli Kluchar, Jackson Froliklong, and many others. I thank the faculty and administrators who helped organize the event: Steven Huefner, Garry Jenkins, and Dean Alan Michaels. I am grateful to the four professors who moderated the panels: Peter Shane, Daniel Tokaji, Chris Walker, and Marc Spindelman. And I appreciate all those who attended the event, ranging from current and past students, to local attorneys, to academics around the country, to many more.

Happily for us, the topics of the Symposium have been memorialized in eight pieces from the participants. In their writings and in the four panels at the event, two central questions emerged: What should our state constitutions say? And how should we interpret them?

On the first question, the Symposium confronted the process of amending the state constitutions and the proper scope and structure of these charters. One panel, made up of Sanford Levinson, Alan Tarr, and Steven Steinglass, discussed amendments to state constitutions—how it's done and what are the virtues and vices of doing so. Their written contributions continue that discussion. Levinson and his co-author William Blake examine the results of the most recent state referenda calling for constitutional conventions (all of which failed) and predict the end of the age of constitutional conventions.²⁷

²⁷ Sanford Levinson & William Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 234–35 (2016).

Steinglass hopes that's not the case, and Tarr seems to doubt that it is. Steinglass, who serves as the Senior Policy Advisor for the Ohio Constitutional Modernization Commission,²⁸ is counting on Ohioans' belief in the need and soundness of amendments to its constitution. His written contribution thoroughly reviews the history of constitutional change in Ohio and the various tools used to amend its constitution.²⁹ For his part, Tarr shows how ongoing popular constitutionalism—constitutional change undertaken by We the People—can flourish more effectively at the state level than the federal level, and what that means for the two sets of governing documents.³⁰

Together, these three contributors set the backdrop for the next theme of the Symposium: Once established and amended, how should courts interpret our state constitutions?

Three panels examined this theme. One panel, consisting of Justice Goodwin Liu, Robert Williams, and myself, took the question head on and debated the phenomenon of lockstepping. Justice Liu, an Associate Justice of the California Supreme Court, gave practical reasons for why it occurs: federal law often is more developed; lawyers too often do not argue their cases based on the text and history of the state constitutions; and a few state constitutions (including California's with respect to the exclusionary rule) require lockstepping.³¹ I proposed that state courts, when permitted, should consider the Oregon model initiated by Justice Hans Linde—of resolving all state constitutional claims first and of addressing the federal claim only if the state claims fail.³² Robert Williams also criticized lockstepping. His piece provides a useful summary of the practice and a powerful argument against an especially odd feature of it, where state courts lock themselves in to interpreting their constitutions the same as the federal constitution *for all future cases*.³³

A second panel, which included Virginia Seitz, James Gardner, and Ann Lousin, discussed the impact of Justice Brennan's landmark 1977 *Harvard Law Review* article, *State Constitutions and the Protection of Individual*

²⁸ Staff, OHIO CONST. MODERNIZATION COMMISSION, <http://www.ocmc.ohio.gov/ocmc/staff> [<https://perma.cc/JS5S-QBQR>]

²⁹ See generally Steven Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281 (2016).

³⁰ See generally G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237 (2016).

³¹ *In re Lance W.*, 694 P.2d 744, 747, 752 (Cal. 1985); see CAL. CONST. art. I, § 28(f)(2) (formerly CAL. CONST. art. I, § 28(d), eff. June 9, 1982; renumbered by Prop. 9, eff. Nov. 5, 2008); see also *California v. Rooney*, 483 U.S. 307, 313 n.4 (1987) (per curiam).

³² See, e.g., *State v. Kennedy*, 666 P.2d 1316, 1318–22 (Or. 1983).

³³ Robert F. Williams, Foreword, *Justice William J. Brennan, Jr. and the Evolving Development of State Constitutional Law*, 77 OHIO ST. L.J. 203, 207–09 (2016); see also, e.g., Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1509–27 (2005).

Rights.³⁴ In her written piece, Lousin summarizes the approaches state courts have employed since the article,³⁵ then provides examples of independent state interpretation before concluding that “in at least some states, the ‘new federalism’ championed by Brennan is alive and well.”³⁶ Gardner disagrees to a point. He thinks that Justice Brennan was right about the importance of state constitutional law but for the wrong reason: It does not necessarily expand human rights but instead better ensures that federalism will protect liberty.³⁷ Only this understanding of state constitutional law, he contends, will have the lasting impact its advocates seek.³⁸

A final panel, made up of Aaron Saiger, Jim Rossi, and Miriam Seifter, addressed how best to structure separation of powers in state constitutions. What is administrative law’s place within state constitutional law? Should state courts, for example, prevent state legislatures from incorporating an entire regime of federal law, amendable in the future by the federal entity, on separation-of-powers or nondelegation grounds? Rossi takes on that question in his written contribution (and answers no).³⁹ Should the states, to take another example, follow a *Chevron*-like principle of deference to agency interpretation, despite the reality that there may be good reason to debate *Chevron*’s merits in some areas of federal law?⁴⁰ Should unelected agency employees play a smaller or greater (or just different) role at the state level than they do at the federal level? And should state agencies learn from local governments, as Saiger argues in his contribution?⁴¹ These and other questions, front and center in federal law debates at the national stage, ought not be limited to that level, as these contributors lucidly explained.

These articles, and the panel discussions that preceded them, offer considerable food for thought and room for debate. That the *Law Journal* managed to entice many of the best state constitutional law scholars in this country to discuss this timely subject is a credit to them and to the Law School. Thanks to symposiums like this one, I predict that the salience of state constitutional law will continue to grow steadily, perhaps even exponentially, in the years ahead.

³⁴ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

³⁵ Ann M. Lousin, *Justice Brennan’s Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 389–92 (2016).

³⁶ *Id.* at 393–96, 407.

³⁷ James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 358 (2016).

³⁸ *Id.*

³⁹ Jim Rossi, *The Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 457–59, 471–78, 480–81 (2016).

⁴⁰ See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027–28 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part).

⁴¹ Aaron Saiger, *Cross-Pollination Between State Administrative Law and the Law of Local Government*, 77 OHIO ST. L.J. 423, 456 (2016).