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“A Document of Independent Force”: Towards a Robust Ohio Constitutionalism

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Cover Page Footnote
The views expressed in this article are not necessarily shared by my employers. Special thanks to the staff of the Wright Memorial Public Library and the Kettering-Moraine Branch of the Dayton Metro Library for their invaluable assistance, as well as to Justice DeWine, Judge Matthew R. Byrne, Professors Robert J. Delahunty, Mitchell Gordon, and Michael Robak, my colleagues Susan Kowalski, Scot Ritter, and Emily L. Smith, and my good friend Joseph R. Barton for reviewing and commenting on earlier drafts. Special thanks also to the love of my life, my wife Theresa, for her unfailing support and encouragement. This article is dedicated to my son, Oscar, whom I hope will one day understand himself to have followed both parts of Wilbur Wright’s advice for “success in life.” Wilbur Wright, quoted in David Mccullough, *The Wright Brothers* (2016) “If I were giving a young man advice as to how he might succeed in life, I would say to him, pick out a good father and mother, and begin life in Ohio.”

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“A DOCUMENT OF INDEPENDENT FORCE”: TOWARDS A ROBUST OHIO CONSTITUTIONALISM*

Nathaniel M. Fouch†

> Each of our Commonwealths has its own local needs, local customs, and habits of thought, different from those of other Commonwealths; and each must therefore apply in its own fashion the great principles of our political life.
>
> -Theodore Roosevelt to the 1912 Ohio Constitutional Convention[1]

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* Arnold v. Cleveland, 616 N.E.2d 163, paragraph one of the syllabus (Ohio 1993) (“The Ohio Constitution is a document of independent force.”). Pursuant to the “syllabus rule” in force in Ohio at the time, the syllabus of an individually authored supreme court opinion alone had the controlling force of law. *See* William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 323 (1985). This Rule has since been amended. *See* REP.OP.R. 2.2.

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[1] Theodore Roosevelt, Address at Ohio Constitutional Convention (Feb. 21, 1912), *in* A CHARTER OF DEMOCRACY, 3, 3 (1919).

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I. INTRODUCTION

On August 11, 1993, the Ohio Supreme Court handed down its decision in *Arnold v. Cleveland*.[2] The Court held that the Ohio Constitution confers a fundamental individual right to bear arms—nearly 15 years before the United States Supreme Court enunciated a similar right guaranteed by the Second Amendment.[3] Perhaps even more consequentially, the *Arnold* court declared that "[t]he Ohio Constitution is a document of independent force."[4] This assertion about the fundamental nature of the state constitution, and the willingness of the Court to engage with and interpret the document on its own terms, breathed new life into Ohio's otherwise moribund state constitutional jurisprudence.[5] While the Court's declaration regarding the independent force of the state constitution may be a truism for students of the American political system, the implications of *Arnold* were—and remain—radical.

Arnold has become the Court's go-to citation for the assertion of Ohio's constitutional independence, or the exercise of "judicial federalism."[6] Before *Arnold*, the Ohio Supreme Court engaged in a "long history of parallelism," whereby decisions of the U.S. Supreme Court were quoted by the Ohio Supreme Court "as giving the true meaning of the guaranties of the Ohio Bill of Rights."[7] In effect, this practice rendered the Ohio Constitution

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[2] *Arnold*, 616 N.E.2d at 175.
[3] *Id.* at paragraph two of the syllabus; District of Columbia v. Heller, 554 U.S. 570, 595 (2008).
[4] *Arnold*, 616 N.E.2d at paragraph one of the syllabus.
[5] *Arnold* "revitalize[d] (or is it 'vitalize[d]'?)" the idea of the Ohio Constitution as being a "truly independent source of individual rights." Richard B. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 451 (2004).
[6] *See, e.g.*, Marianna Brown Bettman, *Ohio Joins the New Judicial Federalism Movement: A Little To-Ing and a Little Fro-ing*, 51 CLEV. ST. L. REV. 491 (2004); State v. Mole, 74 N.E.3d 368, 374–75 (Ohio 2016).
[7] Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 72 (Ohio 1941).

mere window dressing, while the federal Constitution became the site of the real action. *Arnold* can be viewed as the Ohio Supreme Court's reclamation of its authority to interpret the state's constitution on the document's own terms, rather than merely by reference to the U.S. Constitution and the U.S. Supreme Court's explication of that document.[8] By reasserting the truth about the nature of the state constitution, the justices took a critical step toward fulfilling their oath to "support" the Constitution of Ohio, thus vindicating the responsibilities required of the sovereignty entrusted to Ohioans by our forebears.[9]

The promise of *Arnold* is the promise of authentic federalism and vigorous democracy, but 30 years later, that promise remains unfulfilled. In the three decades since *Arnold*, the court has admittedly wavered in its commitment to independent state constitutional interpretation,[10] resulting in a mess of inconsistent and ultimately unsatisfying jurisprudence.[11] This is a far cry from the robust state constitutionalism Ohioans deserve and federalism demands. Ohio's Supreme Court Justices have a responsibility to protect and respect the state constitution to ensure that the popular will is not lightly overturned, and that the state constitution is understood on its own terms—without unnecessary reference or deference to U.S. Supreme Court constitutional jurisprudence.[12] Fulfilling this duty will ensure that the Ohio Constitution remains "a document of independent force" not simply on paper but in practice, and will foster a healthy, organic, and robust state constitutionalism, rooted in the text, history, and tradition of our Constitution.[13]

By reemphasizing the key holding of *Arnold* and taking steps to zealously protect the state's constitutional independence, the Ohio Supreme Court will foster a local jurisprudence tailored to the culture and interests of

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[8] *Arnold* has since become the standard citation supporting the independent force of the Ohio Constitution. Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 417 (2004).

[9] OHIO CONST. art. XV, § 7 ("Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, *and of this state*, and also an oath of office.") (emphasis added); OHIO REV. CODE ANN. § 3.23 ("The oath of office of each judge of a court of record shall be to support the constitution of the United States *and the constitution of this state* . . . .") (emphasis added).

[10] *Mole*, 74 N.E.3d at 375.

[11] Benjamin White, *Prodigal Reasoning: State Constitutional Law and the Need for a Return to Analysis*, 86 U. CIN. L. REV. 1099, 1123 (2018).

[12] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 909 (2021).

[13] *See* State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020). Noted Ohio constitutional scholar, Dean Steven Steinglass, has similarly referred to the need for the Ohio Supreme Court to assist in the development of an "independent, robust, and principled Ohio constitutional jurisprudence." Steven Steinglass, Dean, Cleveland-Marshall Coll. of L., The Ohio Constitution: Views from the Bench at Ohio State Bar Association CLE The Importance of the Ohio Constitution: Direct Democracy and Home Rule (Apr. 12, 2021).

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the people of Ohio.[14] This unwillingness to "abdicat[e] its role as the ultimate arbiter of Ohio law,"[15] but instead to analyze and interpret the Ohio constitution on its own terms, will institute a renaissance of Ohio constitutionalism defined more by democracy and federalism than unquestioning deference to federal judicial counter-majoritarianism. Focusing on the imperative of state constitutionalism to the justices' duties rather than on particular aspects of the fulfillment of those duties, this article offers both a plea to shift the paradigm of Ohio state constitutionalism and a practical scheme by which to begin reframing our most important state judicial debates on the shared grounding of the state constitution rather than the federal. To that end, this article will proceed by (1) exploring the nature of state constitutions in a federal system, (2) surveying the Ohio Supreme Court's tentative history of state constitutional interpretation, (3) discussing some grounds for a new Ohio state constitutionalism rooted in text, history, and tradition(s), and finally, (4) offering practical steps toward the realization of such a renewal.

II. UNDERSTANDING JUDICIAL FEDERALISM AND STATE CONSTITUTIONALISM

A. *Judicial Federalism is Not Optional*

Discussions on the role of state constitutions in modern political life almost always begin—and all too frequently end—with reference to former U.S. Supreme Court Justice William J. Brennan, Jr.'s justly famous 1977 call for attorneys to understand state constitutions as "font[s] of individual liberties."[16] Responding to the U.S. Supreme Court's shift away from its prior emphasis on the protection of individual rights, Justice Brennan both described and endorsed a trend among state supreme courts to interpret their own constitutions as providing greater protection of individual rights than the U.S. Constitution.[17] This movement, then termed the "new judicial

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[14] That is, a jurisprudence which is "based on Ohio's law, history, and experiences, and not the musings of the Justices of the Supreme Court of the United States." Corey Bushle, *The Exclusionary Rule, and the Problem with Search and Seizure Law under the Ohio Constitution*, 89 U. CIN. L. REV. 530, 542 (2021).

[15] Zacchini v. Scripps-Howard Broad. Co., 376 N.E.2d 582, 584 (Ohio 1978) (Celebrezze, J., concurring).

[16] William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). As of 2012, the article ranked in the top 10 most-cited law review articles of all time. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1489 (2012). No doubt the number of citations will continue to increase as we approach the fiftieth anniversary of its publication, with the number of symposia devoted to state constitutionalism already growing exponentially in recent years; each of course, referring to Justice Brennan's early work. *See, e.g.*, Jeffrey S. Sutton, *State Constitutions in the United States Federal System*, 77 OHIO. ST. L.J 195, 196 n.5 (2016).

[17] Brennan, *supra* note 16, at 495–503. In addition to being descriptive, Justice Brennan's article produced tangible action and propelled the movement forward, evidenced by citations of his article in several state supreme courts within a few years of its publication. *See* Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13

federalism" (or judicial federalism), has been engaged by various state supreme courts and studied by scholars ever since.[18]

Brennan's article served as a catalyst by which several disparate and previously neglected strands of analysis were brought together: federalism, constitutional law, constitutional interpretation, judicial review, and many other topics. Picking up these strands, scholars and jurists have attempted to weave a coherent pattern of state constitutionalism that can serve to protect individual rights at the local level. While the practical success of these efforts is debatable, the work of these scholars and jurists has placed judicial federalism on the map, and state high courts have—at the very least—taken notice.[19] What is required now, beyond such judicial "notice," is consistent judicial action to ensure litigants, legislators, lawyers, and citizens not only respect the state constitution, but utilize it as a source of substantive rights separate and distinct from the U.S. Constitution, as demanded by the most basic understanding of American federalism.

Judicial federalism is occasionally, though misguidedly, viewed with suspicion by those who see it as a vehicle for circumventing the jurisprudence of the U.S. Supreme Court to implement partisan ideology in the guise of state constitutional law.[20] While it is true that some of the early pioneers of judicial

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HASTINGS CONST. L.Q. 599, 600–01 (1986) ("Although Justice Brennan based his article in part on signs of a new judicial trend already evident in several states, the pace of that trend picked up after 1977," and including a table of citations). Justice Brennan was not, however, the first modern commentator to suggest recourse to state constitutions for the protection of rights, only the most prominent. *See, e.g.*, Lester J. Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326 (1966); Robert Force, *State "Bill of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969); Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 435 (1970). For a list of other early sources on the subject, see Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 42, 422–23 n.8 (1996); Ronald K.L. Collins, *Foreword: Reliance on State Constitutions – Beyond the "New Federalism"*, 8 U. PUGET SOUND L. REV. vi, vi–vii nn.1 & 9 (1984); Robert F. Williams, *Robert F. Williams State Constitutional Law Lecture: The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 952 n.15 (2020).

[18] For a survey of the judicial federalism movement generally and its implications, see, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–70 (1998) [hereinafter "UNDERSTANDING"]; ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 113–33 (2009). At this point in the judicial federalism "genre," "[t]he typical law journal article contains a multipage footnote or two, listing a menu of states who have gone beyond minimum federal guarantees . . . ." Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263, 268 (1987). "This footnote is like spelling the word 'Mississippi'--it is easy to do but hard to know when to stop." *Id.* at 268 n.21. This author will spare the reader.

[19] Ohio Supreme Court decisions have made numerous citations to law review articles and scholarly works on judicial federalism. *See, e.g.*, State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020) (citing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)); State v. Mole, 74 N.E.3d 368, 374–75 (Ohio 2016) (citing Brennan, *supra* note 16 and Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993)); State v. Robinette, 685 N.E.2d 762, 766 (Ohio 1997) (citing John W. Shaw, *Principled Interpretations of State Constitutional Law: Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1023–24 (1993)); Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (citing Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984); Brennan, *supra* note 16; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993)).

[20] *See, e.g.*, George Deukmejian & Clifford K. Thompson Jr., *All Sail and No Anchor – Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 1009–10 (1979); Earl M. Maltz,

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federalism encouraged its instrumentalization for particular ideological ends,[21] it would be a folly to dismiss the concept on account of such abuses. The attractiveness of judicial federalism lies not in its misuse as an instrument of ideology but in its use as a safeguard for local democratic rule against national standardization. Indeed, in the United States, which was designed *as a nation of states*, judicial federalism is not only inevitable but desirable.[22] Authentic judicial federalism, and the independent state constitutionalism it bequeaths, fulfills the ends of the Framers of the U.S. Constitution and encourages the organic growth of local jurisprudences. State constitutions must be understood on their own terms, given their "different origins, functions, forms, and qualities from the federal document."[23] Failure to do so undermines our federal system.

This article will not rehash the numerous advantages of judicial federalism, but instead, it will demonstrate at length that judicial federalism is not optional but prescribed and demanded by our federal system. Rather than adopt the "celebrational posture" of the earliest proponents of judicial federalism, who were "more inclined to extol the virtues of relying on state constitutions than to explain how one should go about interpreting them," this article should serve as a reminder of the *imperative* of independent state constitutionalism, given that such a jurisprudence is still far from being the default in Ohio.[24] This article will not wade into the "methodology wars,"[25] debating the various approaches of state constitutional interpretation, such as "lock-step," "interstitial," and "primacy,"[26] but will argue that the Ohio Constitution can and *must* be understood on its own terms and that the Ohio Supreme Court is the key to making that happen.[27] In doing so, it is hoped

False Prophet – Justice Brennan and the Theory of State Constitutional Law, 15 HASTINGS CONST. L.Q. 429, 433–34 (1988). This view is not without justification, as "[m]uch of the early literature on the new judicial federalism viewed it as a way to 'get around' the conservative Burger Court." G. Alan Tarr, *Espinoza and the Misuses of State Constitutions*, 73 RUTGERS U. L. REV. 1109, 1116 n.43 (2021).

[21] *See* UNDERSTANDING, *supra* note 18, at 180 ("Many early advocates of the new judicial federalism were remarkably blatant in their result-orientation."). For an example, see SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM 4–6 (1987) (judging state supreme court "performance" on the basis of "activism," with more "activist" courts being adjudged more positively). Professor Fino is at least open about her biases. *Id.* at 116 ("Bear in mind here that I favor an activist—or law-making—role for the state judiciary.").

[22] MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 6 (1999).

[23] WILLIAMS & FRIEDMAN, *supra* note 18, at 54.

[24] UNDERSTANDING, *supra* note 18, at 208.

[25] Williams, *supra* note 17, at 969.

[26] These refer to the various approaches state supreme courts take in the order and level of engagement to the state and federal constitutions where claims are made under both documents. For a review of these approaches, see UNDERSTANDING, *supra* note 18, at 180–85.

[27] Rather than debate methodology, which entails a focus on the sequence of addressing analogous state and federal claims, this article will argue that it is not sequence that matters, but rather "the focus on truly independent state constitutional interpretation, in whatever sequence it occurs." Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1019 (1997). Unlike in the early days of judicial federalism, state supreme courts now have a "better conceptual foundation to support [an] independent state constitutional analysis," and may make such an analysis "without requiring the

that this article can give lawyers and judges a new baseline for understanding the relationship between the state and federal constitutions and so contribute in some small way to the development of a robust Ohio constitutionalism.

B. Robust State Constitutionalism is a Goal of Federalism

Constitutionalism is the political theory that generally accompanies the adoption of a constitution and is concerned with the norms which constitutions contain; in the modern (and American) sense, these include the independence of the judiciary, separation of powers, respect for individual rights, and other similar principles, whether or not expressly articulated therein.[28] While constitutionalism "controls government by limiting its authority and establishing regular procedures for its operation," *constitutions* "are frequently used as a means of articulating those limitations."[29] Constitutionalism thus undergirds, complements, and sustains the constitution.

Judicial federalism is concerned with ensuring that state courts (and other actors) treat state constitutions with respect corresponding to their status as constitutions. It is, at its core, "the sharing of the judicial power by two *court systems* over the same land and people,"[30] and is fundamentally about the right relationship between the state and federal systems, and their respective constitutions. Judicial federalism is but one strand of a robust state constitutionalism, specific to the development of state constitutional jurisprudence;[31] others include public understanding and participation in the constitutional process, the lived reality of principles such as separation of powers, and the manner by and extent to which the processes prescribed in the constitution are practiced or ignored. This article will focus on judicial

identification of distinctive state traditions or subtle differences in textual language, which commentators who interpreted the first wave of state constitutional interpretation have recognized as problematic and unnecessary." Scott L. Kafker, *State Constitutional Law Declares its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 116 (2022). It should be clear that "there is nothing in the design of the federal Constitution, or its original understanding, requiring states to adopt the [U.S.] Supreme Court's interpretation of analogous provisions in the federal Constitution as the default or lockstep setting for interpreting parallel provisions in state constitutions." *Id.*

[28] MARTIN LOUGHLIN, THE TWILIGHT OF CONSTITUTIONALISM? 47, 55 (Petra Dobner & Martin Loughlin eds., 2010).

[29] WILLIAM G. ANDREWS. CONSTITUTIONS AND CONSTITUTIONALISM 26 (1968). In the United States, "many of the norms of constitutionalism [have] remained outside the documentary framework" of the constitution, such as the development of political parties or (for a long time) the two-term norm for U.S. presidents. *Id.* at 21–22. *See also* SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 317 (1999) (referring to the more broadly construed "constitution" of the United States beyond its documentary sources). The "one essential quality" of constitutionalism, however, is its nature as a "legal limitation on government." CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 21 (1940).

[30] SOLIMINE & WALKER, *supra* note 22, at 5 (emphasis in original).

[31] Constitutional jurisprudence is "a species of jurisprudence" concerned with fundamental law. Dennis NettikSimmons, *Towards a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261, 262 (1985). In the context of state courts interpreting state constitutions, "[a] constitutional jurisprudence will enable judges to approach their constitution with a theory that takes into account both the constitution and its cultural, historical, and political context." *Id.* at 288.

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federalism as one essential means by which a new, more robust, Ohio constitutionalism is established, whereby the Ohio Constitution may reattain its proper place, specifically within our state constitutional jurisprudence, and more generally in the public mind.[32]

A healthy state constitutionalism presupposes judicial federalism and is essential for the overarching federal system to work as it was intended.[33] It would be foolish to ignore the many ways the state and federal constitutions and courts intersect and suggest that states should, or even can, "go it alone" and operate without reference to the federal government. Federalism is far more complex than a mere "state versus federal government" dichotomy would suggest, with state governments' prerogatives and independence often stemming from federal action or omission—and vice versa.[34] Indeed, "[a] federal system is not one in which each 'sovereign' interprets only its own law. . . . There are no 'mutually impermeable spheres of sovereignty.'"[35] Instead, in order to provide Americans with a "double security" for their liberties, states generally—and Ohio particularly—can and must zealously safeguard their inheritance and not cede their decision-making power to the federal government without good cause.[36] For courts, making such determinations necessarily entails establishing a robust state constitutionalism, which itself demands engagement with the state constitution as a "document of independent force,"—force independent, that is, of the federal constitution.

Therefore, to realize the ends of the governments instituted by the Founders, hold true to oaths taken to "support" the state constitution, and safeguard the sovereignty entrusted by our forebearers, the justices of the

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[32] *Arnold* itself identifies "new federalism" with "state constitutionalism." Arnold v. Cleveland, 616 N.E.2d 163, 169 (Ohio 1993). However, at least as important to the development of a robust state constitutionalism (and unrelated to judicial federalism) are those state constitutional cases which do not involve civil liberties with parallel federal guarantees but are based upon provisions particular to state constitutions. UNDERSTANDING, *supra* note 18, at 49. The focus of this article is narrower, and necessarily confined to the "judicial federalism" vein of state constitutional cases where deference to federal constitutional interpretation has proven detrimental to the establishment of a healthy (to say nothing of "robust") state constitutionalism.

[33] JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 121 (2005). *See also* UNDERSTANDING, *supra* note 18, at 165 (describing the "sharing of responsibility" and "process of mutual learning" between the state and federal judiciaries in the protection of civil liberties).

[34] It was the precursor to the federal government, the Second Continental Congress, which passed a resolution encouraging those colonies which had not already done so to adopt constitutions, a few short weeks before the united colonies declared their independence from Britain. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 60–62 (Rita Kimber & Robert Kimber trans., 1980) (1973). The U.S. Constitutional Convention and 1st U.S. Congress later looked to those same state constitutions for models of governance and individual rights to protect. Jack L. Landau, *"First-Things-First" and Oregon State Constitutional Analysis*, 56 WILLAMETTE L. REV. 63, 65–66 (2020). In an example of both vertical and horizontal federalism, later state constitutions would in turn look to both the U.S. Constitution and Bill of Rights, and prior state constitutions. *Id.* at 66.

[35] Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1537 (1987).

[36] THE FEDERALIST NO. 51 (James Madison).

Ohio Supreme Court have a responsibility to ensure that the Ohio Constitution and its guarantees are more than mere window dressing. Despite what the Court declared in *Arnold*, the Ohio Constitution will not truly be a "document of independent force" until it is consistently treated as such by our elected officials and the general public. What is required is not only a renewed understanding of the importance of the state constitution on the part of judges and justices, but a renewed sense of civic responsibility for protecting and preserving the state constitution—a new "popular constitutionalism."[37] By virtue of its privileged position and role as a body of elected arbiters of the law, the Ohio Supreme Court bears a special responsibility in fostering such a movement.[38]

III. Grasping the Role of State Supreme Courts in the Constitutional Structure of the United States

As established above, judicial federalism is not an "option" for state courts, but a requirement if the justices are to fulfill their oaths.[39] As the *Arnold* Court recognized, the Ohio Constitution, even where its provisions are similar or identical to the U.S. Constitution, is nevertheless a document of independent force. The state constitution should always be interpreted on its own terms precisely because it is inherently its own document, with its own history and meaning. In treating it as such, the justices will not be merely adopting a fashionable trend, but simply applying the law of their state, which they are already bound to apply—nothing more, and nothing less.[40] Failure to do so unnecessarily undermines the state's constitution, erodes the state's sovereignty, and diminishes the system of federalism entrusted to us by the Founders. To understand why this is the case, it is helpful to review the principles underlying federalism and the complementary roles of the state and

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[37] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 247–48 (2004). Although Kramer's critique and call for a new popular constitutionalism refers to the U.S. Constitution, it nonetheless applies to Ohio's constitution. This proposal should not be taken to suggest a constitutionalization of state politics. Constitutional politics is "the highest kind of politics," democratically superior to "normal" politics. Bruce A. Ackerman, *Neo-federalism?*, *in* Constitutionalism and Democracy 153, 163–64 (Jon Elster & Rune Slagstad eds., 1988). As such, constitutional politics comprises an "intermittent and irregular politics of public virtue associated with moments of constitutional creation." *Id.* Rather, by responsibly fostering a renaissance of state constitutionalism, the Ohio Supreme Court will *enable* new constitutional politics in Ohio—a "constitutionalism that is democratically accessible at the subnational level"—by signaling to the public that it takes the constitution seriously as a document of independent force. Bradley D. Hays, States in American Constitutionalism 5 (2019).

[38] The Ohio Supreme Court's fidelity to the state constitution could organically lend itself to popular constitutionalism: the institutional design of the Ohio Constitution facilitates popular amendment, and the justices' recognition of the ease of amendment and consequently strict adherence to the text will encourage popular amendments to remedy perceived constitutional defects. Jonathan L. Marshfield, *Amendment Creep*, 115 Mich. L. Rev. 215, 260–61 (2016).

[39] "It is our duty to keep within the light of our own Constitution, and to know of no authority beyond its letter and spirit." Good's Lessee v. Zercher, 12 Ohio 364, 369 (1843).

[40] The state constitution "is, in fact, and must be regarded by the judges as, a fundamental law." The Federalist No. 78 (Alexander Hamilton).

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federal governments generally and courts specifically.

A. *Federalism, Sovereignty, and Democracy*

The U.S. Constitution enshrines both the principles of sovereignty and federalism as fundamental to the American system of government, albeit without explicitly naming either.[41] These are both abstract, vast, and unwieldy concepts, the nature of which has been extensively debated since the founding of the United States. The U.S. Constitution, as understood in light of its history, now leaves no doubt that overarching sovereignty resides in "the People."[42] "Governmental sovereignty" is limited by constitutions, while "true sovereignty"—"indivisible, final, and unlimited authority"—resides in the People themselves.[43] This popular sovereignty found its first expression in state constitutions, written both before and after national independence was achieved.[44]

The U.S. Constitution's provisions also make clear that federalism is "a central organizing principle" of the Constitution.[45] The federal Constitution implicitly recognizes a division of authority between the state and federal governments.[46] The "essential characteristic" of federalism is a

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[41] Neither are the equally fundamental principles of "separation of powers," or "checks and balances" named in the U.S. Constitution. GORDON, *supra* note 29, at 322.

[42] This was not always the case; the Civil War was fought in part to determine whether sovereignty resided in the "People" of the nation as a whole or the "People" of the several states. The result of that conflict informs our present constitutional "settlement." AARON N. COLEMAN, THE AMERICAN REVOLUTION, STATE SOVEREIGNTY, AND THE AMERICAN CONSTITUTIONAL SETTLEMENT, 1765–1800, 237–38 (2016). Nor was the answer to this question clear before the U.S. Constitution was ratified; Revolutionary writers, including the Second Continental Congress in promulgating the Declaration of Independence, often remained intentionally vague as to the new seat of sovereignty. ADAMS, *supra* note 34, at 133–35. That said, some important early, antebellum legal texts reached the modern conclusion. *See, e.g.*, TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 69 (1st ed. 1837) ("the federal government is not a creature of the state governments; but emanates from, and expresses the sovereign will of, all the people of the United States, in their original and aggregate capacity."). Dean Walker was the founder and first dean of the University of Cincinnati College of Law and an important but overlooked figure in Ohio and American legal history, whose above-quoted work earned him the moniker "America's Blackstone." M. Paul Holsinger, *Timothy Walker: Blackstone for the New Republic*, 84 OHIO HIST. 145, 145, 151 (1975). For a comprehensive biography, see WALTER THEODORE HITCHCOCK, TIMOTHY WALKER: ANTEBELLUM LAWYER (1990).

[43] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435 (1987). While technically true, as explained below, "the People," by virtue of their composition of different, albeit partially overlapping, communities—state and national—are themselves not a monolithic, monistic sovereign as Amar would have it.

[44] ADAMS, *supra* note 34, at 136–37. "These statements of principle expressed the very heart of the consensus among the victors of 1776. After decades of debate between the colonies and England, no revolutionary act was needed to assure the principle of popular sovereignty its place in the newly established governments." *Id.* at 137.

[45] Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 24 (1988).

[46] *Id.* at 24–25 ("The states are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution. Anyone attempting to do a close textual analysis of the document is driven time and again to the state constitutions to determine what is meant or implied by the national Constitution."); *see also* Madison, *supra* note 36 (discussing the "double security" afforded by the combination of federalism and the separation of powers—another principle enshrined but not named in the Constitution); Scott v. Bank One Tr. Co., N.A., 577 N.E.2d 1077, 1079–80 (Ohio 1991).

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"division of powers between two levels of government, each supreme in some areas of policy making."[47] Thus, the source of tension between state and federal authorities is written into our constitutional system: the "atom" of governmental sovereignty is "split," such that Americans have "two political capacities, one state and one federal, each protected from incursion by the other," and "each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[48]

This new political system represented a radical departure from previous understandings of sovereignty.[49] In its classical conception, as formulated by early modern thinkers such as Jean Bodin and Thomas Hobbes, sovereignty is monistic, meaning indivisible and only derivable from one source.[50] In an exercise of supreme political pragmatism contrary to all received wisdom of political theory, the Framers of the U.S. Constitution developed a system whereby governmental sovereignty resides in two distinct entities.[51] Ultimately, the sovereign of each government is "the People," whether defined broadly to include all Americans or confined to the citizens of a single state.[52] Yet, in their roles as sovereigns of both state and national governments, citizens have different responsibilities and belong to different communities.[53] Thus, rather than in a monistic "People," sovereignty in the United States, and in the states themselves, rests on multiple communities. This development was distinct from the democratic revolutions of Europe, which were generally centralizing rather than devolved, as in the United States.[54]

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[47] DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 64 (1988). "The division of powers between national and state governments, and the provision for dual legislatures and dual citizenship, defined the heart of federalism in the U.S. Constitution." *Id.* at 65.

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

[49] Granted, the U.S. Constitution did not establish the first federal association in history, but rather "the first in which the central government was endowed with a large measure of independent authority in domestic affairs," and was provided with the requisite "autonomous legislative and fiscal power" necessary to effectuate that authority. GORDON, *supra* note 29, at 302.

[50] *Id.* at 19, 22. In the early modern period, this generally meant sovereignty derived from God, through the monarch, i.e. the divine right. JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 95 (2008).

[51] RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 49–51 (1987) ("Theory had to yield to political realities."); ADAMS, *supra* note 34, at 26 ("The American situation demanded that conflicting principles and overlapping institutions be accommodated in the new system of government.").

[52] The People have "delegated" their sovereign powers "to governments created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. A part of this power has been delegated to the Federal, and a part to the State governments; neither is thereby made sovereign or independent; but they are strictly dependent and subordinate organizations." Debolt v. Ohio Life Ins. & Tr. Co., 1 Ohio St. 563, 578 (1853).

[53] 1 R. R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 228–29 (1959). Under this arrangement, the citizen "chose to live under two constitutions, two sets of laws, two sets of courts and officials; theoretically, he had created them all, reserving to himself, under each set, certain liberties specified in declarations of rights." *Id.* at 229.

[54] 2 R. R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 350 (1964). "In America, the possessors of local power were not thought of as obstacles to democratization[,]" but rather as the fount of "liberty and equality." *Id.* In Europe, however, local power was the guardian of the aristocratic and

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This picture is further complicated with a closer examination of the interplay between the state and federal constitutions in their initial formulation and establishment. It is frequently noted that the first state constitutions were adopted before the federal constitution, and in fact influenced it.[55] Yet looking further back, we find that the impetus for the framing of state constitutions in fact came from the "federal" Congress.[56] On May 10, 1776, less than two months before ratifying the Declaration of Independence, the Second Continental Congress passed a resolution encouraging the states to draft their own constitutions.[57] States responded, producing a flurry of new constitutions, with eight adopted by December 1776—the very first American constitutions.[58] The period of the American Revolution has consequently been referred to as "the most creative and significant period of constitutionalism in modern Western history," not because of the U.S. Constitution, but "because of the revolutionary state constitutions that preceded the Constitution by more than a decade."[59] These same constitutions, which "embodied Americans' deepest aspirations for self-government," would provide blueprints not only to the constitutions of future states (including Ohio), but also the U.S. Constitution.[60]

This episode makes clear that from the very beginning of the United States, state constitutions—starting with these first revolutionary constitutions—were essential elements of our political culture and governance. Congress's resolution, and the role of those in Congress in

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monarchical status quo, which meant that "the democratic movement had to be unitary and centralizing, because it had to destroy before it could construct." *Id.* at 350–51.

[55] *See, e.g.*, ADAMS, *supra* note 34, at 291 ("The Federalists of 1787 created political institutions on the national level that were firmly based on a pattern already existing on the state level."); Patrick T. Conley & John P. Kaminski, *Preface*, *in* THE CONSTITUTION AND THE STATES x (Patrick T. Conley & John P. Kaminski eds., 1988) ("[T]he new federal Constitution was permeated with the influence of state constitutions and local precedents."); GORDON S. WOOD, POWER AND LIBERTY 6 (2021) ("The national Constitution, created a decade after the Declaration of Independence, was derived largely from the state constitutions.").

[56] Looking *even further back*, the Continental Congress was itself responding to an earlier request from a state (Massachusetts) for guidance on the establishment of a constitution. Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 PROC. AM. ANTIQUARIAN SOC'Y 317, 318–19 (1981).

[57] 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 228–29 (1971); *see also* 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 342 (Worthington Chauncey Ford ed., 1906). Although the Second Continental Congress sponsored the Declaration of Independence and constructed the Articles of Confederation, "in terms of the development of American constitutionalism, the main importance of the Congress was that it urged the colonies to certify their new status as independent states by adopting constitutions for themselves." GORDON, *supra* note 29, at 294.

[58] Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 913 (1993).

[59] *Id.* at 911; *see also* GORDON, *supra* note 29, at 284 (noting the "flood of political literature" at that time which in quality and quantity "surpassed any other continuous period in Western history up to that time."). Indeed, "[b]y the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the thirteen states (and Vermont as well) had enacted Constitutions . . . ." 1 SCHWARTZ, *supra* note 57, at 383. "Included in these Revolutionary constitutional provisions were all of the rights that were to be protected in the federal Bill of Rights. By the time of the Treaty of Paris (1783) then, the American inventory of individual rights had been virtually completed and included in the different state Constitutions whether in separate Bills of Rights or the organic texts themselves." *Id.*

[60] AKHIL REED AMAR, THE WORDS THAT MADE US 263 (2021).

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drafting their respective state constitutions, demonstrates that the complex interrelationship of state and federal governments—"federalism" as it were—predates the framing of the U.S. Constitution. By the time "Publius" wrote in support of ratification of the new federal constitution, state constitutions were taken as a given.[61] In fact, there is ample documentary evidence that the role of states was to be preserved in the new federal system.[62] Dual constitutionalism is therefore embedded in the nature of the American political system, and understanding it is critical to appreciating the federalism upon which the U.S. Constitution was founded.[63]

The principle of state sovereignty is a necessary corollary of federalism and has a long, occasionally venerable, sometimes nefarious, history. The U.S. Supreme Court has repeatedly declared that the U.S. Constitution "specifically recognizes the States as sovereign entities."[64] It has affirmed that "[e]very citizen of a State is a subject of two distinct sovereignties"[65]—both the United States and the state—and has referred to this system as a "federalist structure of joint sovereigns."[66] The Ohio Supreme Court has agreed, confirming that the State of Ohio is "a sovereignty, with sovereign powers, except as limited by the constitution of the United States."[67] The same court called it a "truism" that "the Ohio Constitution permits the state to exercise its own sovereignty as far as the United States Constitution and [federal] laws permit," noting that, "the state

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[61] *See* Charles R. Kesler, *Introduction*, *in* THE FEDERALIST PAPERS viii–xii (Clinton Rossiter ed., 2003).

[62] *See* BERGER, *supra* note 51, at 48–76.

[63] The argument for taking federalism seriously is thus an "argument from constitutional fidelity." Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1059 (2015). The givenness of federalism, if not necessarily for weighty reasons of political theory, is further reinforced by the radical implications that changing the system now would produce. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 539–40 (1954) (citing among a variety of impracticalities intendent in discarding federalism "the workaday reason of administrative feasibility," by which none of "the three branches of the Federal Government, as now organized, could long avoid breakdown under the load of total governmental responsibility.").

[64] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996). This is a well-established point in U.S. Supreme Court jurisprudence, which often arises in sovereign immunity suits under the Eleventh Amendment. *See, e.g.*, Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991); Hans v. Louisiana, 134 U.S. 1, 13 (1890). However, "[a]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment." Alden v. Maine, 527 U.S. 706, 713 (1999). Notably, the Court has distinguished "external sovereignty"—meaning sovereignty in foreign affairs—from sovereignty more broadly considered, or what we might naturally though imperfectly term "internal sovereignty." The former is said to have passed from Great Britain to the colonies "in their collective and corporate capacity as the United States of America" and never to have resided with the individual states. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–19 (1936). Note though that in a "pointed omission" in contrast to the Articles of Confederation, nowhere did the U.S. Constitution expressly say that the states would remain "sovereign." AMAR, *supra* note 60, at 263.

[65] Claflin v. Houseman, 93 U.S. 130, 136 (1876).

[66] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[67] S. Gum Co. v. Laylin, 64 N.E. 564, 564 (Ohio 1902). This assertion was made in the context of a discussion on the state's power to tax.

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has the power to exercise and the responsibility to protect [its] sovereignty."[68]

Yet the continuing role of states is sometimes called into question. The regionalism and state identity that once defined the United States has eroded to some degree in the face of increased interstate mobility, growing standardization of legal and university education, and the incessant nationalization of all politics.[69] While this might lead some to conclude that states and federalism are outmoded relics of the past, this system contains the structure necessary to return politics to the local level. Even as state identity erodes in some of its more traditional manifestations, not only does it remain strong in others, but states critically retain their full legal personalities. Out of this legal potentiality comes the prospect of a renewed state constitutionalism, which can in turn spark a renewed democratic discourse.[70]

A reemphasis of state sovereignty should occur, not at the expense of federal sovereignty, but rather, at the expense of inappropriate prior deference.[71] This project entails a reclamation or rebalancing rather than a reciprocal attempt to overreach.[72] It is important to note the limitations incumbent upon inappropriately emphasizing state sovereignty in realms it has no business occupying: "[n]o scholar claims that states are completely sovereign polities. There are too many areas where they may not choose their own destiny because they are part of an indissoluble Union."[73] State constitutions do not exist in a vacuum, and proponents of state constitutionalism should be vigilant to ensure they do not run afoul of the U.S.

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[68] Scott v. Bank One Tr. Co., N.A., 577 N.E2d 1077, 1079 (Ohio 1991). The *Scott* Court approvingly quoted the U.S. Supreme Court's *Gregory* opinion, affirming that, "'[i]n the tension between federal and state power lies the promise of liberty.'" *Id.* at 1080 (quoting *Ashcroft*, 501 U.S at 459).

[69] GARDNER, *supra* note 33, at 69. "These factors have made state boundaries extremely porous—indeed, for many purposes, such boundaries have become irrelevant." *Id.* While this is true to an extent, state boundaries nevertheless retain some hold over our lives. Most Americans (58.5%) continue to live in the state of their birth; in the case of Ohio, 71% of the population was born in the state, including 63% of college graduates. Richard Florida, *The Geography of America's Mobile and 'Stuck,' Mapped*, BLOOMBERG (Mar. 5, 2019, 1:14 PM), https://www.bloomberg.com/news/articles/2019-03-05/mobile-vs-stuck-who-lives-in-their-u-s-birth-state.

[70] SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 289 (2012) [hereinafter FRAMED] ("[I]n the United States, the 'direct governance' at the subnational level is provided by officials who are electorally accountable to the state's citizens.").

[71] To be clear, there is some debate as to the extent to which expansion of the federal government has crowded out the states. *See, e.g.*, James R. Rogers, *The Unrecognized Vitality of State Constitutionalism*, LAW & LIBERTY (Apr. 21, 2022) (reviewing JEFFREY S. SUTTON, WHO DECIDES? (2021)), https://lawliberty.org/book-review/dont-forget-the-states/. Rather than focus on intentional federal "overreach," however, I argue that inappropriate federal expansion into state affairs in fact occurs most frequently at the hands of state judges who inappropriately rely upon federal jurisprudence to determine state constitutional issues.

[72] "Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999).

[73] James L. Walker, *The Ohio Constitution: Normatively and Empirically Distinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 447, 458 (George E. Connor & Christopher W. Hammons eds., 2008). It is not for nothing that "states' rights" became a byword for prejudice and *de jure* racial discrimination. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 143–44 (2001).

Constitution's Supremacy Clause, which exists for a reason.[74] Even as it is a reclamation of sorts, the project of state sovereignty should look cleareyed into the future, not longingly to past use of sovereignty for exclusionary ends. To ensure this is so, both the language and ideology of "states' rights" should be re-envisioned and reframed according to the original meaning of federalism as states' *prerogatives*.[75]

State sovereignty is thus not only a critical part of American constitutionalism, but one which can and ought to be a tool towards the ultimate end of democracy. Whereas the federal government is by its structure republican, state governments have the potential to be, and in fact frequently are, more democratic.[76] This is especially true in Ohio, where all executive officers, all judges, and all legislators are independently elected, and where the people may propose and must approve constitutional amendments by popular vote.[77] The opportunity to embrace popular participation in government at a time of widespread cynicism and apathy should not be missed. The establishment of an authentic state constitutionalism can reinvigorate not only state government as a force for good, subject to local control, but can shore up the legitimacy of institutions which have come to be viewed as corrupt or self-interested, particularly in Ohio.[78]

The epigraph at the beginning of this article is derived from a speech delivered by former president Theodore Roosevelt to the 1912 Ohio Constitutional Convention. Its title was "A Charter for Democracy." With his address, Roosevelt extolled the Ohio Framers to take up the cause of popular government, hailing them as "framing a constitution under and in accordance with which the people are to get and to do justice and absolutely to rule themselves."[79] Roosevelt further invited the Convention "to provide

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[74] *See* U.S. CONST. art. VI. The U.S. Constitution was drafted to "remedy the fundamental weaknesses of the pre-Constitution government" under the Articles of Confederation, which included the ability of states to ignore the Confederation government. 1 SCHWARTZ, *supra* note 57, at 435. *See also* WOOD, *supra* note 55, at 60–73.

[75] Ann Althouse, *Why Talking About "States' Rights" Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 DUKE L.J. 363, 366–67 (2001) (critiquing the vocabulary of "rights" in connection with states in federalism discourse, arguing instead for "a flexible, pragmatic federalism.").

[76] *See generally* Bulman-Pozen & Seifter, *supra* note 12. *See also* FRAMED, *supra* note 70, at 289. The initiative and referendum are additionally "forms of direct democracy" which have been incorporated into several state constitutions but have no federal analogue. Timothy M. Tymkovich, *Are State Constitutions Constitutional?*, 97 MINN. L. REV. 1804, 1813 (2013); OHIO CONST. art. II, §§ 1a–1c; *id*. art. XVI.

[77] OHIO CONST. art. V § 7; *id*. art. II § 1b. An attempt to raise the threshold for approval of popularly proposed amendments recently—and roundly—rejected, with 42.89% of voters supporting the measure to 57.11% voting against it. 2023 Official Election Results, https://www.ohiosos.gov/elections/election-results-and-data/2023-official-election-results/.

[78] *See generally* Mark Salling, *A Sign of Democracy in Trouble - Voters' Declining Trust and Participation*, CLEVELAND.COM (Nov. 25, 2022, 5:43 AM), https://www.cleveland.com/opinion/2022/11/a-sign-of-democracy-in-trouble-voters-declining-trust-and-participation-mark-salling.html.

[79] Roosevelt, *supra* note 1, at 3.

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in this constitution means which will enable the people readily to amend it . . . and also means which will permit the people themselves by popular vote, after due deliberation and discussion, but finally and without appeal, to settle what the proper construction of any constitutional point is."[80]

Roosevelt's speech is a cipher to the map toward a reinvigorated state constitutionalism; one which emphasizes democracy and local values, not to the exclusion or detriment of the federal Constitution, but in a complementary way. Roosevelt's vision of vigorous state government action is a refreshing invitation to dial back the nationwide rancor that has recently overtaken our civic discourse and return certain issues to the state level for democratic debate. The justices of the Ohio Supreme Court are uniquely positioned to foster this vision by ensuring that the "document of independent force," which anchors Ohio's government, is protected from undue external influences or inappropriate federal interpretation, both of which remove the sovereignty and democratic decision-making power of the people of Ohio to a body of unelected and largely unaccountable federal judges who know little of the state.

B. Democratic Legitimacy and Representation under Two Constitutions

The democratic potential of the state constitution is bolstered by a comparison with the federal Constitution. The U.S. Constitution was drafted in secret and without public comment, by delegates selected by state legislatures to attend the Convention.[81] The state legislatures then called ratifying conventions to which delegates were elected to ratify or reject the proposed constitution, with nine states required to approve the document for it to become effective.[82] Ratification occurred at a time when it was radical to give franchise to unpropertied white men, let alone to men of other races or to women of any race.[83] The qualifications of voters for the ratifying conventions varied from state to state, and the actual vote for the conventions was light, largely because by that time, many people had lost interest.[84] Add to this the notoriously difficult amendment process—by which the sovereign "people" cannot themselves amend the constitution[85]—and the result is that the United States is governed by an eighteenth century document, to which

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[80] *Id.* at 4.

[81] WOOD, *supra* note 55, at 76–78.

[82] U.S. CONST. art. VII.

[83] *See* Paul Larkin, *The Framers' Understanding of "Property"*, HERITAGE FOUND. (July 6, 2020), https://www.heritage.org/economic-and-property-rights/report/the-framers-understanding-property.

[84] 1 PALMER, *supra* note 53, at 231.

[85] GORDON, *supra* note 29, at 32. *See also* U.S. CONST. art. V (providing for amendment of the U.S. Constitution through processes involving Congress and/or the states).

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few of its citizens have formally "assented."[86]

While this history has not necessarily affected the popular legitimacy of the U.S. Constitution, it raises questions about who, precisely, is included in "We the People." The problem is compounded by the fact that judicial review of the U.S. Constitution at the federal level is performed by judges—appointed by the U.S. president, approved by the U.S. Senate, with the guarantee of life tenure—who are insulated from popular opinion by multiple degrees.[87] The president performing the appointment is likewise not popularly elected, but rather, selected by the electoral college.[88] The senators who approve the appointment, while popularly elected within their respective states, wield disproportionate degrees of voting power corresponding to the comparative population of their respective states.[89] Federal judicial review of the Constitution is thus several degrees remote from the voters, a testament to intentionally undemocratic features of the U.S. Constitution.[90]

In contrast to the U.S. Constitution, the "states have developed a thoroughly popular process for constitutional creation and constitutional revision."[91] The Ohio Constitution, for example, was drafted by delegates elected by the people.[92] It was then ratified by a vote of the people.[93] While the vote for the current constitution occurred before universal franchise was established, the ease and frequency of the document's amendability since its adoption has conferred upon it a far greater theoretical degree of democratic legitimacy than the U.S. Constitution.[94] Not only are amendments subject to

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[86] Only naturalized citizens, military servicemen and women, lawyers, and political officials have taken formal oaths to protect and defend the U.S. Constitution. The degree to which this constitutes "assent" from a social contract standpoint is up for debate; either way, this is a miniscule percentage of those actually governed by the U.S. Constitution. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 180–84 (1988).

[87] "[F]ederal judicial review has an inherently nondemocratic, if not antidemocratic, character." NettikSimmons, *supra* note 31, at 278. *See also* BERGER, *supra* note 51, at 189–90.

[88] U.S. CONST. art. II, § 1, cl. 3.

[89] *See* U.S. CONST. art. I, § 3; *id.* amend. XVII; GORDON, *supra* note 29, at 359.

[90] GORDON, *supra* note 29, at 359–60. To be clear, these undemocratic features are by design. The framers mistrusted democracy and sought instead to institute a republican system of government. FRAMED, *supra* note 70, at 76. *See also* U.S. CONST. art. IV, § 4. That said, the popular meaning of the terms "republic" and "democracy" quickly converged, such that "[b]y [roughly] the first decade . . . of the nineteenth century[,] the two terms became interchangeable." GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 191–92 (2011). This is an ironic development, considering that the initial conflation of these terms was first adopted during the Revolutionary period by *opponents* of independence! ADAMS, *supra* note 34, at 107–08.

[91] G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237, 257 (2016).

[92] WILLIAM HARVEY VAN FOSSAN, THE STORY OF OHIO 97 (1937).

[93] 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 76 (2006) ("State constitutional provisions owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions as is the case with the federal constitution.").

[94] It is a truism that state constitutions are easily amendable—both generally, and in relation to the U.S. Constitution. *See, e.g.*, Marshfield, *supra* note 38, at 260; David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2088 (2010). In Ohio, this ease of amendability is reflected in the fact that there have been 173 amendments to the constitution (and even more proposed) since its adoption, with 162 of those approved since 1912. *Ohio Constitution – Law & History: Table of Proposed Amendments*, CSU L. LIBR., https://guides.law.csuohio.edu/c.php?g=190570&p=936749 (last updated Sept. 5, 2023). That is an average of 1.46 amendments per year since 1912. *Id.*

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popular ratification, but they may even be originated by popular petition.[95] State constitutions, "unlike their federal counterpart, are democratically responsive"; it is thus through state constitutions that Americans "secure popular sovereignty."[96] The Ohio Constitution's legitimacy is further bolstered by periodic mandatory referenda of whether to call a constitutional convention.[97] Even further, the justices who interpret the Ohio Constitution are themselves subject to regular, popular, statewide elections, and thus are democratically accountable in a way federal judges can never be.[98]

All of these levels of popular participation provide democratic safeguards to ensure the constitution indeed reflects "the people," as *currently constituted*. While a member of the "People of the United States" may disagree with some provision of the U.S. Constitution, it is incredibly difficult to amend that document.[99] Conversely, Ohio's constitutional history and practice have shown that citizens can and do regularly change the constitution to reflect the changing values of the community.[100] That said, judges—and in particular state supreme court justices—have a special role in fostering constitutionalism and in preserving the constitution. Judicial review has long been a feature in both the United States[101] and in Ohio,[102] and even considering the ease with which Ohioans may alter their constitution through initiative and referendum, it is even easier (and arguably more dangerous and consequential) for the Ohio Supreme Court to do so through interpretation.

The expansion of judicial power at the federal level has been well documented.[103] That unelected, life-tenured civil servants with essentially no accountability are able to issue nationwide injunctions or overturn popular legislation is contrary to democratic impulses. The reaction this expansive

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[95] *See* Thomas Raeburn White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1133 (1952).

[96] ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 193 (2021).

[97] *See* OHIO CONST. art. XVI, § 3. Ohio is one of fourteen states which hold regular referenda on whether to call a constitutional convention. JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 344 (2022). These referenda allow the people to bypass obstinate legislatures and grant each new generation a say on whether to review the state's fundamental law. John Dinan, *"The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures*, 62 REV. POL. 645, 646–47 (2000).

[98] *Compare* OHIO CONST. art. IV, § 6, *with* U.S. CONST. art. III, § 1.

[99] *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2006–07 (2022).

[100] The difficulty of amending the U.S. Constitution and the comparative ease of amending the state constitutions have rendered the former republican in structure and the latter increasingly democratic. Jeffrey S. Sutton, C.J., 6th Cir., The Increasing Use and Importance of the State Constitutions at The Ohio State Bar Association CLE The Importance of the Ohio Constitution: Direct Democracy and Home Rule (Apr. 12, 2021).

[101] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[102] Rutherford v. M'Faddon, (Ohio 1807). For the full text of this essential, yet unreported case, see OHIO UNREPORTED JUDICIAL DECISIONS, PRIOR TO 1823, 71 (Ervin H. Pollack ed., 1952), or find a copy online at https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2001/2001-Ohio-56.pdf.

[103] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed., 1986).

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power has engendered, in terms of the movement toward judicial restraint, might suggest that the judiciary is not the branch of government best positioned to undertake a revolution in constitutionalism. Such an assumption, however, ignores key differences in character between the state and federal judiciary. Although state judges have too often been unnecessarily deferential to their federal counterparts, their positions are less secure than federal judges, and their behavior and outlook may be affected by their perceived vulnerability.[104] State judges are electorally accountable to the people and have a special duty to the people, which federal judges do not.[105] As such, they may act as a majoritarian force in ensuring the will of the people, as expressed through the acts of their elected representatives, is not lightly overturned.

As established, our political system is premised on dual governmental sovereignty.[106] Regardless of whether the rationale for this system remains the same as at its inception, the American constitutional system will not long survive if one sovereign continually cedes its prerogative to the other, permitting its constitution to be reinterpreted by a foreign body. In a system in which judicial review is so entrenched (and so widely accepted, even if begrudgingly at times), it is imperative that state supreme courts take the lead in protecting state sovereignty by considering the state constitution on its own terms. Only after consistently following through on a pledge to do so, as that made by the Ohio Supreme Court in *Arnold*, will a robust state constitutionalism develop.

C. Overlapping Responsibilities

To work properly, the federal system of dual governments requires dual court systems. Unable to fully dispense with the monistic conception of sovereignty, the U.S. Supreme Court maintains a degree of authority over state supreme courts in certain areas.[107] The Judiciary Act of 1789 put "flesh on the bare bones" of Article III of the U.S. Constitution.[108] In doing so, it provided for appellate review in the U.S. Supreme Court of certain final

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[104] LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 132 (Robert J. Spitzer ed., 2002) ("Democratic theorists concerned about the unchecked power . . . [of] our nation's highest Court might rest easier knowing that state supreme court justices often act as if the power of judicial review is not unchecked.").

[105] Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 723–25 (2013).

[106] Printz v. United States, 521 U.S. 898, 918–19 (1997).

[107] Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 86–87 (2002). *See also* U.S. CONST. art. VI; Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632 (1874) (Uniformity of constitutional construction could only be achieved "by conferring upon the Supreme Court of the United States—the appellate tribunal established by the Constitution—the right to decide these questions finally and in a manner which would be conclusive on all other courts, State or National.").

[108] 1 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 52 (8th ed. 2010); Kevin C. Walsh, *In the Beginning There was None: Supreme Court Review of State Criminal Prosecutions*, 90 Notre Dame L. Rev. 1867, 1868 (2015).

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judgments from state courts.[109] Section 25 of the Act enabled the U.S. Supreme Court to review the final judgments of state supreme courts (1) *invalidating* federal statutes, treaties, or exercise of authority; (2) *upholding* the validity of a state statute or authority allegedly inconsistent with the U.S. Constitution, treaties, or laws; or (3) *denying* a title, right, privilege, or exemption claimed under the U.S. Constitution or a federal treaty, statute, or commission.[110] Conversely, if the state supreme court *upheld* a federal law as constitutional, no appeal was allowed to any federal court, including the Supreme Court.[111]

From the earliest days of the republic to the present, therefore, state supreme courts have been the final arbiters of all matters arising solely from state constitutions.[112] For that same length of time, they have also exercised concurrent jurisdiction of federal constitutional claims.[113] The U.S. Supreme Court's authority to review certain state supreme court holdings was cemented (and arguably expanded) in the Early Republic.[114] Once established however, the Court exercised this power sparingly for the next hundred years, frequently operating under the presumption that in cases where the basis for its jurisdiction was not apparent, it lacked jurisdiction.[115] During this period, the protection of individual rights more frequently fell to state courts than to the U.S. Supreme Court, which held that the Bill of Rights did not apply to the states.[116] This would change as the U.S. Supreme Court "incorporated" parts of the Bill of Rights against the states by means of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[117] The circumstances under which the U.S. Supreme Court would review state court

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[109] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (1789).

[110] *Id.* at 85–86.

[111] *Id.* at 86–87. As such, "[f]or the first 125 years of our nation's existence, the only state court judgments reviewable in the Supreme Court or by any federal court absent diversity jurisdiction were those in which the highest state courts had *denied* federal claims or defenses." Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 850 (2010) (emphasis added). *Id.* at 871. For the current law on U.S. Supreme Court jurisdiction to review state court rulings, see 28 U.S.C. § 1257(a).

[112] SALMON A. SHOMADE, DECISION MAKING AND CONTROVERSIES IN STATE SUPREME COURTS xviii (2018).

[113] Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. 979, 982, 986–87 (2010); 1 ROSSUM & TARR, *supra* note 108, at 297. *See also* OHIO CONST. art. IV, § 2(B)(2)(a)(ii) (The Ohio Supreme Court "shall have appellate jurisdiction . . . [i]n appeals from the courts of appeals as a matter of right in . . . [c]ases involving questions arising under the constitution of the United States or of this state.").

[114] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (invalidating a state statute on U.S. Constitutional grounds); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (overturning a state court judgment in a civil case on U.S. Constitutional grounds); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (overturning a state court judgment in a criminal case on U.S. Constitutional grounds). For a detailed argument that appellate review of state court criminal decisions was not originally contemplated under Section 25, see Walsh, *supra* note, 108 at 1869–73.

[115] Lauren Gailey, *Thirty Years Too Long: Why the* Michigan v. Long *Presumption Should be Rejected, and What Can be Done to Replace It*, 53 DUQ. L. REV. 483, 492 (2015).

[116] Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833); United States v. Cruikshank, 92 U.S. 542 (1875).

[117] RANDY J. HOLLAND, ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 49 (2d ed. 2010).

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judgments thus became more important than ever.[118]

Although it did not fully articulate the rule, *Murdock v. Memphis*[119] is generally understood as the starting point of the modern "adequate and independent state grounds" doctrine.[120] Under this doctrine, as it would develop in a string of cases,[121] "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character," U.S. Supreme Court jurisdiction fails "if the non-federal ground is *independent* of the federal ground and *adequate* to support the judgment."[122] The U.S. Supreme Court now presumes jurisdiction to review state court decisions "in the absence of a plain statement that the decision below rested on an adequate and independent state ground."[123] The effect has been to increase the incidence of U.S. Supreme Court review and reversal of decisions by state supreme courts.[124]

The U.S. Supreme Court has used the doctrine of adequate and independent state grounds to reverse state supreme court decisions which it deems to rest on the U.S. Constitution—even where the cases themselves purport to rely on state constitutions but cite to federal jurisprudence.[125] At the same time, the U.S. Supreme Court has reminded state courts that they may utilize state constitutional provisions to provide broader protections to their citizens where the analogous federal constitutional provisions are more narrowly interpreted.[126] As will be explored below, the Ohio Supreme Court has been entirely inconsistent in taking up this invitation.

IV. OHIO'S EXPERIENCE OF JUDICIAL FEDERALISM

A. *The Origins of a Problem*

It was by no means a given that the Ohio Supreme Court should adopt a deferential position toward the U.S. Supreme Court in interpreting the Ohio Constitution. In fact, an early chief judge of the Ohio Supreme Court—Thomas Welles Bartley—denied appellate jurisdiction of the U.S. Supreme

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[118] William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 641–42 (2007).

[119] 87 U.S. 590 (1874).

[120] Michael G. Collins, *Reconstructing* Murdock v. Memphis, 98 VA. L. REV. 1439, 1441 (2012).

[121] *See* Wiecek, *supra* note 118, at 655–56 (citing Berea Coll. v. Kentucky, 211 U.S. 45, 53 (1908); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125 (1945)).

[122] *Fox Film Corp.*, 296 U.S. at 210 (emphasis added).

[123] Michigan v. Long, 463 U.S. 1032, 1044 (1983). For criticisms of this ruling, see Gailey, *supra* note 115.

[124] Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 468 (2002).

[125] This has happened repeatedly to the Ohio Supreme Court. *See, e.g.*, City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668 (1976); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); Ohio v. Robinette, 519 U.S. 33 (1996).

[126] *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982); California v. Greenwood, 486 U.S. 35, 43 (1988); Nichols v. United States, 511 U.S. 738, 748 n.12 (1994).

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Court over state courts altogether.[127] Though admitting the U.S. Supreme Court's jurisdiction to overturn Ohio laws which conflicted with the U.S. Constitution, nineteenth century judges of the Ohio Supreme Court went so far as to reserve the right "as a court of last resort in a sovereign state" to "decline obedience" to a mandate of the U.S. Supreme Court "in a case of clear usurpation . . . of an authority and jurisdiction wholly unwarranted by the federal Constitution."[128] The court went even further a few years later—vindicating Chief Judge Bartley's position—to declare that it was not "subordinate" to the U.S. Supreme Court, and that the decisions of the U.S. Supreme Court "although entitled to the highest respect, do not bind and conclude the judgment of this court."[129] It forcefully declared that "[t]here is no constitutional nor legislative provision which makes the decision of the Supreme Court of the United States, in one case, binding, as a precedent for the decision of a similar case."[130]

To the extent the Ohio Supreme Court eventually began following the U.S. Supreme Court's lead, it was more a matter of deferring to "nine of our best legal minds" even as Ohio's justices guarded their own positions as the arbiters of the state constitution.[131] The Ohio Supreme Court eventually adopted a posture of deference in statutory interpretation in cases where Ohio adopted legislation substantially similar to a federal statute which had previously been construed by the U.S. Supreme Court, decreeing that "such construction will be regarded as most persuasive by the Supreme Court of

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[127] Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States – A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 16 (1913); *see* Stunt v. Steamboat Ohio, 3 Ohio Dec. Reprint 362 (1855). As an aside, associate justices of the Ohio Supreme Court were referred to as "judges" until the passage of the Modern Courts Amendment, which changed the title to "justices." William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 846 (1968). The chief justice was referred as the chief judge before 1912. In this article, "justices" is used generically to refer to the membership of the bench, while "judges" will be used to refer specifically to pre-1968 members of the court.

[128] Piqua Bank v. Knoup, 6 Ohio St. 342, 343 (1856). In fact, the chief judge vehemently dissented (at great length), questioning the ability of the U.S. Supreme Court to even review state laws or constitutions at all. *Id.* at 404–06 (Bartley, C.J., dissenting); *see also* State ex rel. Morgan v. Moore, 5 Ohio St. 444, 447 (1856) (Bartley, C.J., dissenting).

[129] Skelly v. Jefferson Branch of State Bank of Ohio, 9 Ohio St. 606, paragraph two of the syllabus (1859).

[130] *Id.* at 609. The Court continued to affirm the principles enunciated in *Skelly* for several years, even where it failed to formally act upon them. *See* Ry. Passenger Assurance Co. v. Pierce, 27 Ohio St. 155, 158– 59 (1875). Even as late as the turn of the century, the court decreed that "We, of course, bow cheerfully to the judgment of the supreme court of the United States, in all cases coming within its cognizance, but, at the same time, feel that it is our duty to follow the decisions of this court, except where they have been distinctly overruled by that court, or are clearly inconsistent with its holdings." Schroder v. Overman, 55 N.E. 158, 162 (Ohio 1899).

[131] McNary v. State, 191 N.E. 733, 741 (Ohio 1934) ("We do not regard ourselves as being married to the decisions of the Supreme Court of the United States as a general proposition . . . We regard an opinion of the Supreme Court of the United States as the concrete product of nine of our best legal minds."). Unlike later in the court's history, the *McNary* court recognized that "no decision of any court is better or stronger than the reasoning behind it, and we look behind the [U.S. Supreme Court's] opinion in order to ascertain the means by which it was reached." *Id.*

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Ohio, if not controlling."[132] It was not long before deference to the U.S. Supreme Court would creep into *constitutional* interpretation as well.[133] This development paved the way for future errors. Eventually, deference to the U.S. Supreme Court's interpretation of the *U.S. Constitution* became the Ohio Supreme Court's default in the absence of "compelling reasons why *Ohio* constitutional law should differ from the federal law" on a given issue.[134] Even before these more explicit declarations, the Ohio Supreme Court began uncritically equating clauses from the Ohio Constitution with analogous provisions in the U.S. Constitution, often providing no reasoning or textual or historical analysis for the supposed equivalency.[135] Thus commenced a "long history of parallelism," whereby decisions of the U.S. Supreme Court were often quoted by the Ohio Supreme Court "as giving the true meaning of the guaranties of the Ohio Bill of Rights."[136]

As an example, the Ohio Supreme Court first equated the Ohio Constitution's "Due Course of Law" provision with the U.S. Constitution's "Due Process" clause in 1893.[137] The Court provided no textual or historical analysis of the Ohio provision—in fact *ignoring* important textual differences between the documents—and no citation for its assertion that these clauses were "equivalent."[138] Yet this uncritical reading of the state constitution remains lodged in Ohio constitutional jurisprudence more than a hundred years later. Later cases, continuing into the present, would not even use the term "due course of law," but merely reference "due process" under the "state

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[132] *Id.* at paragraph three of the syllabus. This differed from its prior declaration that "[i]n construing a statute of this state, where no federal question is involved, this court is not required to adopt a construction given to a similar law of the United States by the supreme court of the United States." Erie R.R. Co. v. Steinberg, 113 N.E. 814, 818 (Ohio 1916). Though, to its credit, the *McNary* court prefaced its declaration of deference with the similar caveat, "There is no rule requiring the Supreme Court of Ohio, in its interpretation of the statutory law of Ohio, to follow the decisions of the Supreme Court of the United States under any and all circumstances. . . " *McNary*, 191 N.E. 733 at paragraph three of the syllabus.

[133] State v. Lindway, 2 N.E.2d 490, 498 (Ohio 1936) (Jones, J., concurring). Justice Jones cited no authority to support the proposition that "[t]he rule applying to the construction of statutes also applies to the construction of constitutional provisions as well." *Id.*

[134] State v. Wogenstahl, 662 N.E.2d 311, 326 (Ohio 1996) (emphasis added).

[135] For example, the Ohio Supreme Court first equated the state and federal equal protection clauses in 1895. State ex rel. Schwartz v. Ferris, 41 N.E. 579, 584 (Ohio 1895) (relying on OHIO CONST. art. I, § 2 (equal protection) to strike down a progressive tax on estates). There was no independent analysis of the Ohio provision's meaning. *Id.*

[136] Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 72–73 (Ohio 1941).

[137] Salt Creek Valley Tpk. Co. v. Parks, 35 N.E. 304, 306 (Ohio 1893) (declaring portions of the revised code unconstitutional on the basis of OHIO CONST. art. I, § 5 (jury trial), OHIO CONST. art. I, § 16 (due course of law), and U.S. CONST. amend. XIV, § 1 (due process)). It is unclear the extent to which the Court's holding relied upon the U.S. Constitution. However, the equivalence between the two clauses has been repeatedly affirmed. *See* State v. French, 73 N.E. 216, 217 (Ohio 1905) (no difference in the two constitutions "respecting due process of law"); Wilson v. City of Zanesville, 199 N.E. 187, 189 (Ohio 1935) ("the words 'due course of law' are equivalent in meaning to 'due process of law.'"); *Direct Plumbing Supply Co.*, 38 N.E.2d at 72 ("The 'due course of law' clause of Section 16, Article 1 of the Ohio Constitution, has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment."); Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1232 (Ohio 2018) ("For many years . . . we have treated [Article I, Section 16 of the Ohio Constitution] as equivalent to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").

[138] *Stolz*, 1122 N.E.3d at 1232.

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and federal constitutions," despite that term being found *nowhere* in the Ohio Constitution.[139] Now, where the phrase "due course of law" is used in Ohio Supreme Court opinions, it is frequently only in quoting the constitutional provision itself, before analyzing the issues solely on "due process."[140] The depth of this error is really stunning: even supposing the Court was correct in determining the clauses are equivalent, it does not follow that the Ohio Supreme Court was thereby bound to interpret the due course of law clause in accordance with the U.S. Supreme Court's *subsequent* interpretations of the federal due process clause, let alone to begin referring to the Ohio provision as "Ohio's due process clause," as if the text of the Ohio Constitution did not matter!

This uncritical approach perhaps reached its nadir in an "equal protection" context in *State ex rel. Heller v. Miller*, when the Ohio Supreme Court went so far as to declare that "[t]he phrase in Section 2 of Article I [of the Ohio Constitution] that ' * * * [g]overnment is instituted for their [the people's] equal protection and benefit' is essentially identical to the Fourteenth Amendment's equal protection clause."[141] For reference, the U.S. Constitution's Equal Protection Clause reads "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."[142] The Ohio Constitution's "equivalent" provision states "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . . ."[143] To say these are "essentially identical" is to ignore not only the very different texts (and the rules of grammar generally), but also the very different historical and structural contexts between the two provisions.[144] This disregard for

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[139] *See French*, 73 N.E. at 217; Grieb v. Dep't of Liquor Control, 90 N.E.2d 691, 693 (Ohio 1950) ("Due process of law as guaranteed by the federal and state constitutions . . . ."); State v. Troisi, 206 N.E.3d 695, 699 (Ohio 2022) (holding made "under *the Due Process Clauses* of the Ohio and United States Constitutions") (emphasis added).

[140] *See* State v. Hand, 73 N.E.3d 448, 453 (Ohio 2016).

[141] 399 N.E.2d 66, 67 (Ohio 1980) (emphasis added) (brackets in original).

[142] U.S. CONST. amend. XIV, § 1.

[143] OHIO CONST. art. I, § 2.

[144] Setting aside the obvious and tremendously consequential (yet under-analyzed) textual subject-verb difference—the U.S. Constitution's declaration that no state shall deny to any person within its jurisdiction "the equal protection *of the laws*" versus the Ohio Constitution's declaration that government is instituted for the equal protection and benefit *of the people*—there are two additional important (and also overlooked) differences which militate against reading the same meaning into the two provisions. First, constructively, the Ohio provision is one of the very first provisions in the constitution (suggesting its importance) and the federal provision is an amendment proposed almost eighty years after the constitution was written. *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 95, 105, 116 (2d ed., 2022). Second, linguistically, Ohio's "Equal Protection Clause" is Lockean or Jeffersonian in its origin and meaning, pointing to both a right of revolution akin to that enunciated in the Declaration of Independence, as well as extra-textually the principle of popular sovereignty and retained rights intendent in that concept. *See* Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261, 277–78 (2005); Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV.

constitutional text and misreading of *both* constitutions, with their distinct language and phraseology, is the sort of judicial proclamation which made textualism so attractive as an interpretive methodology.[145]

Given this approach, Ohio was obviously a latecomer to the judicial federalism movement, and in the early days of the movement, was described as having "done little to claim the interest of scholars, the press, or the public."[146] Then came *Arnold*, which changed the whole paradigm—at least in theory.[147] Yet no sooner had the Ohio Supreme Court embraced judicial federalism than it seemingly abandoned it.[148] The Court has since alternated between a sheepish embrace of "coextensivity" between the U.S. and Ohio constitutions, [149] and a rather reactionary embrace of Ohio's constitutional independence,[150] as well as something in between.[151] A full description of this back-and-forth is described well in other articles and need not be repeated here.[152] Suffice it to say that the Court's approach to state constitutional law remains arguably as unimpressive as that observed pre-*Arnold*.

Since *Arnold* (and very occasionally before), the Ohio Supreme Court has shown a willingness, however glancing, to construe the Ohio Constitution as providing broader protections than the U.S. Supreme Court has read into the U.S. Constitution.[153] However, it has done so in an inconsistent and

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1299 (2015). The Fourteenth Amendment Equal Protection Clause's language emerges from a very different political and philosophical context, in the aftermath of the Civil War and with the aim of protecting the rights of freedmen. Nevertheless, in spite of the state and federal clauses being "textually distinct; [having] different origins and different histories; and [having] been the subject of wildly diverging interpretations," the Ohio Supreme Court has bafflingly continued to find them "functionally equivalent" without independent analysis. *See* STEINGLASS & SCARSELLI, *supra*, at 120.

[145] *See* Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1236–38 (Ohio 2018) (Fischer, J., concurring). By contrast, other sections are almost identical, such as the freedom from unreasonable search and seizure. *See, e.g.*, State v. Brown, 39 N.E.3d 496, 503 (Ohio 2015) (French, J., dissenting) ("Article I, Section 14 of the Ohio Constitution differs from the Fourth Amendment in only minimal, nonsubstantive ways. In addition to minor changes in punctuation, it substitutes the word 'possessions' for 'effects,' removes the capitalization from 'Warrants' and 'Oath,' changes the plural 'Warrants' to the singular 'warrant,' and substitutes 'and' for 'or' in the final clause.").

[146] Porter & Tarr, *supra* note 19, at 144.

[147] Saphire, *supra* note 5, at 450.

[148] *See* State v. Robinette, 685 N.E.2d 762, 771 (Ohio 1997).

[149] *Id.* ("Section 14, Article I of the Ohio Constitution affords protections that are coextensive with those provided by the Fourth Amendment").

[150] *See* State v. Mole, 74 N.E.3d 368, 376–77 (Ohio 2016).

[151] *See* State v. Noling, 75 N.E.3d 141, 146 (Ohio 2016) ("[T]he Equal Protection Clause of the Ohio Constitution is coextensive with, *or stronger than*, that of the federal Constitution . . .") (emphasis added).

[152] *See* Williams, *supra* note 8, at 417–36; Saphire, *supra* note 5, at 444–86; Bettman, *supra* note 6, at 493–503; White, *supra* note 11, at 1116–23; Pierre H. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism*, 90 U. CIN. L. REV. 1061, 1066–83 (2022).

[153] *See, e.g.*, *Mole*, 74 N.E.3d at 377 (equal protection); State v. Bode, 41 N.E.3d 1156, 1160–61 (Ohio 2015) (right to counsel); Norwood v. Horney, 853 N.E.2d 1115, 1129 (Ohio 2006) (eminent domain); State v. Farris, 849 N.E.2d 985, 995–96 (Ohio 2006) (search and seizure); State v. Brown, 792 N.E.2d 175, 323 paragraph one of the syllabus (Ohio 2003) (warrantless arrests); Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000) (free exercise); Simmons-Harris v. Goff, 711 N.E.2d 203, 211–12 (Ohio 1999) (establishment); Simpkins v. Grace Brethren Church, 75 N.E.3d 122, 138 (Ohio 2016) (criminal defendants).

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largely reactionary manner.[154] For example, the Ohio Supreme Court rejected the U.S. Supreme Court's *Rodriguez* test for determining fundamental rights under the equal protection clause of the Ohio Constitution.[155] Conversely, it has willingly imported whole-cloth the "scrutiny" and "rational basis" regime used by the U.S. Supreme Court in federal equal protection and due process cases,[156] and the much reviled Lemon test for establishment cases.[157] What made the *Rodriguez* test "unhelpful" in the context of the Ohio Constitution, but the scrutiny regime and *Lemon* test instructive? The court did not really say.[158] Was the logic and the conclusion of *Rodriguez* rejected merely because it was politically unpalatable in Ohio? The same question could be asked of other reactionary Ohio Supreme Court decisions which expressly rejected the logic of other specific U.S. Supreme Court cases.[159]

B. *The Nature of the Problem*

Thirty years after *Arnold*, the Court still struggles with how to appropriately address Ohio constitutional claims where analogous federal constitutional provisions exist. Despite frequent criticisms leveled in concurrences and dissents in these cases, the Ohio Supreme Court shows no signs of consistently reversing its prior decisions and interpreting the Ohio Constitution in a manner consistent with its nature—as a document of independent force—or its role in the federal system. This despite the fact that most of the sitting justices have in one way, or another, affirmed the value of judicial federalism or the importance of the Ohio Constitution.[160] There remains considerable debate as to how to implement an independent state constitutional analysis, particularly with reference to stare decisis. This has in turn resulted in a series of inconsistent results and reflects an incoherent

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[154] White, *supra* note 11, at 1118.

[155] Bd. of Ed. of City Sch. Dist. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979) ("[W]e reject the '[San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973)] test' for determining which rights are fundamental. While the test may have some applicability in determining which rights are fundamental under the Constitution of the United States, *it is not helpful in determining whether a right is fundamental under the Ohio Constitution*.") (emphasis added).

[156] State v. Thompson, 767 N.E.2d 251, 255 (Ohio 2002) (equal protection); State v. Lowe, 861 N.E.2d 512, 516 (Ohio 2007) (due process).

[157] *Simmons-Harris*, 711 N.E.2d at 10.

[158] *See generally Rodriguez*, 411 U.S. 1; *Simmons-Harris*, 711 N.E.2d 203; *Thompson*, 767 N.E.2d 251; *Lowe*, 861 N.E.2d 512.

[159] *See, e.g.*, Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) (rejecting Kelo v. New London, 545 U.S. 469 (2005)); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000) (rejecting Lemon v. Kurtzman, 403 U.S. 602 (1971)); *Simmons-Harris*, 711 N.E.2d at 211–12, (rejecting Emp. Div. v. Smith, 494 U.S. 872 (1990)).

[160] Patrick DeWine, Panel One: The Role of a Justice in the Ohio Supreme Court, 2022 Federalist Soc'y Ohio Chapters Conference (Apr. 1, 2022), https://fedsoc.org/conferences/2022-ohio-lawyers-chapters-conference. *See, e.g.,* State v. Daniel, Slip Opinion No. 2023-Ohio-4035, 74 (Brunner, J., concurring in part); State ex rel. One Person One Vote v. LaRose, Slip Opinion No. 2023-Ohio-1992, 57 (Donnelly, J., dissenting); State v. Morris, Slip Opinion No. 2022-Ohio-4609, 7 (Stewart, J.); Newburgh Heights v. State, 200 N.E.3d 189, 193 (Ohio 2022) (Kennedy, J.); State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020) (DeWine, J.); Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1236 (Ohio 2018) (Fischer, J., concurring).

jurisprudence. Reconciling these competing visions is central to rectifying this sorry state of affairs and fulfilling the promise of *Arnold*.

The conceptual difficulty at the heart of judicial federalism in Ohio is twofold. First, there is tension between the idea that (1) the Ohio Constitution grants *de facto* broader protection than its federal counterpart (as interpreted by the U.S. Supreme Court), and (2) the competing assumption that the U.S. Supreme Court's interpretation of the federal Constitution's guarantees represents the default point of departure for analyzing state constitutional claims. Second, there is a debate about the role and institutional competence of the Ohio Supreme Court in solving this dilemma: to what extent does responsibility lie with the Court to correct its prior errors, and to what extent with litigants and their counsel? Answering each of these questions will determine the fate of the Ohio Constitution moving forward.

1. Interpreting the State Constitution in the Shadow of the Federal

The first hurdle in developing a robust Ohio constitutionalism is how to approach the state constitution in the shadow of the federal. The federal Constitution looms large in the background of state constitutional claims, both because state claims are frequently accompanied by federal claims, and because the Ohio Supreme Court has historically equated provisions of the two documents. Two principal approaches to this dilemma have emerged in the Ohio Supreme Court's jurisprudence: what this article terms "declarationism" and "proceduralism." Declarationists "declare" the state constitution independent from the U.S Constitution and emphasize the Ohio Supreme Court's ability and responsibility to interpret it independently—but focus less on whether such interpretation is merited by the text, history, or tradition surrounding the relevant provision. Proceduralists emphasize the proper procedure for bringing state constitutional claims, such as whether the state constitutional claim is fully briefed and developed, the extent to which the argument was raised below, and whether stare decisis constrains the Court's interpretation of the provision. Both approaches have shown themselves unsatisfactory, and finding a way forward will involve carefully threading a needle between them, taking the good of each and leaving the bad.

The Court seems torn between these approaches, which effectively amount to either "equating state and federal provisions without an independent analysis of the state provisions," as in proceduralism, or "announc[ing] *ex cathedra* that state provisions provide greater rights than their federal counterparts without an independent analysis of the state provisions," as in declarationism.[161] Declarationists are accused of a "magic wand approach" whereby the state supreme court "simply announces, with no textual or factual analysis or reasoning, that one of its state constitutional

[161] *See* STEINGLASS & SCARSELLI, *supra* note 144, at 95.

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provisions provides greater protection than its federal analog."[162] Proceduralists are derided as abdicating state sovereignty or punting on state constitutional issues.[163] Most frequently the debate ends with the Court or individual justices throwing up their hands, blaming the parties for underdeveloped briefing or arguments, and either doubling down on erroneous precedent or reading policy preferences into the Ohio Constitution.[164]

Dean Steinglass, one of the leading scholars of the Ohio Constitution, has referred to the declarationist-proceduralist dilemma as a "chicken and egg" problem, and has consistently advocated for the need to break the cycle.[165] "State court judges typically, and often correctly, blame practitioners for failing to raise and develop state constitutional arguments adequately."[166] Indeed, if litigants continue to disregard state constitutional claims in preference of federal ones, Ohio will be unable to develop a robust state constitutional jurisprudence and the status quo will be maintained. But parties are hardly to blame for taking the state constitution less than seriously, since that is precisely the approach the Ohio Supreme Court has taken for over a century.[167] Only by affirmatively repudiating its lazy reasoning in conflating the Ohio and federal Constitutions—and its continuing reliance on such precedent under the guise of stare decisis—will the Supreme Court put the ball well and truly into the litigants' court. Solving the "chicken and egg" issue and signaling to litigants that state constitutional claims will be seriously considered will require courage on the part of the justices, and perhaps

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[162] Marianna B. Bettman, *Merit Decision: A Surprising Application of the New Judicial Federalism.* State v. Mole., LEGALLY SPEAKING OHIO (Aug. 9, 2016), https://legallyspeakingohio.com/2016/08/merit-decision-a-surprising-application-of-the-new-judicial-federalism-state-v-mole/. *See also* State v. Bode, 41 N.E.3d 1156, 1162 (Ohio 2015) (French, J., dissenting).

[163] Bergeron, *supra* note 152, at 1083; *see also* Stolz v. J & B Steel Erectors, Inc.,122 N.E.3d 1228 (Ohio 2018) (Fischer, J., concurring) (noting the impropriety of "upward delegation" of the Ohio Supreme Court's "duty to interpret the Ohio Constitution . . .").

[164] *See* cases cited *infra* notes 167–68.

[165] Dean Steinglass has proposed a variety of means by which the Ohio Supreme Court can foster such a transformation, which mostly emphasize using its influence to encourage the OSBA and local bar associations to make trainings as well as pushing for the publication of a "pocket" Ohio Constitution (which would go some way towards fostering a healthy popular constitutionalism). Steinglass, The Ohio Constitution: Views from the Bench, *supra* note 13. He has also proposed more concrete suggestions, such as new lawyer training requirements and briefing requirements for state constitutional claims. The Justices have expressed support for or echoed some of these ideas. *See, e.g.*, Judges' Panel at the Ohio State Bar Association CLE The Importance of the Ohio Constitution: Direct Democracy and State Constitutional Interpretation (Apr. 3, 2023) (Justice Stewart referring to the lack of briefing state constitutional claims in chicken and egg terms; Justice Donnelly endorsing the granting of a pocket Ohio Constitution to all new lawyers at their swearing in).

[166] Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771, 772 (2022). *See also* WILLIAMS, *supra* note 8, at 157 ("Despite the development of the [New Judicial Federalism] over two generations ago, however, lawyers still fail to argue properly the state constitutional grounds where available. In many states, the courts refuse to reach the state constitutional argument in such circumstances.").

[167] See State v. Hackett, 172 N.E.3d 75, 81-82 (Ohio 2020) (Fischer, J., concurring) ("I do not fault Hackett for failing to raise this issue under the Ohio Constitution. Indeed, this court's precedent would discourage even a seasoned attorney from raising such an argument. . . ").

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unconventional thinking.

That said, the present situation is not hopeless. Om the one hand, the Ohio Supreme Court continues to ignore nominal but undeveloped state constitutional claims without ordering additional briefing or remanding.[168] On the other, however, the Court continues to drop hints that it would have otherwise been willing to consider parallel state constitutional claims if they had been raised or argued.[169] Recent concurrences by individual justices highlighting the need to revisit past judicial federalism precedent are also promising.[170] The Court is clearly interested in addressing the issue, but has not ascertained a way forward yet.

2. Interpreting the State Constitution in a Fractured Court

Much of the present conflict between the Ohio Supreme Court justices' contrasting approaches to judicial federalism arises from within the Court's Republican majority. Despite its historic reputation as a liberal movement, most of judicial federalism's vitality in Ohio has traditionally come from Republican justices.[171] The court's present 4–3 Republican majority regularly invokes judicial restraint.[172] The suggestion that it ought to actively overturn past precedent might lend itself to accusations of judicial "activism" ordinarily leveled at more liberal justices. It should be remembered, however, that these same accusations have been leveled at the U.S. Supreme Court's Republican-appointed supermajority in its quest to

[168] *See* State v. Bevly, 27 N.E.3d 516, 526 (Ohio 2015) n.1; Cleveland v. Oles, 92 N.E.3d 810, 818 (Ohio 2017) n.1; Willacy v. Cleveland Bd. of Income Tax Rev., 151 N.E.3d 561, 567 (Ohio 2020); State v. Weber, 168 N.E.3d 468, 480 (Ohio 2020); State v. Burroughs, 202 N.E.3d 611, 614 (Ohio 2022); State v. Brinkman, 202 N.E.3d 651, 668 (Ohio 2022); State v. Campbell, 211 N.E.3d 1174, 1177 (Ohio 2022) n.1; State v. Grievous, 2022 WL 17542593, 16 (Ohio 2022). There is some debate on the court precisely how "developed" such an argument should be before the court is obligated to consider it. Justice DeWine has spoken about how "[l]itigants have done a very good job in recent years about raising the Ohio Constitution" but need to "go beyond that" in developing their claims before the court will consider them. DeWine, The Ohio Constitution: Views from the Bench, *supra* note 13.

[169] *See* Bey v. Rasawehr, 161 N.E.3d 529, 533 (Ohio 2020) n.1; State v. Jordan, 185 N.E.3d 1051, 1054–55 (Ohio 2021); State v. Blanton, 215 N.E.3d 467, 479 (Ohio 2022) n.1. At least two sitting justices have admitted to using concurring opinions to flag these issues to attorneys for future usage. DeWine, The Ohio Constitution: Views from the Bench, *supra* note 13.

[170] *See, e.g.,* Bergeron, *supra* note 152, at 1082 (citing Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1238 (Ohio 2018) (Fischer, J., concurring); and State v. Hackett, 172 N.E.3d 75, 82 (Ohio 2020) (Fischer, J., concurring)).

[171] Justice Andy Douglas, who authored the majority opinion in *Arnold* was a Republican. So too was Justice J. Craig Wright, an early advocate for "developing a truly independent body of state constitutional law . . . ." Marianna B. Bettman, *Comity and the New Federalism through the Lens of School Vouchers*, 29 N. KY. L. REV. 455, 459 (2002). His "heir" in that role, Justice Paul Pfeifer was also a Republican. Brown, *supra* note 6, at 467. Chief Justice O'Connor was likewise a Republican and advocate for judicial federalism. Kathleen M. Trafford, City of Norwood v. Horney -- *Much More Than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce It*, 48 AKRON L. REV. 35, 56 (2015). The foremost advocates for judicial federalism on the court today, Justices DeWine and Fischer, are likewise Republicans.

[172] Bettman, *supra* note 171.

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revisit erroneous precedent.[173] Such criticism should not deter the Ohio Supreme Court's majority from overturning bad precedent to protect the integrity of the Ohio Constitution. However, there remain important disputes between the Republican justices regarding how to approach judicial federalism, which will define whether or how the Court approaches these cases going forward.[174] These are worth examining, as their outcome will dictate the direction of the Court.

Of the recent justices, former Chief Justice Maureen O'Connor perhaps best represents the declarationist camp, with a more activist strain of state constitutionalism characteristic of its early proponents on the bench. At the time she retired at the end of 2022, she had been a justice almost ten years longer than the next longest tenured justice then sitting.[175] She was thus an integral part of the Court's development towards its present partial embrace of judicial federalism, and a link between today's Court and the first generation of justices to grapple with judicial federalism.[176] Chief Justice O'Connor referred to herself as a "success story" in terms of how far the movement has come; by her own admission, she "evolved" in her views on the role of the state constitution, and this evolution is reflected in her opinions.[177] Compare her dissent in *State v. Brown*[178] and plurality opinion in *State v. Mole*.[179] However, her interpretation of this evolution contrasts with members of the current Court, who disapprove of what they see as her

[173] *See, e.g.*, Linda Greenhouse, *This Is What Judicial Activism Looks Like on the Supreme Court*, N.Y. TIMES (Apr. 8, 2021), https://www.nytimes.com/2021/04/08/opinion/Supreme-Court-religion-activism.html; Ed Pilkington, *Post-Trump Supreme Court Appears Willing to Embrace Judicial Activism*, GUARDIAN (July 9, 2021), https://www.theguardian.com/law/2021/jul/09/post-trump-supreme-court-appears-willing-to-embrace-judicial-activism; *The Supreme Court's Judicial Activism will Deepen Cracks in America*, ECONOMIST (June 29, 2022), https://www.economist.com/leaders/2022/06/29/the-supreme-courts-judicial-activism-will-deepen-cracks-in-america.

[174] This is not a new dynamic; Ohio's Republican justices have long been fractious in their approach to cases where they have been in the majority. Joshua Vineyard et al., *Justice Behind the Labels: How Political Affiliation and Gender Influence the Decisions of the Ohio Supreme Court*, 72 U. CIN. L. REV. 1159, 1198 (2004). It can be seen in the number of Republican-authored concurrences and dissents in these cases. *See* Vail v. The Plain Dealer Pub. Co., 649 N.E.2d 182, 186 (1995) (four opinions); State v. Mole, 74 N.E.3d 368, 389 (Ohio 2016) (four opinions); State v. Aalim, 83 N.E.3d 862, 872 (Ohio 2016) (three opinions); State v. Aalim, 83 N.E.3d 883, 897 (Ohio 2017). *See also* Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

[175] *Justices by Term Since 1913*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-by-term/ (last visited Oct. 3, 2023).

[176] Pierce J. Reid, *Chief Justice Maureen O'Connor: A Legacy of Judicial Independence*, 48 AKRON L. REV. 1, 7 (2015).

[177] Maureen O'Connor, Chief Justice, Supreme Court of Ohio, The Importance of the Ohio Constitution at the Ohio State Bar Assocation CLE: Who Decides - Constitutional Rights in Criminal and Civil Case, (Apr. 4, 2022).

[178] State v. Brown, 792 N.E.2d 175, 180 (Ohio 2003) (O'Connor, J., dissenting) ("The United States Constitution, as interpreted by [the U.S. Supreme Court] clearly permits such an arrest. *It is illogical to suggest that the nearly identical Ohio constitutional provision would prohibit it*." (emphasis added)).

[179] State v. Mole, 74 N.E.3d 368, 376 (Ohio 2016) ("We also reaffirm that *we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution* . . . ." (emphasis added)). *Mole* was an equal protection case brought under both the state and federal constitutions.

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later tendency towards declarationism.[180]

There are certainly aspects of Chief Justice O'Connor's judicial federalism legacy which even her opponents praise.[181] Her opinion in *Norwood v. Horney* is a classic of Ohio constitutional law.[182] Despite the reactionary nature of the result, its robust analysis rooted the right in question in Ohio's history and tradition, reaching all the way back to the Northwest Ordinance to do so.[183] Yet compared with some of her later opinions, like *Mole*, it is clear that her evolution was not all positive. Her lead opinion in *Mole* positions itself as the obvious successor to *Arnold*, with a ringing endorsement of judicial federalism, grandiose language about the Ohio Constitution, extensive quotation of *Arnold*, and citations to judicial federalism law review articles.[184] Yet, as then-Associate Justice Kennedy contended in her dissent, *Mole* lacked the intellectual rigor and principled analysis that characterized *Arnold*.[185] *Mole* is characteristic of the declarationist style of judicial federalism—simply declaring that analogous state and federal constitutional provisions mean different things without appropriate analysis.[186] Worse still, the "state constitutional" analysis in *Mole* is just a "scrutiny" analysis of the sort conducted by the U.S. Supreme Court, but with a different result.

It is perhaps for the best then that declarationism is on the wane in Ohio. More characteristic of the early years of judicial federalism, it suffers from accusations of being results-driven. Yet depending on what takes its place, we may be in an only marginally better situation in regard to developing a robust Ohio constitutionalism. If declarationism is too reckless with the state constitution, stretching its clauses to the breaking point, proceduralism is inappropriately cautious, failing to develop the "true meaning" of the state constitution. The primary issue with proceduralism is that it expects litigants to bring and brief state constitutional claims, with no guarantee that those claims will be taken seriously, since they historically have not been. In unduly tying itself to stare decisis, proceduralism effectively institutionalizes the status quo where decisions of the U.S. Supreme Court are understood "as giving the true meaning of the guaranties of the Ohio Bill of Rights."[187]

Proceduralism is overly deferential to the U.S. Supreme Court and in its attempt to be prudent, misunderstands the nature of the state

[180] *Id*. at 390 (Kennedy, J., dissenting).
[181] *Id.* at 391–92 (Kennedy, J., dissenting).
[182] Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).
[183] *Id.* at 1129–36.
[184] *Mole,* 74 N.E.3d at 374–77; Bergeron, *supra* note 152, at 1076.
[185] *Mole,* 74 N.E.3d at 393.
[186] *See generally Id.*
[187] Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 72 (Ohio 1941).

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constitution.[188] Taking federal jurisprudence as a jumping off point, for example, one might conclude that "the Ohio Constitution *can be* a document of independent force" insofar as it diverges from, or offers greater protections than, the U.S. Constitution[189] The problem with this mode of thinking is, of course, that the Ohio Constitution *is* a document of independent force *irrespective* of whether that independence implies a divergence from the rights guaranteed by the U.S. Constitution. Its independence derives from its status as a wholly separate document: one framed by different people, for different purposes, and at a different time than the U.S. Constitution.

Where it is clear that an Ohio constitutional provision is derived from that of another state or the federal Constitution, it is perfectly reasonable for the justices to look at how those corresponding provisions were interpreted pre-adoption. However, in doing so, it is imperative that they remember that the mere fact of Ohio's adoption of an identical or similar phraseology does not mean that they are bound to give deference to other courts' interpretations of the original provisions.[190] Even where the text of the provisions is exactly the same, it is generally inappropriate to consult U.S. Supreme Court jurisprudence on the analogous federal provision, except insofar as limiting the search to U.S. Supreme Court cases which predate Ohio's adoption of the provision, which would have been known and understood by the framers of the Ohio provision.[191] Those provisions, though they have the same text, have a different history.

Thus, the Court finds itself stuck between two undesirable extremes in judicial federalism cases. On the one hand, it can continue to assert that the Ohio Constitution means what the Court says it means merely because the document has independent force.[192] On the other, it can maintain its allegiance to precedent which decrees that, to the extent the language of the state and federal constitutions are similar, there is no reason to ever diverge from the Court's prior unnatural coupling of the Ohio Constitution to the U.S. Supreme Court's shifting interpretations of an analogous federal provision. As the Court struggles to find its way, nothing short of the sovereignty of the state, integrity of the constitution, and the principle of democracy are at stake. Moving forward, it will have to find and embrace an approach that takes the best of these extremes—the forcefulness of declarationism and the principles

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[188] *See, e.g.*, *Mole*, 74 N.E.3d at 391–92 (Kennedy, J., dissenting) (describing a determination that the Ohio Constitution provides greater rights than the federal as a "formidable step[,]" and stating that "in order to hold that the Ohio Constitution is more protective than the federal Constitution," the court must point to language in the Ohio Constitution "that is different from the language" of the U.S. Constitution).

[189] State v. Aalim, 83 N.E.3d 862, 872–73 (Ohio 2016) (Kennedy, J., concurring) (emphasis in original).

[190] The original state may have inferred an existing judicial interpretation of the particular language used which would not be appropriate to impute to the borrowing state's constitution. 2 GRAD & WILLIAMS, *supra* note 93, at 81.

[191] For this presumption, see State v. Carswell, 871 N.E.2d 547, 549–50 (Ohio 2007).

[192] Bergeron, *supra* note 152, at 1078.

of proceduralism.

V. WHAT IS TO BE DONE?

A. *Charting a New Course*

Arnold—the starting place in Ohio's journey to judicial federalism—remains helpful as a model and guide for establishing a robust Ohio constitutionalism. The late Justice Andy Douglas's majority opinion is thorough and thoughtful in disposing the case, and ought to be the standard for the type of briefing attorneys make and the type of opinion judges and justices write in addressing state constitutional claims.[193] After reviewing relevant U.S. Supreme Court jurisprudence, the Court opted to rely on the state constitution to determine whether it contained an individual right to bear arms.[194] It analyzed the text, history, and tradition of the Ohio Constitution, including Ohio's constitutional conventions, the common law history of the purported right at issue, and the history and traditions "of our nation and this state."[195] It then held that the state constitution "confers upon the people of Ohio the fundamental right to bear arms," but that the right "is not absolute."[196] The Court went on to uphold a municipal ordinance which limited the accessibility of certain types of firearms.[197]

Justice Douglas's analysis in *Arnold* foreshadowed the Ohio Supreme Court's eventual articulation of the present standard of state constitutional review, first enunciated in *State v. Smith*: "In construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions."[198] This test cites to *Arnold*, and renders *Smith* in many respects *Arnold*'s spiritual successor. It also represents the fruit of a concerted effort by its author, Justice DeWine, and others to chart a path forward in the midst of this mess.[199] Beginning with his concurrence in *Aalim II*, Justice DeWine has made this same argument, that in construing the Ohio Constitution, "we are bound by the text of the document as understood *in light of our history and traditions*."[200] This focus on "text" and "history and

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[193] *See Mole*, 74 N.E.3d at 390–91 (Kennedy, J., dissenting).
[194] Arnold v. City of Cleveland, 616 N.E.2d 163, 166–69 (Ohio 1993).
[195] *Id.* at 168–71.
[196] *Id.* at 171.
[197] *Id.* at 173.
[198] State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020).
[199] *Id.* at 1130–32.
[200] State v. Aalim, 83 N.E.3d 883, 898 (Ohio 2017) (DeWine, J., concurring) (emphasis added). Justice DeWine has since used different formulations of this test in dissenting and concurring opinions. *See* City of Cleveland v. State, 136 N.E.3d 466, 480 (Ohio 2019) (DeWine, J., concurring) ("text, context, broader constitutional structure, and history"); State v. Long, 168 N.E.3d 1163, 1172 (Ohio 2020) (DeWine, J., dissenting) ("text or history of the state [constitutional] provision."); State v. Yerkey, No. 2020-1392, slip op. 2022-Ohio-4298, 34 (Ohio Dec. 5, 2022) (DeWine, J., dissenting) ("text and history of the constitutional amendment"); State v. Grievous, No. 2019-0912, slip op. 2022-Ohio-4361, 57 (Ohio Dec. 9, 2022) (DeWine, J., concurring) ("things like text, precedent, and history"). His text, history, and tradition(s) formulation, however, has remained thematically consistent in majority opinions, if not

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tradition(s)" is similar to recent trends in the U.S. Supreme Court but is importantly distinct in its emphasis on the *state* constitution and the *state's* history and tradition(s).[201] The unanimous *Smith* decision marked the first time this phraseology made its way into a majority opinion and, for that reason, may represent the dawn of the next phase of Ohio's struggle with judicial federalism.[202] It remains to be seen whether the Court will take it seriously or continue to stumble at the first hurdles.[203]

The "text in light of our history and traditions" framework provides a principled basis for taking seriously the Ohio Constitution's independent force. It represents an invitation to practitioners to make arguments about the Ohio Constitution and gives them the tools to do so. Looking to the constitutional "text" will prevent a repetition of earlier errors, as where the Court ignored the rules of grammar, construction, and common sense in declaring the fundamentally textually different equal protection clauses of the Ohio and U.S. Constitutions as "essentially identical."[204] Looking to "our history and traditions" will ground the analysis in an understanding of what the text meant to those who adopted it, be those Framers at the 1802, 1851, or 1912 Constitutional Conventions, or voters in last year's election. Finally, reading the text "in light of" our history and traditions is a means of elucidating the text without attempting a wholly intent-based analysis unmoored from the words themselves.[205] Far from producing a specific result, this test should become the jumping off point for any analysis of the state constitution.[206]

Justice DeWine has spoken at length about the importance of the state constitution and the Court's "obligation" to understand its "original meaning," stating that he is "a firm believer that we should not be following

syntactically so. *Compare Smith*, 165 N.E.3d at 1130 ("we look first to the text of the [state constitution] as understood in light of our history and traditions"), *with* State v. Burroughs, 202 N.E.3d 611, 614 (Ohio 2022) ("text, history, or tradition of the Ohio Constitution"). *But see* State v. Brinkman, 202 N.E.3d 651, 668 (Ohio 2022) ("unique text, structure, and history of the Ohio Constitution") (omitting "tradition(s)").

[201] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022); Dru Stevenson, *"Text, History, and Tradition" as a Three-Part Test*, DUKE CTR. FOR FIREARMS L. (Mar. 11, 2020), https://sites.law.duke.edu/second-thoughts/2020/03/11/text-history-a-nd-tradition-as-a-three-part-test/. Justice DeWine himself has argued for the use of a "text, history, and tradition" test in the context of interpreting the federal constitution. State v. Weber, 168 N.E.3d 468, 485 (Ohio 2020) (DeWine, J., concurring). He has also enumerated other factors which could be used in interpreting the state constitution, including the "structure, text, and context of our Constitution, along with the historical record." *City of Cleveland*, 136 N.E.3d at 478–79 (DeWine, J., concurring).

[202] *Smith*, 165 N.E.3d at 1130 ("In construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions."). Interestingly, Justice DeWine cites *Arnold* in support of this proposition. *Id.*

[203] Promisingly, the *Smith* test has made its way into state constitutional cases outside the judicial federalism realm. *See* State ex rel. One Person One Vote v. LaRose, No. 2023-0630, slip op. 2023-Ohio-1992, 13 (Ohio June 16, 2023).

[204] State ex rel. Heller v. Miller, 399 N.E.2d 66, 67 (Ohio 1980).

[205] *See generally* Neomi Rao, *Textualism's Political Morality*, 73 Case W. Res. L. Rev. 191 (2022).

[206] This may have already begun. *See LaRose*, slip op. at 57 (Donnelly, J., dissenting) (approvingly quoting the majority's use of the *Smith* test even while disagreeing that it was appropriately applied).

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lockstep federal interpretations of the U.S. Constitution, saying the Ohio Constitution means the same thing."[207] He has bemoaned the Ohio Supreme Court's history of interpreting the Ohio Constitution "like the federal Constitution even though the state Constitution has very different language."[208] Justice DeWine has expressed his agreement "as a matter of first principles" that the Ohio Constitution ought to be treated differently than the U.S. Constitution, and has emphasized that litigants should make an "independent analysis," based on "the text, the tradition, or the history of the Ohio Constitution, about why it's different."[209] However, he has also expressed reservations about overruling past precedent interpreting the Ohio Constitution in light of the federal Constitution, identifying what he calls "a stare decisis problem."[210] Whether the Court can find a way to solve this problem will be a key factor in terms of his role in bringing about a robust Ohio constitutionalism.[211]

This interpretive approach to Ohio constitutional cases seems to strike an appropriate balance between the "Scylla" of declarationism's bald assertions of independent force, unmoored from the text and history of the state constitution, and "Charybdis" of proceduralism's unnecessary and illogical deference to U.S. Supreme Court's interpretation of a very different document. Emphasizing constitutional text, history, tradition, and structure appropriately limits the Ohio Supreme Court's ability to read into the Ohio Constitution its own policy preferences. Yet it also recognizes that the history, motivations behind, structural relationship between, and literal syntax of the Ohio Constitution's provisions mean that it is irresponsible to treat those provisions as synonymous with different provisions found in the federal Constitution.[212] To the extent the other justices can be persuaded to regularly employ the *Smith* test and engage the state constitution on its own terms, it will represent a critical shift and massive step towards the establishment of a robust Ohio constitutionalism.

The text-history-traditions approach is not new insofar as it represents to some degree an articulation of the analysis laid out by Justice Douglas in

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[207] DeWine, *supra* note 160.

[208] Marty Schladen, *State Constitutions Have Played Second Fiddle Since the Civil War. Justice DeWine Says That's Bad*, OHIO CAP. J. (Sept. 19, 2022, 4:45 AM), https://ohiocapitaljournal.com/2022/09/19/state-constitutions-have-played-second-fiddle-since-the-civil-war-justice-dewine-says-thats-bad/.

[209] DeWine, The Ohio Constitution: Views from the Bench, *supra* note 13; *see also* DeWine, Ohio Constitutional Interpretation, *supra* note 165.

[210] DeWine, The Ohio Constitution: Views from the Bench, *supra* note 13. *See also* DeWine, Ohio Constitutional Interpretation, *supra* note 165.

[211] Justice DeWine has spoken about this, noting, "I certainly do not think that we should lightly overturn precedent," but clarifying "we take an oath not to stare decisis, but we take an oath to the Constitution, and if . . . we've made a decision and it's incompatible with the Constitution, our obligation is to overturn that precedent." DeWine, *supra* note 160.

[212] *See* State v. Long, 168 N.E.3d 1163, 1172 (Ohio 2020) (DeWine, J., dissenting) (criticizing the court for "routinely lump[ing]" state and federal "constitutional provisions together and resolv[ing] both using federal standards, without any consideration of the text or history of the state provision.").

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Arnold, as well as the criticisms levelled by Chief Justice Kennedy in her *Mole*[213] and *Aalim I*[214] opinions and by Justice French in her *Brown*[215] and *Mole*[216] dissents. However, unlike these criticisms, it is framed in a manner as to give less deference to prior erroneous interpretations of analogous clauses. Unlike the criticisms leveled in those opinions, Justice DeWine's enunciation of these principles in his majority opinion in *Smith* represents the most concerted effort to construct a workable framework for these questions, backed by the whole Court.[217] The timing for these efforts could not be more opportune. A majority of the Court either identifies as textualist, or utilizes or sympathizes with a textualist framework, and others have spoken approvingly of the use of history to understand the intent of the framers.[218] The new chief justice has also spoken forcefully in favor of judicial federalism.[219] The Ohio Supreme Court is, as it were, "[a] court at the [c]rossroads."[220] At this point then, further reaffirmance of past precedent erroneously and uncritically conflating the Ohio Constitution with the U.S. Supreme Court's interpretation of the U.S. Constitution would be devastating to the prospect of a robust Ohio constitutionalism. As Justice DeWine has written elsewhere, "It's time to return to the Constitution."[221]

What is needed now is an opinion repudiating past precedent *not* rooted in the diligent textual, historical, and traditional analysis characteristic of *Arnold* and articulated in *Smith*. Such an opinion would serve as a "teaching opinion," announcing to litigants that the Ohio Supreme Court is

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[213] State v. Mole, 74 N.E.3d 368, 393 (Ohio 2016) (Kennedy, J., dissenting) ("[O]ur constitutional interpretation should be guided exclusively by the *language and history* of the clause at issue." (emphasis added)).

[214] State v. Aalim, 83 N.E.3d 862, 874–75 (Ohio 2016) (Kennedy, J., concurring in part and dissenting in part) (noting the need to examine the "*explicit text or history* of the Ohio Constitution." (emphasis added)).

[215] State v. Brown, 39 N.E.3d 496, 503–06 (Ohio 2015) (French, J., dissenting) ("carefully examining the *language* of the Ohio Constitution to justify its departure from federal law." (emphasis added)).

[216] *Mole*, 74 N.E.3d at 398–99 (French, J., dissenting) ("an independent analysis of the equal-protection guarantee in Article I, Section 2 of the Ohio Constitution premised on its *language, history or early understandings*.").

[217] State v. Smith, 165 N.E.3d 1123, 1130–32 (Ohio 2020).

[218] Youngstown City Sch. Dist. Bd. Educ. v. State, 161 N.E.3d 483, 508 (Ohio 2020) (Donnelly, J., dissenting) ("I am sorely distressed that this court has missed the opportunity to uphold fundamental principles of the Ohio Constitution . . . . The wise framers of the Constitution carefully fashioned checks and balances that are a cornerstone to our democratic system and that provide for good governance. *The intent of the framers of the Constitution should guide this court*." (emphasis added)); City of Cleveland v. State, 136 N.E.3d 466, 473 (Ohio 2019) ("[I]n construing the Ohio Constitution, our duty is to determine and give effect to the intent of the framers as expressed in its plain language . . . .").

[219] In recent years, Chief Justice Kennedy has emerged as a strong conservative voice for principled state constitutionalism, speaking passionately on the value of judicial federalism, which she defines as "a constitutional foundation to protect individual freedom from the overreach of government through a document of independent force, our state constitution." J. Sharon Kennedy, Panel One: Interpreting State Constitutions, 2021 Federalist Soc'y Ohio Chapters Conference, FEDERALIST SOC'Y (May 7, 2021), https://fedsoc.org/conferences/2021-ohio-lawyers-chapters-conference#agenda-item-interpreting-state-constitutions-2.

[220] David J. Owsiany, *The Ohio Supreme Court: A Court at the Crossroads*, FEDERALIST SOC'Y (Oct. 20, 2004), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/oQJkvIQCKk5NfzvDNUvR2AFofokMXxrq1czW7Jl9.pdf.

[221] City of Dayton v. State, 87 N.E.3d 176, 197 (Ohio 2017) (DeWine, J., dissenting).

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finally serious about consistently and independently interpreting and enforcing the guarantees of the Ohio Constitution.[222] This would in turn lead to an increase in the quantity, and more importantly, quality of state constitutional claims. One key obstacle to this is that proceduralist justices may be reticent about "rewarding" poor briefing by taking seriously underdeveloped state constitutional claims.[223] Yet, rather than wait for the "right" cases to come along to assuage these concerns (and in the interim "meeting every year and lamenting" the lack of briefing on state law issues[224]), the Court should exercise its powers to ensure that such cases are not only brought, but properly briefed. To the extent that the justices are unwilling to consider a state constitutional argument that was raised but not fully developed, the justices should order additional briefing.[225] If the Court is uncomfortable considering a state constitutional issue raised but not adequately briefed below, it may alternatively remand for further proceedings to better develop the record.[226]

There will inevitably be pushback to such an opinion or to such action to force attorneys to brief state constitutional claims, which is where the second aspect of the conceptual difficulty emerges. Proceduralists raise institutional competence arguments, criticizing proponents of judicial federalism for arguing that "justices should dig into those provisions [of the Ohio Constitution] and find something new to hang onto," despite this being "not really the role of the Court."[227] Yet it is far less the role of the Court to permit its previous errors to remain the law. What this article and others argue for is not for an unfettered reading of policy values into the Ohio Constitution, but rather a reading of the Constitution as it is written and as it was meant to be understood and enforced, "in light of our history and traditions." This is the *via media* between the state constitutional embrace of declarationism and

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[222] WILLIAMS, *supra* note 18, at 144–45. For a recent example of a teaching opinion released by the Ohio Supreme Court in another area of law, see TWISM Enters. v. State Bd. of Registration for Pro. Eng'r & Surveyors, No. 2021-1440 slip op. 2022-Ohio-4677 (Ohio Dec. 29, 2022).

[223] *See* State v. Bembry, 90 N.E.3d 891, 894 (Ohio 2017) ("Generally, we will not consider any issue 'that was not raised in any way in the Court of Appeals and was not considered or decided by that court.'" (quoting City of Toledo v. Reasonover, 213 N.E.2d 179, paragraph two of the syllabus (Ohio 1965))). The court has "justified this rule in no uncertain terms":

> Any other rule *would relieve counsel from any duty or responsibility to the court*, and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel, which enjoins upon counsel the duty to exercise diligence and to aid the court, rather than by silence mislead the court into commission of error.

Id. at 894 (quoting State v. Driscoll, 138 N.E. 376, 378 (Ohio 1922)) (emphasis added).

[224] Donnelly, Judges' Panel, *supra* note 165.

[225] S.CT.PRAC.R. 17.09(A); *See, e.g.*, State v. Robinette, 685 N.E.2d 762, 765 (Ohio 1997).

[226] *See* OHIO REV. CODE § 2505.39; OHIO REV. CODE § 2503.44. The court of appeals may likewise remand such a case, so that the record is better developed at the trial level. OHIO REV. CODE § 2505.39. Additionally, in conflict cases, the Supreme Court may remand the case to the court of appeals with an order to "clarify the issue presented." S.CT.PRAC.R. 8.02(B). Such remands need not be viewed as a critique of the lower courts, but rather, a reprimand to counsel.

[227] Dewine, *supra* note 160.

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the principled approach of proceduralism.

One of the core arguments levelled by proceduralists against a full embrace of judicial federalism at this late stage of the development of the law is that it upends the stability and predictability of long-settled law. No doubt, stare decisis is a valuable tool, providing "a clear rule of law by which the citizenry can organize their affairs" and giving the legal system an air of continuity and predictability.[228] Yet ignoring errors in the law merely because they occurred long ago is no way to uphold the integrity of the law, and in fact could prove deeply damaging. Misplaced respect for stare decisis should not stand in the way of constitutional integrity and state sovereignty.[229]

Even where the language is the same, the fact that it appears in different documents drafted by different framers should, on its own, be sufficient to interpret the phrases differently. More specifically, the language of the Ohio Constitution should be interpreted with an eye towards the text and history of the provision at issue, *not* to subsequent interpretations of parallel *but distinct* clauses of the U.S. Constitution as interpreted by the U.S. Supreme Court, nor even the text and history of those parallel clauses.[230] To do otherwise is to conflate the Ohio Constitution—the embodiment of the people's sovereignty—with the status quo. Far from causing chaos and unpredictability, a consistent embrace of judicial federalism would actually render greater stability than an adherence to stare decisis rooted in shifting U.S. Supreme Court jurisprudence.[231]

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[228] Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1267 (Ohio 2003).

[229] State ex rel. Ohioans for Secure and Fair Elections v. LaRose, 152 N.E.3d 267, 288 (Ohio 2020) (Kennedy, J., concurring) ("[S]tare decisis does not compel adherence to an incorrect interpretation of the Constitution.").

[230] To be sure, constitutional copying (to the extent that certain phrases in the Ohio Constitution trace their origin to the U.S. Constitution) can lead to knotty interpretive problems. *See* Mitchell Gordon, *Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type*, 8 WASH. U. GLOB. STUD. L. REV. 487, 488–89 (2009).

> Doubtless both the original constitution and the copied constitution are distinct texts, and we may presume generally that only the copy is binding authority. Yet we may presume also that the borrowed constitution's framers, that is, the copyists, had sound reasons for copying those words in particular. How, then, should one weigh the relative authority of the parent text? . . . Must we know the borrowers' original understanding of the parent text? What if they misunderstood the parent text? Does it matter how they saw the parent text or its subsequent history—whether as an oracle, deserving full deference, or instead as a guidebook, providing a helpful historical account of common experience?

Id. The answer to these difficulties lies not in blindly following the subsequent precedent of a foreign court interpreting the "original" constitution, but rather in understanding the history behind why the copied text was adopted.

[231] The court appears to admit as much in its past reticence to "irreversibly tie ourselves" to potentially changing federal constitutional standards. Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999); *see also* DeWine, Judges' Panel, *supra* note 165 ("We certainly should not be tying our decisions to what the U.S. Supreme Court may do in the future, even when [the U.S. and Ohio constitutional provisions are identical]."). Maintaining this posture, the Court would avoid the embarrassment and awkwardness of having to reactively backpedal the Ohio Supreme Court's "harmonization" of its state constitutional interpretation in response to "unwelcome" developments in U.S. Supreme Court jurisprudence. It would also provide a settled state baseline to prevent contentious and drawn-out state constitutional litigation in

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While the subject of stare decisis could constitute an article or book in its own right, it is sufficient for purposes of this article to note that stare decisis should be no barrier to overruling past precedent uncritically conflating the provisions of the Ohio Constitution with those of the U.S. Constitution.[232] In its series of cases on stare decisis, the Court has gone so far as to state that the doctrine "is not controlling in cases presenting a constitutional question."[233] Even setting aside this bold proclamation (found in a plurality opinion), the Ohio Supreme Court has nevertheless recognized that it "not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors."[234] Where it is clear that there was no state constitutional analysis made in the earlier case(s), and therefore no basis for finding coextensivity between analogous state and federal constitutional provisions, the Court should absolutely overturn its past precedents.[235] To hide behind stare decisis to avoid correcting a known error is to engage in legalism of the highest degree and is tantamount to a dereliction of the justices' constitutional oaths.

B. Changing the Legal Culture

If the justices are more comfortable waiting for an appropriate test case to use as a vehicle for the issuance of a teaching opinion, there are a number of other helpful steps the Ohio Supreme Court could take to ensure that litigants raise and fully brief state constitutional claims, in addition to, or in advance of, the Court's issuance of such an opinion. While there are other institutions which can (and should) take steps to ensure the growth of a robust Ohio constitutionalism, what is most needed is a bold commitment from the justices themselves. The Ohio Supreme Court governs the requirements for admissions to the Ohio bar,[236] the rules of professionalism[237] and conduct[238] for Ohio attorneys and judges, and regulation of Continuing Legal Education

circumstances where the U.S. Supreme Court unexpectedly adjusts its own interpretation of the U.S. Constitution's rights guarantees. *See, e.g.*, Preterm-Cleveland v. Yost, 2022-Ohio-4540 (Ct. App. 2022) (whether the Ohio Constitution guarantees the right to an abortion following the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health*).

[232] *See* STEINGLASS & SCARSELLI, *supra* note 144, at 94 (stare decisis "should not present a significant obstacle to the court if it decides to more aggressively review its past constitutional decisions in the course of interpreting the Ohio Constitution.").

[233] State v. Bodyke, 933 N.E.2d 753, 763 (Ohio 2010) (lead opinion).

[234] Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1267 (Ohio 2003); *see also* State ex rel. Ohioans for Secure and Fair Elections v. LaRose, 152 N.E.3d 267, 288 (Ohio 2020) (Kennedy, J., concurring) ("[S]tare decisis does not compel adherence to an incorrect interpretation of the Constitution . . .").

[235] State v. Hackett, 172 N.E.3d 75, 84 (Ohio 2020) (Fischer, J., concurring). Stare decisis, "which only has a limited impact in the area of constitutional law, should be even less of an inhibiting force when the court is reviewing state constitutional provisions that had not [previously] been subjected to an independent review." STEINGLASS & SCARSELLI, *supra* note 144, at 95.

[236] OHIO REV. CODE § 4705.01; GOV.BAR R. I.

[237] GOV.JUD.R. I.

[238] PROF.COND.R. PREAMBLE (11); JUD.COND.R. PREAMBLE (3).

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(CLE) in Ohio.[239] Even where the Court cannot itself produce change, it wields influence to induce or persuade other institutions to do so.[240] This authority puts the Ohio Supreme Court in the driver's seat when it comes to fostering a robust Ohio constitutionalism.

Ohio possesses several powerful tools with which to initiate a cultural change in the state bar in favor of state constitutionalism. As some commentators have proposed, attorneys should be subject to ineffective assistance of counsel claims for failing to raise Ohio constitutional arguments when appropriate.[241] This would send a powerful signal that the Ohio judicial system takes the state constitution seriously and would forcibly kickstart the new era of state constitutionalism by ensuring that well-developed state constitutional arguments are made, beginning at the trial court level, and thereby preserved for the Supreme Court. It would prevent the justices from perpetually falling back on the excuse that the state constitutional claim was brought but not briefed, and therefore will not be considered.[242]

Testing state constitutional law on the bar exam would be another easy way to signal to lawyers that state constitutional law is important.[243] Although Ohio, which recently adopted the Uniform Bar Exam (UBE), retains an Ohio-specific component of the exam, this aspect of bar admissions in the state is woefully lacking.[244] The "Ohio Law Component" (OLC) is comprised of twenty-five online multiple choice questions utilizing an open-book format, no time limit (with the ability to pause and resume at will), and no limit of the number of times applicants can retake the test.[245] While state constitutional provisions comprise part of the course outline, the OLC's subject matter is quite broad.[246] Reframing the test to emphasize key Ohio

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[239] GOV.BAR R. X; GOV.JUD.R. IV; CLE REG. 300. Indeed, the court has "the unique and complete responsibility, as designated by Article IV, Sections 2(B)(1)(g) and 5(B) of the Ohio Constitution, to regulate *all matters related to the practice of law*" (emphasis added). State ex rel. Parisi v. Dayton Bar Ass'n Certified Grievance Committee, 150 N.E.3d 43, 49 (Ohio 2019).

[240] *See* OHIO REV. CODE § 2503.36 ("The supreme court may prescribe rules for the regulation of its practice, the reservation of questions, the transmission of cases to it from the lower courts, and the remanding of cases."). This section could be used to encourage trial and appellate courts to address constitutional claims and if necessary, order briefing to support them.

[241] SUTTON, *supra* note 144, at 192. There appears to be a growing expectation from the bench that the failure to properly raise or brief state constitutional claims is irresponsible. *See* Stewart, Judges' Panel, *supra* note 165 (describing it as "inexcusable" and "negligent" not to present state constitutional arguments); Jeffrey S. Sutton, C.J., 6th Cir., Recent National Developments on State Constitutions, Panel Discussion at Ohio State Bar Association CLE The Importance of the Ohio Constitution: Direct Democracy and State Constitutional Interpretation (Apr. 3, 2023) (describing the failure to bring or develop such arguments as a "form of ineffective assistance of counsel").

[242] SUTTON, *supra* note 19, at 122–23.

[243] SUTTON, *supra* note 144, at 193–94.

[244] GOV.BAR R. I, § 7.

[245] On top of all this, applicants are merely required to answer 80% of the questions correctly. *Ohio Law Component Frequently Asked Questions*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., https://www.supremecourt.ohio.gov/attorneys/admission-to-the-practice-of-law-in-ohio/ohio-bar-examination/ohio-law-component/ (last visited Nov. 5, 2023).

[246] *Course Outlines for the Ohio Law Component*, OHIO BD. L. EXAM'RS (Feb. 2023), https://www.supremecourt.ohio.gov/docs/AttySvcs/admissions/OLC/courseOutlines.pdf.

constitutional provisions and making the test more challenging and higher-stakes so that students take it more seriously are but two simple fixes the Supreme Court could easily make to signal to incoming attorneys that the Ohio Constitution is in fact "a document of independent force."[247]

The Supreme Court Commission on Professionalism is another tool at the Court's disposal, tasked as it is with developing and making available "educational materials and other information for use by judicial organizations, bar associations, law schools, and other entities in emphasizing and enhancing professionalism"; assisting in "the development of law school orientation programs, law school curricula, new lawyer training programs, and continuing education programs that emphasize professionalism"; and overseeing and administering "a mentoring program for attorneys newly admitted to the practice of law in Ohio as the Commission deems appropriate."[248] Though the scope of its purview is tailored to "promoting professionalism among attorneys admitted to the practice of law in Ohio," such a mandate does not exclude promoting state constitutionalism.[249] This commission could reshape the discussion and practice of state constitutional law in Ohio, touching as it does, legal professionals at all stages of their careers and in all regions of the state.

Although the Ohio Supreme Court is the protagonist in this story, other actors nevertheless have a role to play in changing the legal culture. As Judge Sutton has helpfully noted, local rules could be utilized to require litigants who raise state constitutional challenges "to separate their briefing between the state and federal constitutional claims."[250] Even in the absence of Supreme Court action, all eighty-eight courts of common pleas, and all twelve appellate districts in Ohio may adopt local rules to this effect.[251] Similarly, Ohio's law schools reflect the broader national practice of offering federal but not state constitutional law courses.[252] Changes in law school

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[247] Justice Fischer has referred to the adoption of the OLC requirement for new admittees as "at least a start in reminding those law students that there is a state constitution." Fischer, Views From the Bench, *supra* note 13.

[248] GOV.BAR R. XV, § 3(A)(4)–(5), (7).

[249] GOV.BAR R. XV, § 1(B).

[250] SUTTON, *supra* note 144, at 192.

[251] OHIO CONST. art. IV, § 5(B) ("Courts may adopt additional rules concerning local practice in their respective courts . . ."); *see also* APP.R. 41(A); SUP.R. 5(A)(1); CIV.R.83(A).

[252] Two of the ten Ohio (or Ohio-adjacent) law schools offer a regular course on state constitutional law. The Ohio State University and the University of Cincinnati both offer a "State Constitutional Law" course. Cleveland State University has in the past offered such a course. On closer examination, these offerings are even less impressive than might otherwise appear at first blush; the courses are taught by Judge Sutton at OSU, Judge Bergeron at UC, and Dean Steinglass at CSU, all scholars of the Ohio Constitution in their own right (whose works on the subject are extensively cited herein), who likely themselves proposed the courses to the university administrators rather than the other way around. They are also mere electives, and it is unclear how consistently they are offered or to how many students at a time. The law schools at the University of Akron, Capital University, Case Western Reserve University, University of Dayton, Northern Kentucky University, Ohio Northern University, and University of Toledo do not have any state constitutional law course offerings. For the lack of such courses nationally, see SUTTON, *supra* note 19, at 194–97.

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curricula, including not only offering, but requiring courses in state constitutional law, would train a new generation of attorneys to bring state constitutional claims rather than just federal constitutional claims. Such changes would put pressure on the Ohio Supreme Court to take further action itself.

Continuing legal education programs have so far been successful in raising attorneys' consciousness of state constitutional law.[253] Since 2019, the Ohio State Bar Association has put on a series of fantastic programs, "The Importance of the Ohio Constitution," coordinated by the redoubtable Dean Steinglass and featuring a majority of the sitting Supreme Court justices.[254] Likewise, the recently formed Federalist Society Ohio Chapters Conference has enjoyed success in emphasizing state constitutionalism at its annual meetings featuring justices and candidates for judicial office as well as judges, academics, and practitioners.[255] These professional associations could be joined by others, including Ohio's extensive network of local bar associations and American Inns of Court, in both raising awareness and further pressuring the Supreme Court to take the state constitution seriously, hopefully leading to an increase in briefing and arguing state constitutional claims from below.

C. *Alternative Solutions*

If the Ohio Supreme Court is unwilling to fulfill its responsibility to independently interpret the Ohio Constitution and instead persists in marching "lockstep" behind the U.S. Supreme Court, it will fall to the people of Ohio to guard their sovereignty themselves.[256] This is consistent with the people's duty as exposited by President Roosevelt in his address to the 1912 Ohio Constitutional Convention.[257] Other state high courts have taken it upon

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[253] *See* Collins, *supra* note 17, at xiii.

[254] *See, e.g.*, *The Importance of the Ohio Constitution: Direct Democracy and State Constitutional Interpretation*, OHIO BAR ASS'N, https://www.ohiobar.org/2023-cle-live-seminarsmeetings/the-importance-of-the-ohio-constitution-a222f96f/ (last visited Nov. 5, 2023).

[255] These gatherings began in 2017, and many of the speeches and panel discussions are available online. *See Inaugural Ohio Chapters Conference*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/inaugural-ohio-chapters-conference (last visited Nov. 5, 2023); *2018 Ohio Lawyers Chapters Conference*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2018-ohio-lawyers-chapters-conference (last visited Oct. 3, 2023); *2019 Ohio Lawyers Chapters Conference*, FEDERALIST SOC'Y, https://fedsoc.org/events/2019-ohio-lawyers-chapters-conference (last visited Nov. 5, 2023); *2021 Ohio Lawyers Chapters Conference*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2021-ohio-lawyers-chapters-conference (last visited Nov. 5, 2023); *2022 Ohio Chapters Conference*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2022-ohio-lawyers-chapters-conference (last visited Nov. 5, 2023).

[256] In the same manner as the U.S. Constitution, the Ohio Constitution "leaves room for countless political responses" to an overly or in this case under-assertive supreme court. Larry Kramer, *The People v. Judicial Activism,* BOS. REV. (Feb. 1, 2004), https://www.bostonreview.net/articles/larry-kramer-we-people/. Although lawyers and judges may be "chill[ed]" in considering such responses, if the court fails to correct its own errors, such responses are valid means by which the people can reassert their control over the state constitution. KRAMER, *supra* note 37, at 250.

[257] "[T]he decision of a State court on a constitutional question should be subject to revision by the people of the State." Roosevelt, *supra* note 1, at 15. "[T]he fault is not with the Constitution; the fault is in the judges' construction of the Constitution; and what is required is power for the people to reverse this false and wrong construction." *Id.* at 18.

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themselves to develop methodologies of state constitutional interpretation or to prioritize state constitutional claims over federal ones.[258] Ohio has done neither, as the discussion above demonstrates.[259] Ohio's citizens, however, are not powerless to prevent the continued inaction of the Supreme Court in this area.

The two principal tools available to the people to protect the integrity of their constitution and the sovereignty of their state are voting and the constitutional amendment process. Ohioans could opt either to vote out of office justices who refuse to prioritize the Ohio Constitution or to approve a constitutional amendment narrowing the scope of the Court's judicial review by requiring the justices to prioritize the state constitution in their deliberations. Each route offers promises and challenges. Complementing each tool, it will still be critical to utilize existing institutional structures (as discussed above) to change the state's legal culture to encourage litigants to bring state constitutional claims in addition to or instead of federal constitutional claims in state courts.

1. The Current Court and Using the Vote to Change It

Voting is the most basic, longest standing, and bluntest tool to check the Supreme Court.[260] One of the primary issues that necessitated the 1851 Ohio Constitutional Convention was the desire for an elected judiciary.[261] Despite numerous changes in the political climate of the state since that time, the popularity of judicial accountability to the people has been a constant theme: since the current constitution was approved in 1851, the voters of Ohio have twice rejected attempts to remove their authority to elect judges, each time by significant margins.[262] Ohio is one of thirty-eight states that utilize judicial elections to select or retain supreme court justices, and this method is

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[258] *See, e.g.*, Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981); State v. Jewett, 500 A.2d 233, 236–37 (Vt. 1985); State v. Gunwall, 720 P.2d 808, 812 (Wash. 1986); State v. Geisler, 610 A.2d 1225, 1231 (Conn. 1992).

[259] *See supra* part IV.

[260] "Most basically, elections provide a mechanism—the paradigmatic mechanism—for enshrining popular control over [an] institution . . ." Pozen, *supra* note 94, at 2068. "When the elections involve judgeships, they are special moments for affirming our collective commitment to popular sovereignty with respect to the application of law." *Id.* at 2069. Judicial elections "clarify the democratic basis of judicial authority and help legitimate that authority by grounding it in repeated public consent." *Id.*

[261] Barbara A. Terzian, *Ohio's Constitutional Conventions and Constitutions*, *in* 1 THE HISTORY OF OHIO LAW 40, 51 (Michael Les Benedict & John F. Winkler eds., 2004). For further discussion on the historiography of the impetus behind the transition from an appointed to elected judiciary in 1851, see Michael E. Solimine & Richard B. Saphire, *The Selection of Judges in Ohio*, *in* 1 THE HISTORY OF OHIO LAW 211, 213–16 (Michael Les Benedict & John F. Winkler eds., 2004).

[262] Most recently, in 1987, Ohio voters rejected such a proposal by a margin of 1,600,588 to 878,683 (64.56% nay vote). A similar proposed amendment from 1938 was rejected by a margin of 1,237,443 to 621,011 (66.58% nay vote). For the full text of both proposals, see *Ohio Constitution – Law & History: Table of Proposed Amendments*, *supra* note 94.

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by now well entrenched as part of the state's political and legal culture.[263] Coupled with mandatory judicial retirement at the age of seventy,[264] this gives the Ohio Supreme Court a fairly high turn-over rate and allows for fresh perspectives from the justices.[265]

Judicial elections are a critical tool for democracy and ensure that laws reflective of the will of the people are not struck down in order to instead reflect the will of the state judiciary.[266] Judges are dual representatives, standing as both a symbol of law and justice and as a representative of the people.[267] As noted above, there has already been a considerable shift in the attitudes toward state constitutionalism of Ohio Supreme Court justices occasioned by changing membership on the court, including the changing partisan composition of the court.[268] However, where a justice refuses to engage the state constitution in a way that is meaningfully distinct from the U.S. Constitution as interpreted by the U.S. Supreme Court, it may be the responsibility of the voters to exercise their rights to replace that justice and protect the sovereignty of the state.[269]

Voters should insist justices and judicial candidates commit to independently reviewing state constitutional claims. Where justices do not so commit, voters can and should vote against them.[270] Such a commitment on the part of justices and judicial candidates would not violate ethics rules, but would merely represent an affirmation that the justices are committed to the

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[263] *See Significant Figures in Judicial Selection*, BRENNAN CTR. FOR J., https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (last updated Apr. 14, 2023); Solimine & Saphire, *supra* note 262, at 228.

[264] OHIO CONST. art. IV, § 6(C).

[265] Since 2016, thirteen different justices have been seated at the Ohio Supreme Court. *See Justices by Term Since 1913*, *supra* note 175.

[266] LANGER, *supra* note 104, at 132 ("[I]f judges stray too far from the preferences of those to whom they are beholden, they may lose their seat on the bench or see their least preferred policy become law."). Though Langer's "constituents" also include state legislatures and governors, the point still holds. *Id.* However, there is also evidence that popular election may lead to an increase in the incidence of legislative enactments being struck down as unconstitutional. G. ALAN TARR, WITHOUT FEAR OR FAVOR 51–52 (2012).

[267] Nathaniel M. Fouch, *The Case for Districts: Descriptive Rural Representation on State Supreme Courts*, 16 U. ST. THOMAS L.J. 279, 286 (2020). Judges in the American system quickly came to be viewed as "agents of the people," representative of the people in the same manner as other public officials. WOOD, *supra* note 90, at 185–86; *see also* THE FEDERALIST NO. 78, *supra* note 40 ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."). This understanding laid the groundwork for the eventual institution of judicial elections. WOOD, *supra* note 90, at 186.

[268] *See Justices by Term Since 1913*, *supra* note 175.

[269] Although not in a judicial federalism context (as the case involved a state constitutional provision without a federal constitutional analog), Chief Justice O'Connor's concurring opinion in the recent legislative redistricting cases appealed directly to voters, informing them that they "should understand they have the power to again amend the Ohio Constitution." League of Women Voters v. Ohio Redistricting Comm., 192 N.E.3d 379, 415 (Ohio 2022) (O'Connor, C.J., concurring).

[270] Judicial elections are "symbolic vehicles for affirming the people's *active, ongoing sovereignty over the Constitution and the officials who apply it*," as well as "practical instruments for translating that sovereignty into concrete outcomes, for ensuring that the adjudicated Constitution remains aligned with public opinion." Pozen, *supra* note 94, at 2070 (emphasis added).

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role and responsibilities of the office they are seeking or seeking to retain.[271] Asking questions about the justices' and candidates' approaches to the state constitution would bring the issue to the fore in what are generally low-information races.[272] Judicial review of the state constitution, after all, is at the heart of the role of supreme court justices: the practice of interpreting and construing our fundamental law through the "normal ordinary practice of adversarial justice in the regular courts."[273]

2. Court-Constraining Constitutional Amendment

The historical desire for—and attempts to effectuate—judicial accountability in Ohio extends beyond judicial elections, cutting to the heart of the constitutional process itself. The concept of judicial review is not explicitly guaranteed by the Ohio Constitution. Even if it was, the Ohio Constitution could be—and has in the past been—amended to constrain judicial review where this power is used irresponsibly.[274] Ohio has a long history of attempting to set contours on judicial review, both politically and constitutionally, and has in the past experimented with and pioneered constitutional means of narrowing judicial review.[275] The state has a "full toolkit" for revising its Constitution, being one of only five states to utilize "legislatively proposed amendments, legislatively proposed conventions, a direct constitutional initiative, and a mandatory convention call."[276] Any one of these options would be an appropriate vehicle for formalizing a state constitutional interpretation method.[277] This type of "court-constraining amendment," as one scholar has termed it, has a venerable history; such amendments "have been an enduring feature of the state constitutional tradition."[278]

The early story of judicial review in Ohio is a turbulent one and is

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[271] Indeed, it would also be practical: "[T]he election of judges should help the advocate who is trying to convince the state court to chart its own path. And the reason I say that is it's a very strange form of getting reelected to say that one looks to Washington, D.C., for the presumptive answers to the meaning of a state law or state constitution. That doesn't strike me as a very flattering thing to say about an elected state court judge." Sutton, Recent Nation Developments on State Constitutions, *supra* note 241.

[272] G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 59–61 (7th ed. 2019); SHOMADE, *supra* note 112, at 116.

[273] WOOD, *supra* note 55, at 138–39.

[274] 1 CARRINGTON T. MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO 170 (1934).

[275] While Ohioans were occasionally successful in limiting state judicial review, national politicians have been largely unsuccessful, despite a long history of attempts. *See* Joseph L. Lewinson, *Limiting Judicial Review by Act of Congress*, 23 CALIF. L. REV. 591, 591–601 (1935); Katherine B. Fite & Louis Baruch Rubinstein, *Curbing the Supreme Court: State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 762–72 (1937); 1 MARSHALL, *supra* note 273, at 170–73; Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW. & HIST. REV. 205, 244 (2012).

[276] Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 284–85 (2016).

[277] "[T]he amendment power is the only *direct* check on judicial review." Marshfield, *supra* note 38, at 274 (emphasis added).

[278] John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 986 (2007).

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critical to understanding the political and legal history of the state.[279] The Constitution of 1802 enshrined legislative dominance in response to the perceived overreach of the territorial governor.[280] As such, judicial review was by no means guaranteed. When a common pleas judge first found a law unconstitutional, he was investigated by the legislature; when the Supreme Court did the same, the legislature impeached both the trial judge and the Supreme Court judge who was still on the bench.[281] When they were acquitted by a single vote, the legislature retaliated by passing the "sweeping resolution," declaring all judicial offices with seven year terms vacant,[282] and thereby "sweeping" judges from office and enabling the General Assembly to appoint more sympathetic replacements.[283]

Following the sweeping resolution, however, it became clear that judicial review was not going away.[284] The "popular acceptance" of judicial review was due in large part not to a rise in prestige in the Ohio bar,[285] but rather with "the decline in the public respect for the Legislature," which ultimately culminated in calls for a new constitution.[286] By the 1870s, judicial review was generally taken for granted.[287] It is even more so now.[288] While the power itself is now beyond debate, its scope need not be. It is possible to narrow the limits of judicial review through constitutional amendment, thereby keeping the judiciary from dominating the state government in the manner the federal judiciary is frequently seen to dominate the federal government.

In 1883, Article IV of the Ohio Constitution was amended to revise the quorum requirement for judicial review.[289] Whereas the 1851

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[279] William T. Utter, *Judicial Review in Early Ohio*, 14 MISS. VALLEY HIST. REV. 3, 19–20 (1927). The events briefly described below were noteworthy enough to be treated in comparatively great detail in the earliest histories of Ohio. *See* SALMON P. CHASE, A SKETCH OF THE HISTORY OF OHIO 30–33 (1833); CALEB ATWATER, A HISTORY OF THE STATE OF OHIO: NATURAL AND CIVIL 182–86 (1838).

[280] Walker, *supra* note 73, at 450–51.

[281] DAVID M. GOLD, DEMOCRACY IN SESSION: A HISTORY OF THE OHIO GENERAL ASSEMBLY 32–33 (2009). Interestingly, the legislative act in question was held unconstitutional because it violated the Seventh Amendment of the U.S. Constitution, not the Ohio Constitution. ANDREW R. L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780–1825, at 99 (1986).

[282] For the legal rationale behind the resolution, see Utter, *supra* note 278, at 23.

[283] STEINGLASS & SCARSELLI, *supra* note 161, at 28. For a detailed history of the controversy, see DONALD F. MELHORN, JR., LEST WE BE MARSHALL'D (2003).

[284] GOLD, *supra* note 280, at 34. *See also* Lewis v. McElvain, 16 Ohio 347, 354 (1847) ("There was a time when it was dangerous for the courts of this state to inquire as to the constitutionality of legislative enactments . . . But we have fallen upon different times. Supremacy seems to be claimed for the court, instead of the general assembly."). *See also* Miller v. State, 3 Ohio St. 475, 482–84 (1854) (describing the doctrine of judicial review).

[285] Attorneys remained in low esteem in the state. *See, e.g.*, Terzian, *supra* note 262, at 62–63 (attributing the failure of the 1874 Constitution to public resentment toward domination by lawyers).

[286] Randolph C. Downes, *Judicial Review Under the Ohio Constitution of 1802*, 18 NW. OHIO Q. 140, 144 (1946).

[287] David M. Gold, *The General Assembly and Ohio's Constitutional Culture*, *in* 1 HISTORY OF OHIO LAW 88, 108 (Michael Les Benedict & John F. Winkler eds., 2004).

[288] Bd. of Educ. of City Sch. Dist. v. Walter, 390 N.E.2d 813, 823 (Ohio 1979) ("The doctrine of judicial review is so well established that it is beyond cavil.").

[289] ISAAC FRANKLIN PATTERSON, THE CONSTITUTIONS OF OHIO 251–53 (1912).

Constitution originally permitted a majority of the Supreme Court's five judges to constitute a quorum in all cases, the amendment clarified that "whenever a case shall involve the constitutionality of an act of the [G]eneral [A]ssembly or of an act of [C]ongress, it shall be reserved to the whole court for adjudication."[290] This structural safeguard was designed to ensure that the judges of the Supreme Court did not lightly overturn acts of the General Assembly. While it was removed as part of a subsequent amendment, it represents an early effort to curb counter-majoritarianism by the Supreme Court.[291]

The next attempt to constitutionally limit judicial review emerged as a result of Supreme Court abuses of authority. Like their counterparts on the U.S. Supreme Court, most judges of the Ohio Supreme Court at the end of the nineteenth and beginning of the twentieth centuries repeatedly struck down social and economic reforms on the basis of "freedom of contract," scrutinizing legislative regulation of private enterprise.[292] When the 1912 Ohio Constitutional Convention met, its delegates sought to remedy constitutionally what the Supreme Court prevented them from remedying statutorily.[293] To that end, numerous reforms were proposed, including constitutional ballot and referendum procedures.[294] Supporters of such measures sought a more flexible constitutional amendment process which they believed "would be instrumental in securing the passage of social and economic reforms" which had been blocked "in the courts by intransigent jurists."[295]

In his address before the 1912 Convention, President Roosevelt spoke strongly in favor of providing a popular recall of unpopular judicial decisions.[296] He advocated in some manner for an abridgment of judicial review, noting that in the controversial cases overturning legislation, when the court was split, and "the judges and courts have decided every which way, and it is foolish to talk of the sanctity of a judge-made law which half of the judges strongly denounce."[297] President Roosevelt framed popular

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[290] OHIO CONST. art. IV, § 2 (repealed 1968).

[291] Downes, *supra* note 285.

[292] WILLIAM G. ROSS, A MUTED FURY 26 (1994); *but see* Jackson v. Berger, 110 N.E. 732, 733-735 (Ohio 1915) (Wanamaker, J., dissenting). Ohio Supreme Court justices have acknowledged this history. *See* City of Cleveland v. State, 136 N.E.3d 466, 479, (Ohio 2019) (DeWine, J., concurring); City of Rocky River v. State Emp. Relations Bd., 539 N.E.2d 103, 121-124 (Ohio 1989) (Wright, J., dissenting). To be clear, this "brand of activism" continued even after the 1912 Convention. STEINGLASS & SCARSELLI, *supra* note 161, at 107.

[293] *See generally* Dinan, *supra* note 277.

[294] John Dinan, *Framing a People's Government: State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999).

[295] Dinan, *supra* note 97, at 667.

[296] Roosevelt, *supra* note 1, at 15 ("When the supreme court of the State declares a given statute unconstitutional because in conflict with the State or the National Constitution, its opinion should be subject to revision by the people themselves."). He was less enthusiastic about the recall of judges, which he believed may endanger judicial independence. ROSS, *supra* note 291, at 136, 140.

[297] Roosevelt, *supra* note 1, at 18.

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intervention as a means to settle the dispute of a divided court: "[i]f there must be decision by a close majority, then let the people step in and let it be their majority that decides."[298] This critically important speech propelled the simmering debate about the recall of judicial decisions into the national arena.[299] It also appears to have influenced the proceedings of the convention.[300]

The state constitution was accordingly amended to require a "concurrence of at least all but one of the judges" for the Supreme Court to declare a law unconstitutional.[301] This mechanism preserved the separation of powers but provided an additional safeguard against partisan judicial intervention into the political process. Ohio was the first state to enact such an amendment.[302] The adoption of this supermajority requirement was part of a broader reaction of the people to judicial overreach, as other constitutional amendments at the 1912 convention overruled seven prior Ohio Supreme Court decisions, including those invalidating eight-hour workdays for public works, striking down pensions for school teachers, and invalidating other employee health and safety legislation.[303] While these specific amendments remedied past judicial overreach,[304] the introduction of ballot and referendum procedures and the supermajority requirement for judicial review were supposed to prevent future abuses: "[t]his inhibition against judicial overthrow was the most progressive act of a convention of progressives."[305]

The justices of the Ohio Supreme Court relentlessly complained about the provision.[306] Nevertheless, when it was challenged in federal court,

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[298] *Id.*

[299] Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J.L. HIST. 257, 257–58 (1980).

[300] Fite & Rubinstein, *supra* note 274, at 773–74. Chief Justice Marshall speculated that "[i]t is probable that the convention was influenced by a very remarkable address of Theodore Roosevelt." 1 MARSHALL, *supra* note 273, at 170.

[301] The full text of the relevant portion of the amendment reads: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." OHIO CONST. art IV, § 2 (repealed 1968). For an account of the debates which led to this precise formulation, see Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How* Mapp *became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 CASE W. RES. L. REV. 441, 443–52 (2001).

[302] Sandra Zellmer & Kathleen Miller, *The Fallacy of Judicial Supermajority Clauses in State Constitutions*, 47 U. TOL. L. REV. 73, 76–77 (2015). Although the amendment removed the 1883 constitutional case quorum requirements, the supermajority provision had the practical effect that the lack of a full bench made it extremely difficult to invalidate laws. Entin, *supra* note 300, at 461.

[303] For a list of cases overruled, see STEINGLASS & SCARSELLI, *supra* note 161, at 58–59.

[304] These amendments represented a "piecemeal" effort "to overcome particular instances of . . . judicial intransigence" which utilized existing channels of constitutional amendment. Dinan, *supra* note 294, at 669–70. They were backward-looking, not forward-looking.

[305] 1 MARSHALL, *supra* note 273, at 170. Chief Justice Marshall speculates that "[i]t is probable that the convention was influenced by a very remarkable address of Theodore Roosevelt." *Id.*

[306] *See, e.g.*, E. Cleveland v. Bd. of Educ. of City School Dist., 148 N.E. 350, 352 (Ohio 1925) ("When in the course of human events it becomes necessary for the majority of the Supreme Court of Ohio to differ from the judgment pronounced by the minority, and to assume the separate though inferior station to which

the U.S. Supreme Court held that the amendment did not violate the due process clause of the Fourteenth Amendment of the U.S. Constitution.[307] The people of Ohio had chosen, for good reason, to amend their constitution to limit judicial review following rampant abuse of that power.[308] Though the amendment's wording created some practical difficulties,[309] it nevertheless succeeded in preventing the Supreme Court's earlier abuses of power.[310] A better worded amendment today may limit judicial review in a manner that would force the Court to take seriously the demands of judicial federalism and accordingly establish a robust state constitutionalism.[311]

Such an amendment might perhaps read:

> United States Supreme Court decisions interpreting the United States Constitution shall not be construed as authoritative in the interpretation or construction of the Ohio Constitution by the Supreme Court of Ohio, even where provisions of the two documents are similar or identical. Such decisions may be cited persuasively in judicial opinions interpreting or constructing the Ohio Constitution only insofar as the analysis is grounded in the history and text of the Ohio Constitution.

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the amendment of 1912 has consigned them."); Bd. of Educ. of City Sch. Dist. v. City of Columbus, 160 N.E. 902, 902 (Ohio 1928) ("calling attention to the deplorable situation which has grown out of the practical operation of the aforesaid constitutional provision"); 1 MARSHALL, *supra* note 273, at 173 ("It is not too much to say that [the amendment] has placed the courts and the legal profession of Ohio in a ridiculous light before courts and lawyers of other states.").

[307] Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 81 (1930).

[308] Frederick Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. CIN. L. REV. 191, 207–08, 212, 214 (1939).

[309] The precise wording of the amendment led to some unintended consequences whereby "the validity of a statute would turn on what a lower court had decided," as a simple majority was required to affirm and a supermajority to reverse the court of appeals determination. Entin, *supra* note 300, at 452–64; *see also* Woodbridge, *supra* note 307, at 278–81. Yet, "[t]his unfortunate situation could have been avoided by simply omitting the final clause in the amendment," which was "by no means an essential and integral part thereof." Fite & Rubinstein, *supra* note 274, at 776. Unfortunately, rather than revising the provision, this limitation on judicial review was subsequently removed entirely from Article IV by constitutional amendment in 1968 as one among many parts of the Modern Courts Amendment. Milligan & Pohlman, *supra* note 127, at 845–46.

[310] ROSS, *supra* note 291, at 226. The court, in spite of its grumblings about some of the seemingly absurd results produced by the amendment, acknowledged its broader structural effect:

> [U]nder the present constitution the supreme court of Ohio has been clearly and distinctly directed by the people of Ohio that the power to set aside laws passed by the general assembly, over which the people exercise the veto power through the referendum, is to be exercised with the greatest care. . . . [T]he privilege of exercising the vast responsibility of [judicial review] has been hedged about with the most positive and drastic limitations.

State ex rel. Turner v. U.S. Fid. & Guar. Co., 117 N.E. 232, 234 (Ohio 1917).

[311] Such an amendment would constitute a "constitutional reform" of the sort that could "be a source of pride and a unifying force" in the state, in addition to its practical implication of ideally forcing the supreme court to take the state constitution more seriously. G. Alan Tarr, *Introduction* to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 1, 4–7 (G. Alan Tarr & Robert F. Williams eds., 2006).

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> When litigants bring before Ohio courts claims arising under the both the Ohio Constitution and the United States Constitution, the claims arising under the Ohio Constitution must be addressed and disposed of independently of those arising under the United States Constitution.

The first part of this proposed amendment would insulate many of the Ohio Supreme Court's decisions against review by the United States Supreme Court by ensuring that all opinions would rest on adequate and independent state grounds, thus preserving state sovereignty. The second part would foster the development of a robust state constitutional jurisprudence. While the language of this amendment here is purely hypothetical, the point is that creative solutions should not be foreclosed in attempting to protect and promote the independent force of the Ohio Constitution.

VI. CONCLUSION

The goal of an independent Ohio state constitutional jurisprudence is the establishment of a more logical, consistent, and democratic constitutional jurisprudence, which takes seriously the independent force of the Ohio Constitution. By taking the state constitution seriously, the Ohio Supreme Court can foster a robust state constitutionalism for the protection of individual rights. It can fortify existing constitutional guarantees by grounding them in the text, history, traditions, and structure of the Ohio Constitution, rather than looking to the federal government for guidance on interpreting the guarantees of the state constitution. By revisiting erroneous precedent that undermined the independent force of the Ohio Constitution, and by laying out guidelines for attorneys and litigants making constitutional claims, the Ohio Supreme Court can fulfill the promise of Arnold and transform the Constitution into a "charter for democracy" in practice. If it refuses to do so, it will fall to the people of Ohio to guard their sovereignty themselves.

Constitutions are "frail, paper creations of fallible human beings," which "only function well to the degree that politicians, the law courts and the populations concerned are able and willing to put sustained effort into thinking about them, revising them when necessary, and making them work."[312] If the Ohio Supreme Court willfully chooses to ignore the

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[312] LINDA COLLEY, THE GUN, THE SHIP, AND THE PEN 13–14 (2021). *See* Sam'l F. Miller, *Introductory to Constitutional Law*, 4 S. L. REV. 79, 82 (1878) ("[S]omething more than written constitutions is essential to the safety and perpetuity of any government, and that is a due reverence of the people for their constitution and laws. All the instruments in the world, though they were written in letters of gold upon the most imperishable tablets, would be but as sand where the people themselves have no respect for law or for those who administer it."). Hence, the importance of a robust *constitutionalism* to bolster the constitution itself.

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independent force, history, and meaning of the state's constitution, the Ohio Constitution will become meaningless, and the state will cede its sovereignty to the unelected and unaccountable U.S. Supreme Court. To be clear, the fostering of a robust Ohio constitutionalism will not be easy; it will require the commitment of Ohio's judges and justices, additional briefing by the Ohio attorneys, and additional research and teaching by the Ohio's legal, political, and historical scholars. The result, however, will be a triumph for democracy, self-determination, and governmental accountability. By construing the state constitution on its own terms, the justices of the Ohio Supreme Court will usher in a new era in this state's venerable history, re-engaging the people in the difficult, but critical, work of self-governance and becoming the political community we were meant to become.

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