



## 2018 FORUM FOR STATE APPELLATE COURT JUDGES

### *State Court Protection of Individual Constitutional Rights*

## STATE CONSTITUTIONAL STRUCTURES AFFECT ACCESS TO CIVIL JUSTICE

*Justin R. Long\**

### *Executive Summary*

*Justin Long's paper addresses nine ways in which the structures of state constitutions protect individual rights in the area of civil justice, in some ways affording more protections than does the United States Constitution.*

*In his introduction, he points out that the federal Constitution, and the federal courts which it authorizes and governs, protect individual rights to an extent. They provide a federal "floor" for our rights. America's state constitutions, however, create rights beyond the federal catalog, and the state courts enforce them in ways in which the federal courts cannot.*

- *In section I, Professor Long describes the ways in which state constitutions allocate power among the states' governmental institutions in ways different from those of the federal Constitution. State constitutions create institutions that have broader substantive authority than the federal government, and they enforce rights through judges who, for the most part, have legitimacy derived directly from the voters. They also impose checks on state government, including subject matter exclusions; procedural limitations; and empowerment of state institutions to act against the legislature when appropriate.*
- *In section II, Long considers the civil justice system more specifically, focusing on who decides cases and the critical role of institutions in enforcing rights to prevent their violation.*
- *In section III, Professor Long looks at the authority of the state courts to adopt rules that can be fair and neutral, favoring neither side, or more outcome-determinative, as when they erect barriers to, or increase the cost of, litigation. He discusses conflicts that can and do arise between court rules and inconsistent state statutes.*

---

\* Associate Professor, Wayne State University Law School, Detroit, Michigan. A.B., Harvard College; J.D., University of Pennsylvania.

- *In section IV, Long discusses the ways in which the courts' authority over law school enrollment, bar admission, and attorney conduct can impact the availability of legal services to citizens. He points out that increased diversity in law schools—and, ultimately, in the bar as a whole—could help to enhance access to justice for minorities and the indigent.*
- *Section V focusses on the “civil Gideon” concept: constitutional protection of the right to counsel in certain civil cases that affect crucial personal matters like parental rights, evictions, adoption, foreclosure, public benefits, and consumer debt collection.*
- *In section VI, Long discusses the state constitutions' grant to the state courts of authority to secure their own functionality, through the power to require adequate funding from the state government. He provides examples of situations in which courts have had to become litigants against their own state governments in order to continue to fulfill their obligations to provide justice.*
- *In section VII, Professor Long examines constitutional provisions that create, fund, and staff state government programs (like employee benefits and pension plans), and require that the activities be administered responsibly.*
- *Section VIII is dedicated to the unique role of the state attorneys general, most of whom are elected by the citizens. State constitutions ensure that they have the authority to enforce the law and individual rights, even in the face of political opposition from state executives and legislators.*
- *In section IX, Professor Long looks at the ways in which state constitutions empower state agencies, giving them the power to regulate business, health care, worker safety, education, and the environment.*

*In conclusion, Professor Long observes that most of the constitutional structures he examines have no federal analogues. He argues that the state courts should draw confidence from the sometimes unusual provisions of their constitutions, and embrace and enforce them in the interest of their citizens.*

---

## **Introduction**

When we think about state constitutions (as rarely as that might be for most lawyers) and how they differ from the federal Constitution, most likely we consider how individual rights under state constitutions can be protected above the federal floor. Typically, these questions arise in the area of criminal procedure. For example, what can be regulated as obscenity under the federal First

Amendment is protected under the Constitution of New York,<sup>1</sup> and what is a permissible police search under the federal Fourth Amendment violates the Washington Constitution.<sup>2</sup>

Prof. Jeffrey Shaman authored a thorough and thoughtful catalog of these individual rights,<sup>3</sup> and I heartily recommend that every state judge keep a copy close at hand. For the specific purposes of this forum, Prof. Williams has described how state constitutions can and do protect individual rights above the federal floor in the area of civil justice. Even as someone who thinks about state constitutions every day, I still find myself startled by Prof. Williams's work: who would have imagined that there could be state common law torts that cannot be superseded by the legislature?

Relatedly, when we think about access to civil justice, we tend to focus on private law: the torts, contracts, and property disputes that adjust the relative power of people acting in the free market. Government power can be oppressive, but so, too, can economic power. Workers and consumers turn to the courts for protection from this private oppression. The law, and its observers, largely treat these disputes as relevant to the parties involved and little else. By contrast, *public* law, the constitutional law that determines the relative power of institutions of government and citizens' rights against that government, can sometimes be forgotten in both legal and scholarly writing about civil justice.

But the focus of this paper is different. Instead of first-order individual rights, here I will discuss second-order constitutional structures that protect and enhance those rights. I refer to institutions, not rights, and public law, not private law. In math, if individual rights are the function, you would think of this paper as taking the integral; in music, if rights are the melody, here is an account of the harmony. And as with individual rights, state constitutions can and do vary in quite meaningful ways from the federal constitution.

Some of these variations are themselves startling: for example, if the three branches of government must include a legislature accountable to the people and supreme in lawmaking, an executive accountable to the people and supreme in executing the laws, and a judiciary independent from the people but ultimately accountable to the other two branches, then *no state* has three branches of government. The concept simply does not fit (as we will see in detail below). So the most important first step in thinking about state constitutional structure is to open your mind to the possibility (and even likelihood) of truly creative diversity in function and form. What we teach in the law schools about federal constitutional structure (typically the only kind of constitutional structure we teach), is at best a loose analogy to the way things work in the states. And the federal Constitution itself leaves open this constitutional space for the states to go their own weird ways.<sup>4</sup>

---

<sup>1</sup> See *People v. P.J. Video, Inc.*, 501 N.E.2d 556 (N.Y. 1986); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 553 (N.Y. 1986).

<sup>2</sup> See *Washington v. Boland*, 800 P.2d 1112 (Wash. 1990).

<sup>3</sup> JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* (2008).

<sup>4</sup> See U.S. Const. amend. X. See generally G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 115 PENN. ST. L. REV. 1133 (2011).

## **I. State constitutions allocate power among governmental institutions differently from the federal Constitution**

One of the foremost theoreticians in current state constitutional studies, James Gardner, has described our American federal system as a contest for affection.<sup>5</sup> If the people trust the federal government more, they can trust it with more powers by way of the constitutional arrangement. And if the people trust their state governments more, they can likewise bolster it with constitutional arrangements.<sup>6</sup> Given the cultural/political difficulty in amending the federal Constitution, the more ordinary place to adjust these arrangements is in the state constitutions.

A state with complex and deep limits on legislative procedure, or a state with too many checks and balances among branches, will be unable to pass much legislation, unable to implement policy, and therefore unable to do much good (or harm) for the people. When the people of that state seek help, they will turn to the government they like better: the federal government. For a practical example, consider a state like Florida with strong limits on its power to borrow money. When a natural disaster strikes, and the people of Florida need their homes rebuilt, their infrastructure restored, and their environment rehabilitated, state assistance would necessarily be inadequate because the state's budget cannot accommodate the sudden massive expense while remaining balanced. Instead, the people turn immediately to the federal government for assistance from FEMA. After all, the federal government has proven itself quite willing to borrow whatever amount it wants to satisfy its policy preferences.<sup>7</sup> Conversely, if the state government is structured without impediments to policy-making, with a vigorous executive and an unhampered legislature, it will fill the gaps left by a federal government that lacks constitutional power to make or enforce the full range of desirable policies. For example, a state like Massachusetts could adopt far-reaching public health insurance ("Romneycare") without the constitutional controversy<sup>8</sup> that has dogged the Affordable Care Act ("Obamacare"). Maybe the state has the fiscal resources to carry out such policies, or maybe it doesn't, but, as a constitutional matter, it has far more room to maneuver than does the federal government.

What does all of this have to do with access to civil justice? As important as the individual rights are, they mean nothing if they cannot be implemented and protected. State constitutions create the institutions that are capable of providing injured people a remedy, or not. And states go about protecting these remedies through governmental structures that might well seem bizarre from a federal perspective. Naturally, the front line for protecting access to civil justice is the judiciary. And state courts have a variety of powers that federal judges would gnash their teeth in envy over (if only they knew about them!).

---

<sup>5</sup> See JAMES GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005).

<sup>6</sup> The third leg in the table of power is the private sphere. If the people handcuff both their federal and state governments, they are necessarily empowering private power—corporations. If the people fear oppression in their role as workers, consumers, and small entrepreneurs, they must give some layer of government sufficient power to act against the forces that threaten them in the private economy.

<sup>7</sup> See generally Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 *RUTGERS L.J.* 907 (2003).

<sup>8</sup> See, e.g., *Nat'l Fed. of Indep. Business v. Sebelius*, 567 U.S. 519 (2012).

For one thing, the scope of state courts' substantive authority is greater than that of the federal courts. State courts make common law, routinely and well; federal courts generally do not.<sup>9</sup> Most state high courts, with the assistance of other state judges, create the rules of procedure and evidence for their states.<sup>10</sup> The federal Supreme Court (after preliminary work by subordinate institutions of the judiciary) produces a draft of procedure and evidence rules for the federal courts, but it does so subject to Congress's power to reject the Court's rules and only because Congress has delegated it that responsibility<sup>11</sup> just as it delegates the details of rulemaking for highway safety to the Department of Transportation. State courts also regulate the bar, a crucial function for determining whether the indigent, the marginalized, and the unpopular will have access to law or not.

Furthermore, unlike federal judges, most state judges have direct democratic legitimacy in that they have stood for election and won. As Prof. Helen Hershkoff has explained, state judges' close connection to the people, via the ballotbox, should lead them to feel empowered to carry out their duties unapologetically and with gusto.<sup>12</sup> Federal judges just don't think about courts as having democratic legitimacy; even Justice O'Connor, a famous proponent of states' rights, has written of the "representative branches" when she meant the *political* branches.<sup>13</sup> Thirty-seven states elect their judiciary, in one way or another.<sup>14</sup> State judges know the same rubber-chicken circuit that state senators know; they know the party bosses, the community organizers, and the out-of-state donors.<sup>15</sup> Whether or not judicial elections are wise policy, they at least mean that state judges need not worry that their "activism" is unaccountable or undemocratic.

Another feature of state constitutions is more uncomfortable to discuss, but cannot be avoided. To understand it requires a bit of background. As we all know, the federal government is one of *enumerated* powers. Whatever shenanigans the Commerce Clause and the Spending Clause have gotten up to lately, it remains irrevocably correct that each and every federal action—whether legislative, executive, or judicial—must have some origin in Constitutional text. If a letter carrier steps onto your porch to deliver mail, it's because her supervisor assigned that route. The supervisor's power to assign the route comes from a guidance manual, which in turn derives its authority from duly promulgated Post Office regulations. Those regulations are authorized by statute, and Congress is empowered to pass the statute by Article I, Clause 9.

---

<sup>9</sup> Compare *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring the application of state common law in federal diversity cases) with *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (making federal common law of admiralty by following state practices and principles).

<sup>10</sup> See Hon. Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS L. REV. 1309, 1322 n.76 (2017) (asserting that thirty-eight state high courts have constitutional authority to create rules of procedure). Connecticut, unusually, vests rulemaking power in the state trial courts, not the supreme court. See Conn. Prac. Book § 1-9; Rules Committee of the Superior Court, at <https://www.jud.ct.gov/Committees/rules/default.htm#Members> (listing the members of the rules-making committee, of whom only the chair is a supreme court justice).

<sup>11</sup> Rules Enabling Act, 28 U.S.C. § 2072 (1934).

<sup>12</sup> See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

<sup>13</sup> See Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277, 299 (2002), citing *Missouri v. Jenkins*, 515 U.S. 70, 112 (O'Connor, J., concurring).

<sup>14</sup> See Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQ. L. REV. 413 (2015).

<sup>15</sup> See, e.g., Michigan Judicial Selection Task Force, Report and Recommendations (April 2012), available at <http://www.lwvmi.org/documents/JSTFreport.pdf>.

But state governments are different. As a matter of constitutional theory, states—not the federal government—are the inheritors of the sovereignty enjoyed by medieval English kings.<sup>16</sup> That means that state legislatures have plenary power. They can pass any statute they wish, limited only where federal law or the state constitution prohibits their action. And the state governor, too, has plenary power in her proper sphere, subject only to the limitations imposed by federal law and the state constitution.

State courts? The same. They hold the same sovereign powers as the King’s courts, restrained only by superior sources of law and the prerogatives of the other branches. If that seems odd, consider under what authority the common law exists. An injured person comes to court; she asks the court to compel the injurer to make her whole. With no basis in text and no express grant of power, the court decides whether the injury complained of is redressable at law or not—even if that particular wrong has never been so much as imagined by the courts before. In other words, the state courts have power unless some other source of law takes it from them.

When we see state constitutional provisions directed at the legislature, then, we are seeing the expression in law of the people’s wish to *constrain* the legislature, not empower it. If the people wish to permit their state legislature to make law in any given area, they need do nothing. The default, unlike in the federal context, is that the power to act exists. By writing a legislature-directed clause into the constitution, then, the people express, at root, a lack of confidence in their elected legislators. Sadly, history offers many examples to justify such lack of faith.<sup>17</sup> State democratic processes have often resulted in “capture” of the legislature by special interests, to disastrous effect. The people have responded by writing state constitutions that reflect an intent to implement checks on a non-majoritarian legislature.<sup>18</sup>

These checks take a variety of forms, but the most important are three: subject matter exclusions, where the legislature is barred from acting on specified topics; procedural limitations, where the legislature is burdened with super-majority rules or other constraints on the lawmaking process (a method entirely absent from the federal Constitution apart from the basic requirement of bicameralism); and the empowerment of other state institutions to act against the legislature when appropriate. This third form of restraint, in turn, manifests in complex ways. For example, strong state constitutional protection for the powers of localities are one way a legislature must contend with, and even concede to, other state institutions.

State constitutional grants of authority to state agencies are another means of weakening the legislature and forcing it to make deals with other institutions rather than set policy unilaterally. For example, in my state of Michigan, the three leading state universities are governed by independently elected boards—and the boards’ authority over university policy exceeds that of the legislature. The legislature can use its power of the purse to affect university policy indirectly, but ultimate authority remains with the elected boards. Of course, by far the most influential check on the legislature is the judiciary.

---

<sup>16</sup> See *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>17</sup> See, e.g., Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012).

<sup>18</sup> Cf. *League of Women Voters v. Pennsylvania*, 181 A.3d 1083 (2018).

Courts in every state exercise ordinary judicial review of statutes, seemingly just as the federal courts do. But the reasons for state court review are fundamentally different. Judicial review in the states occurs against the background described above: judges with their own democratic legitimacy instead of isolating independence; the assumption of power except where prohibited instead of exclusively that power that has been strictly enumerated; and a deep, durable, and justified constitutional suspicion of the legislature. In that context, state judicial review can often be *majoritarian*. When the legislature has passed anti-majoritarian statutes because of special lobbying by powerful but not numerous elites (like the medical associations),<sup>19</sup> or has infringed the powers of other state institutions with their own democratic authority, or has violated constitutional procedural restraints with a wink and a nod, the state courts stand empowered to strike down the legislation in the name of the people.

The vigor, or lack thereof, with which the courts carry out this function directly affects injured parties' ability to win some form of justice, both against state officials and against private forces. After all, it is private forces—the economic elites that set terms of employment, compel consumer contracts of adhesion, and “speak” to the legislature with their dollars<sup>20</sup>—that will rush to fill the power void if state courts do not.

## **II. Structural arrangements intimately affect access to civil justice**

### **A. As every litigator knows, *who* decides often matters just as much (or more) as *how* they decide.**

The layer of government responsible for a particular issue will have, in many circumstances, a dispositive effect on how the issue gets resolved. For example, if air pollution is left to local governments to solve, there will be a race to the bottom and we will all live in smog (except, maybe, here in Denver). On the other hand, if the federal government has adequate power and responsibility to address air pollution, it can take great strides to protect public health. If financing schools is left to local governments, there will be enormous inequality of opportunity as rich towns buy high quality schools while poor towns look on in grief and frustration. On the other hand, if states and the federal government assume primary responsibility for financing schools, adequate and uniform resources for public education become possible, if not likely.<sup>21</sup>

Which branch of government bears primary responsibility for a particular issue can also determine the outcome. Legal economists point out that tort damages, all else being equal, are no different from an administrative fine or a legislative tax, at least from the perspective of a profit-driven firm.<sup>22</sup> But all else is not equal. Administrative agencies have the resources, expertise, and inclination to send out inspectors across the land, actively seeking safety violations. The tort system must wait for the injured party who is injured gravely enough for litigation to be cost-effective and who has the personal temperament and capacity to seek a remedy in court. And the legislature

---

<sup>19</sup> See generally Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2014).

<sup>20</sup> See *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310 (2010).

<sup>21</sup> Cf. Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401 (2014).

<sup>22</sup> See generally Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

can hold hearings, debate, and study research that brings forward perspectives from all sides before fixing a preventative tax on unsafe activities, while the tort system must rely on the parties before it for information and typically must treat arguments not raised as waived. For a concrete example of *who* decides making a difference, consider family law: historically, state legislatures were responsible for granting divorces, but today courts fill that role—and divorces have become much easier to get as a result.<sup>23</sup>

Even within the judiciary, the level of court with responsibility for an issue can have outsized effects on the results. The level of deference appellate courts pay to fact-finding by the trial court substantially affects whether losing litigants will be able to take a second bite at the apple (without a jury) or not. In New York, for example, the appellate division of the state supreme court has far greater power to review fact-finding than in many other states. The willingness of a state high court to correct inconsistent lines of appellate precedent<sup>24</sup> determines whether litigants will be able to exploit competing precedents to effectively throw the matter to the personal ideology of the judges, where the advocates' and parties' relative power outside of court (as important firms in the local economy, politically connected firms, or the like) can sometimes influence judges, consciously or unconsciously.

Unresolved inconsistencies lead to throat-clearing platitudes; as I teach my education law students, every student free-speech case must include the line, “Students do not lose their constitutional rights at the schoolhouse door” and then that line must be followed by some variety of, “But schools may restrict those rights to protect the educational environment.”<sup>25</sup> The pointless repetition of these lines does nothing to advance doctrine or explain the result to the litigants and lower courts, but does reveal how the federal Supreme Court has not taken enough of these cases for its precedents to be determinative in a wide array of common circumstances.

The result is that lower courts have more room to decide cases than the Supreme Court should give them. And a supreme court's response to lower courts that comply with precedent less than enthusiastically can have, and has had, major effects on the substance of the law. For example, after many lower federal courts began tightening pleading requirements in apparent contravention of the liberal standard articulated in *Conley v. Gibson*,<sup>26</sup> the federal Supreme Court responded not by slapping down the errant courts, but by adopting their unauthorized “reforms” as its own in *Iqbal*.<sup>27</sup> Similarly, the federal Court in *Pearson*<sup>28</sup> explicitly cited lower courts that were out of compliance with its precedent in *Saucier*<sup>29</sup>, which required them to consider qualified immunity claims in an order that would preserve the plaintiff's right to have the challenged conduct declared unlawful or not. Even though the lower courts had no authority to disregard binding, clear, effective law from the Supreme Court, their path was treated by the Court as evidence that its precedent

---

<sup>23</sup> See Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. Legis. 39 (2013).

<sup>24</sup> See, e.g., Michael J. Yetter, Note, *Gutierrez v. Smith, A Curious Case of Depraved Indifference Murder*, 77 ALB. L. REV. 1201 (2014) (describing conflicting lines of precedent in New York's depraved-indifference murder doctrine).

<sup>25</sup> See, e.g., *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000) (“students have a lesser expectation of privacy than the general public, but students do not shed their constitutional rights at the schoolhouse door”).

<sup>26</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>27</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>28</sup> *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>29</sup> *Saucier v. Katz*, 533 U.S. 194 (2001).

was not working and the Court then adopted the approach of the rebellious circuits. On the other hand, when some federal circuits were expanding non-mutual claim preclusion beyond previously expressed boundaries, the Court corrected them sharply in *Taylor*.<sup>30</sup> In this way, even when it comes to the law-announcing function, power can flow back and forth between high courts (which, formally, have the exclusive authority to set a conclusive interpretation) and the lower courts, which must implement the jurisprudence and may do so with more or less vigor.

The geographic boundaries of judicial authority and judicial financing also affect how the law shapes access to justice. Geographic jurisdiction, which is limited by more than just venue and long-arm statutes, can funnel the most vulnerable members of society to the most underfunded and overworked courts. If *state* courts are funded by *local* units of government like counties, the misalignment between resources and function can sometimes lead to underfunding the judiciary (such as by denying judges sufficient support staff, sufficient office space, or sometimes even adequate courtrooms) in ways that expand dockets, rush decisions, and impugn the dignity of the courts.

Perhaps worse, relying on the poorest localities to fund their courts often means that the poorest citizens are served by courts that cannot provide the justice their richer neighbors enjoy. Furthermore, if judges are elected or selected from local or regional districts instead of statewide, opportunities for forum-shopping increase as the differing characteristics of different areas of the state manifest themselves on the bench—and states exhibit greater internal political variation than they do compared to each other (just think about how Austin is much more like Boston than it is like the exurban areas around Dallas, and rural Maine is much more like rural West Virginia than it is like Portland). And, as is commonly acknowledged, the differing geographic cachements from which jury pools are drawn can yield extraordinary differences in the ability of plaintiffs, in particular, to file their complaints in a fair forum.

The layer of government, the branch of government, the level within the judiciary, and the geographic jurisdiction all work to strengthen or weaken a court's power to offer an adequate remedy for legal wrongs. Legal procedure also affects how these institutional arrangements allocate power. For example, some state courts have identified parts of their constitution as “hortatory”<sup>31</sup> or “precatory,” fancy euphemisms for “toothless.” Even among judges who would find shocking and unacceptable any suggestion that the federal Constitution contains inconsistencies and superfluities, there seems to be a widespread willingness to treat duly ratified elements of state constitutions as unenforceable. For example, in Pennsylvania, a quite direct and strong clause protecting environmental, historical, and aesthetic values was held unenforceable, even by the state Attorney General (who, as an elected official, has ample non-legal incentive to avoid over-enforcing the clause).<sup>32</sup> The first step against this tendency, then, is to accept that the people have placed clauses in their state constitutions purposefully—even if they seem obstructionist or hampering the legislature!—to solve historically contingent social problems, and expect the courts to stand firm in enforcing every last word.

---

<sup>30</sup> *Taylor v. Sturgell*, 553 U.S. 880 (2008).

<sup>31</sup> See, e.g., *Claremont School Dist. v. Governor*, 635 A.2d 1375, 1377 (N.H. 1993) (holding that the state's education clause is “hortatory” and not enforceable); *Mandel v. O'Hara*, 576 A.2d 766 (Md. 1990) (referring to art. 6 of the Maryland Declaration of Rights as “precatory” and so inapplicable).

<sup>32</sup> *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.* 311 A.2d 588 (Pa. 1973).

## **B. Rights without an institution capable of enforcing them are commonly violated.**

To accomplish the courts' duty to the people to preserve the rule of law, a private cause of action is necessary. Sometimes state courts have followed (often without much introspection) the federal practice of acknowledging the existence of a right but leaving enforcement to government officials like the Attorney General. For example, in federal law there is no private cause of action for damages to challenge conditions of immigration detention, even though there *is* formally a "right" to be free of unconstitutional conditions of confinement.<sup>33</sup> Factors in support of this practice at the federal level typically include federalism, deference to the elected branches, national security concerns, and a general antipathy to judge-made law.

But not one of these rationales applies at the state level. State courts are common-law courts, and routinely make law where justice and sound policy call for it. And state judges are mostly elected—meaning that the courts themselves *are* an elected branch—which gives that common-law making function democratic legitimacy. Federalism favors decentralizing decision-making down to the states; it does not favor states abdicating the problem-solving capacity properly devolved to them. So the federal skepticism about judicially created causes of action is simply misplaced at the state level. Access to justice requires private parties to have their grievances heard and remedied in the courts, even in the absence of legislation to that effect.

Furthermore, for civil wrongdoers to face justice, the courts must grant standing liberally. The federal standing doctrine is complex and restrictive. But as with the recognition of private causes of action, the reasons behind the federal approach to standing largely do not apply in state courts. For a start, every state has a court of general jurisdiction—unlike any federal court. Exercising general jurisdiction over all comers eliminates the need for the parsimony we see in federal standing doctrine. Many similar factors, carefully and comprehensively articulated by Helen Hershkoff, point state doctrine toward opening the courts to plaintiffs who would not satisfy federal requirements.<sup>34</sup> Since many social problems, such as climate change, affect a wide array of people but not any one person with provable severity, standing obstacles can exclude the courts from doing their share to right wrongs. This is a structural defect that states are well-positioned to correct.

Once the state courts recognize a private cause of action and a plaintiff with standing to pursue it, the courts must assert for themselves the power to remedy the legal violation for access to justice to be meaningful. Particularly in cases implicating the other branches of government, state courts have often recoiled from a full-bore remedial effort. For example, in education law, state courts have identified constitutional violations in one of our most important communal obligations only to then offer no more than a tepid admonition to the political branches.<sup>35</sup>

Courts that have more assertively exercised their authority to remedy wrongs have seen greater success.<sup>36</sup> In New Jersey, the supreme court has heard the same education-equity case nearly two dozen times, demonstrating its unwillingness to let repeated legislative non-compliance wear the

---

<sup>33</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

<sup>34</sup> Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

<sup>35</sup> See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (1996).

<sup>36</sup> See generally Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

court down into impotence.<sup>37</sup> In Massachusetts, when the legislature refused to follow a court order to appropriate money for a public finance fund for political campaigns, the state high court authorized a single justice to start selling state surplus at a judicial auction; compliance quickly followed.<sup>38</sup> Whether a reluctance to pursue assertive remedies is understood as a matter of doctrine or culture, procedure or structure, it remains a substantial chokepoint for access to justice even where a substantive right and appropriate procedures exist to protect it.

### III. State high courts have constitutional authority to make rules of procedure and evidence

One way state constitutions allocate lawmaking authority would seem exceedingly strange to a federal observer: they allocate it to the courts.<sup>39</sup> Most state high courts have the authority—whether granted expressly by constitutional text<sup>40</sup> or implied by inherent powers<sup>41</sup>—to make rules of civil procedure and evidence.<sup>42</sup> This is decidedly not the power that the federal Supreme Court has to promulgate the Federal Rules, which is nothing more than an agency’s power to make regulations under authority delegated from Congress and subject to Congress’s approval.<sup>43</sup> Some state constitutions have taken this power from the courts and granted it to the legislature;<sup>44</sup> others have acceded to the courts’ power but modified it with concurrent or superseding legislative authority.<sup>45</sup> But for most courts, the supreme lawmaking authority with respect to rules of procedure is the high<sup>46</sup> court itself, even in the face of contrary statutes.

This basic constitutional principle—that the judiciary should make its own rules, just as the houses of the legislature make their own rules<sup>47</sup>—might seem a mite abstruse. Constitutional separation of powers arguments already veer toward the theoretical, and constitutional separation of powers arguments about civil procedure are even more unlikely to grip the crowds at a summer barbecue. But as the many examples I discuss below demonstrate, these superficially abstract structural disputes can have profound effects on the workaday world of the civil litigator, and therefore on the ability of the unjustly injured to obtain redress. Who makes the rules can determine the outcome.

---

<sup>37</sup> See Education Law Center, *The History of Abbott v. Burke*, available at <http://www.edlawcenter.org/litigation/abbott-v-burke/abbott-history.html> (last visited May 31, 2018).

<sup>38</sup> See Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O’Neill*, 151 U. PA. L. REV. 277, 301, n. 155 (2002).

<sup>39</sup> See, e.g., Helen Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and Erie-Effects on State Governance*, 60 WAYNE L. REV. 117 (2014).

<sup>40</sup> See, e.g., MICH. CONST. ART. VI, § 5. See also Note, Kent R. Hart, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 UTAH L. REV. 153 (1992); Comment, Jason Bologna, *An Abuse of Power: How the Pennsylvania Supreme Court Uses Article V, Section 10(C) of the Pennsylvania Constitution to Dominate Procedural Lawmaking, and Why Pennsylvania Should Amend this Constitutional Provision*, 71 TEMP. L. REV. 711 (1998).

<sup>41</sup> See, e.g., Ill. S. Ct. R. 3 (describing court’s power to promulgate rules of procedure without reference to constitutional support).

<sup>42</sup> See generally ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 291-292 (2009).

<sup>43</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

<sup>44</sup> See, e.g., IOWA CONST. ART. V, § 14 (assigning the legislature authority over civil procedure).

<sup>45</sup> See, e.g., Va. const. art. VI, § 5 (declaring that court-made rules of procedure shall not conflict with statutes).

<sup>46</sup> With the exception of Connecticut, where a committee of *trial* court judges (albeit chaired by a supreme court justice, presumably so the trial judges don’t get out of hand) crafts the rules. See CONN. PRAC. BOOK § 1-9 (2018).

<sup>47</sup> See John H. Wigmore, Editorial Note, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1929).

The foundational case in this area comes from New Jersey.<sup>48</sup> John Winberry sued a clerk of court asserting that a grand jury report lodged against him was libel. The trial court held there was no cause of action and dismissed, so Winberry appealed—but with a catch. According to a state statute, Winberry had a year from the final judgment to file his appeal, and he filed just over two months after the judgment. But the rule promulgated by the state supreme court gave only 45 days to file an appeal. So whether Winberry could get an appellate court to review the merits or not turned on whether the court rule or the statute would control. The New Jersey Supreme Court pointed out that the tradition of court-made rules of procedure extended back to ancient English practice, a tradition near-universally picked up in the colonies and carried forward in the new states. The court noted that this type of rule-making is unmistakably a kind of legislation—there could be no hiding that—but that

many people think of the Legislature as a body that has as its sole function the making of laws for the future, the Governor as a chief executive who merely enforces the law, and the courts as having power only to decide cases and controversies. While these notions are true so far as they go, they are quite insufficient to explain the complicated operations of the three great branches of government, either historically or analytically. Thus, while the primary function of the courts is to decide cases and controversies properly brought before them, the Legislature also has the power to adjudicate as to the qualifications of its members, their deportment while in office, as well as in impeachment proceedings on the misdemeanors of all state officers, and the Governor has the right to try any officer or employee in the Executive Department on charges after notice and an opportunity to be heard, and a host of controversies are decided in administrative tribunals which are not courts but which are located in the Executive Branch of the government. Thus, adjudication is not exclusively a judicial function.... Not only are these seeming exceptions to an oversimplified statement of the doctrine of separation of powers necessary as a matter of logic and analysis of governmental activities, but they have centuries of historical justification.<sup>49</sup>

The court refused to be bound by formalist (and inaccurate) limitations of strict separation of powers. Instead, the court carried out an extensive analysis of the then three-year-old state constitution's text and legislative history to conclude that the court's own rules would, indeed, trump the legislature's statutes, but only where the rules were procedural rather than substantive. There being no dispute about the procedural element of the timing for appeals, the court ruled Winberry's appeal untimely.

Among the policy reasons the *Winberry* court found in support of its constitutional authority were the interest in uniformity obtained by the dominance of a single institution in the field (as opposed to pluralist procedure made by different branches at different times), and even more importantly, a dedication of the task to the institution most expert in the subject. After all, the court reasoned, who knows better than judges what the rules of procedure ought to be?

---

<sup>48</sup> *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950).

<sup>49</sup> *Id.* at 412.

Neither of these policy rationales impressed the justices of the Michigan Supreme Court in 1999, when they decided the case of *McDougall v. Schanz*.<sup>50</sup> As the result of an intensive lobbying campaign by the state medical association and insurance carriers, the Michigan legislature adopted a package of statutes aimed at “tort reform”—particularly limiting medical malpractice liability. Among those new statutes was a provision imposing heightened requirements for testifying physicians to be qualified as expert (and therefore permitted to testify as to the standard of care). This legislation conflicted directly with the aims of a plaintiff suing a group of doctors who failed to diagnose his wife’s diabetes, which caused her death. He wanted to put an expert on the stand who did not meet the new requirements. But the plaintiff figured that he had a good shot at getting the testimony admitted, because a Michigan Rule of Court plainly and explicitly permitted a doctor with the proffered qualifications to be placed in front of the jury. The case made its way to the supreme court for resolution of the question the New Jersey court answered in *Winberry*: does the statute or the court rule prevail?

In *McDougall*, the majority (a group of justices ideologically sympathetic to, and politically aligned with, the proponents of “tort reform”) held, quite vigorously, that rules do indeed trump statutes where they conflict—but only when those court-made rules are truly procedural, or as the court put it, affect the “mere dispatch of judicial business.”<sup>51</sup> Where there is *any* legislative policy other than court administration underlying a statute, the court rule is no longer procedural and can be superseded by statute. The court did not discuss the fact that no legislature anywhere would ever pass a statute that was *only* motivated by concern for the dispatch of judicial business. Voters don’t flock to the polls to support their favorite representative’s stance on the font size of legal briefs. Any bill sufficient to garner a majority of two houses’ worth of legislators would need some rationale that would affect the public, something to satisfy an interest group or win favor from a constituency. And the constituency of people who vote based on policies affecting the “mere” administration of justice without any effect on people outside the courts (court clerks? legal printers? stenographers?)<sup>52</sup> is just too tiny to support the passage of legislation. Thus, in the *McDougall* case itself, the court concluded that the statute fixing the qualifications of an expert witness was not simply a matter of evidentiary law, but was motivated by the legislature’s broader public policy push to limit tort liability. And, presumably, there will never again be a court rule that trumps a statute in Michigan.

The separation-of-powers dispute in *McDougall* had a major effect on the plaintiff’s effort to hold his wife’s doctors accountable for her death. But more broadly, that decision changed the battleground for how to win fair rules of procedure. While the supreme court was responsible for procedure (and evidence), citizens seeking a change in the rules could present their claims to the court—by definition a group of experienced and savvy former lawyers—at rule-making hearings. But they could also seek procedural change by way of litigation,<sup>53</sup> or by a democratic campaign. Michigan justices, like most state high court judges, are elected.

---

<sup>50</sup> 597 N.W.2d. 148 (Mich. 1999).

<sup>51</sup> *Id.* at 158.

<sup>52</sup> Even trial lawyers would be unlikely to spend lobbying efforts on procedural rules unless they had an effect on public policy, such as the ability for injured parties to recover compensation.

<sup>53</sup> *See, e.g.,* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (changing the settled meaning of Rule 8 of the Fed. R. Civ. P. by caselaw rather than through the rule-amendment process).

All of these approaches strongly favor lawyers, the people who know and care about the judiciary's internal politics and who work daily in the cauldron of the courts. These methods of accountability and change make surprise lurches in one direction or another unlikely and assure that experts in law have the most influence on policy within their ambit of expertise. By contrast, the crafting of civil procedure in the legislature subjects the courts to rules that swing from one political pole to the other as partisan majorities cycle through the statehouse. And the kinds of voices that get privileged in the legislature are different from those with influence in the judiciary. Lobbying by special-interest groups with no real knowledge of or belief in the fundamental principles of civil justice, or even rule of law, can (and often does) prevail over the measured voice of the experienced bar. Changes can be piecemeal without thought for their effect on the overall litigation experience. And high-visibility or controversial questions get disproportionate attention while important but "technical" issues are left unexamined.

In another personal injury case that turned out to really be about separation of powers, *Lebron v. Gottlieb Memorial Hospital*,<sup>54</sup> the Illinois Supreme Court confronted a state statute setting caps on non-economic (but still compensatory) damages, specifically in medical malpractice cases. There was no court rule in open conflict with the statute. But after a comprehensive review of *why* plaintiffs are entitled to damages, how that entitlement can vary from case to case, and how the courts had always operated to apply rationality to damages awards through the procedure of remittitur, the supreme court concluded that the statute was a legislative encroachment on the powers constitutionally vested in the judiciary. Therefore, the caps were invalidated on state constitutional separation of powers grounds.

In Ohio, "a power struggle between those who seek to limit their liability and financial exposure for civil wrongs and those who seek compensation for their injuries" roiled the state.<sup>55</sup> After the legislature passed a statute that, among other things, required plaintiffs to obtain a "certificate of merit" in medical malpractice cases before their action could go forward, the supreme court ruled that the requirement violated the state civil rules, which contained no such obstacle. In an opinion that can only be described as heated, the supreme court reiterated its longstanding understanding of the state constitution's explicit grant of rulemaking authority to the judiciary. While the court could not make substantive law in the guise of procedural rules, where its rules were procedural no statute could supersede them. Thus, again, a highly political and practical fight about how far the law should go to provide a remedy for people injured by medical professionals was transformed into a structural dispute about separation of powers. And it was on that battlefield—the historical, philosophical ground on which the constitution allocated power among government institutions—that the healthcare policy dispute and the injured parties' entitlement to relief were finally determined.

It is worth remembering, in thinking about cases like *Winberry*, *Lebron*, and *Ohio Trial Lawyers*, that these cases could not possibly have come out the way they did under federal constitutional doctrine. The Rules Enabling Act,<sup>56</sup> by which Congress delegated its power over the lower federal courts to the Supreme Court for the development of procedural rules (but retained the last word by requiring proposals to come back to Congress before taking effect), is "undoubted[ly]"

---

<sup>54</sup> 930 N.E.2d 895 (Ill. 2010).

<sup>55</sup> *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

<sup>56</sup> 48 Stat. 1064 (1934).

Constitutional.<sup>57</sup> The federal Supreme Court, presented with the question of whether an Act of Congress must yield to a contrary Rule, would find the matter farcical if not sanctionable. As a result, the fight over procedure—the rules of the game that can be fair or fixed, and that determine, in so many cases, who wins and who loses—must ultimately be carried out in the political branches at the federal level. That the states, broadly, have made the opposite choice goes to the heart of our federalist system. There is no one way of doing something in American democracy. Groups that struggle to be heard over the din in the lobbies of legislatures might find a more receptive forum in the judiciary; groups ill-equipped to seek change in the courts might find greater access in the capitols. The big questions before us might be the same, and their political connotation might also; some judges lean one way, some lean the other, just as some politicians do. But the *way* we carry out that large, important social conflict matters enormously to what result we get. He who sets the agenda controls the outcome.

#### **IV. State high courts have constitutional authority to regulate the bar**

For ordinary people, especially including the indigent or otherwise vulnerable, access to justice is crucial because it puts the power of the state on their side against the economic elites who oppress them in the marketplace. If the courts lack power—if the judges are demoralized, the dockets are overcrowded, and competent attorneys won't accept judicial appointments—then the courts cannot protect the injured and downtrodden. Again, state constitutional structures bear on access to justice in profound and practical ways.

In addition to deciding the rules by which cases go through court, state high courts decide *who* may argue those cases. Access to civil justice is not commonly linked to state policy about bar admissions. Instead, we see two large-scale debates presented as if they were unrelated. On the one hand, post-Great Recession changes in the legal services market caused law school enrollment to plummet. To keep up their revenue, many schools admitted students with low LSAT scores, which correlated with low bar passage (and also with the race and class of the admitted students).<sup>58</sup> As legal jobs disappeared, vituperative anti-law school rhetoric from popular websites like Above the Law<sup>59</sup> and even the New York Times<sup>60</sup> poisoned the common conception of lawyering's economic, social, and moral value. In particular, critics attacked law schools with low bar passage rates on the ground that students' expensive educational loans could never be repaid without access to a legal career. Even the president of the National Conference of Bar Examiners blamed law schools for the historically low bar passage rates.<sup>61</sup>

On the other hand, the unmet need for indigent clients across the country continues at a heart-breaking scale. Long-time homeowners facing foreclosure find themselves outgunned in mortgage proceedings by the banks' greater access to savvy lawyers; public benefits recipients face new and

---

<sup>57</sup> *Sibbach v. Wilson*, 312 U.S 1, 9 (1941).

<sup>58</sup> See generally Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—"Do the Work!"*, 40 CAL. W. L. REV. 321 (2004).

<sup>59</sup> See <http://abovethelaw.com/>

<sup>60</sup> See Lawrence E. Mitchell, *Law School is Worth the Money*, N.Y. TIMES (Nov. 28, 2012) (referring to attacks on legal education)

<sup>61</sup> See Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47 (2015).

complex requirements without affordable representation; arbitration clauses and anti-class action initiatives leave workers alone and vulnerable, and in need of advocates.<sup>62</sup>

Increasing the socioeconomic diversity of the bar would likely increase the number of lawyers motivated to take on these clients. But the broader sense that too many lawyers are competing for too few (paying) legal jobs has led to calls for increasing the difficulty of passing the bar examination.<sup>63</sup> Even defenders of the bar examination agree that it replicates the racial disparities present earlier in the pipeline: law school admissions, LSAT scores, college graduation rates, and SAT scores. Critics of the current structure of the bar exam go further, arguing that it exacerbates racial inequity and worsens the under-representation of people of color in the legal profession.<sup>64</sup> And, as already noted, under-representation at the bar correlates with lower access to attorneys for clients from those under-represented racial and ethnic groups.

Wherever one falls along the spectrum of opinion on this issue, it should be clear that a large and growing pool of clients who can't afford lawyers is *not a separate question* from the problem of law school enrollment and bar admissions. An economist would characterize the current debate around law schools and low bar passage rates as addressing the problem of supply. But the problem of demand is just as pressing: how can we increase the access of indigent and otherwise marginalized communities to competent lawyers?<sup>65</sup> Some part of that discussion must include a reconsideration of whether the bar exam is effective at testing what we need it to test and how raising the required scores would affect these vulnerable client communities.

And what is the appropriate institution of government to carry out that reconsideration? State high courts and the relevant commissions and committees of the state judiciary that report to them have well-established authority in this area. For example, in a Connecticut case from 1961,<sup>66</sup> the state high court considered whether a New York lawyer who had not graduated from a law school could still be admitted to the Connecticut bar, as a statute would have permitted, or was properly denied admission, as court rules required. The court held without hesitation and without dissent that only the judiciary could set the qualifications for attorneys. This result followed from an analysis of the constitutional practice in other states, the early English and colonial practice, and the legislative history of the constitution; all of those sources pointed in the same direction.

This structural allocation of power means that, instead of the horse-trading, logrolling, and grandstanding associated with legislative decision-making, citizens can expect the relatively collegial, learned, and deliberate lawmaking of the judiciary. Even politically unpopular outcomes are feasible for a court focused on the long-term good of the commonwealth. The judges and justices responsible for regulating admission to the bar can—and should—set policy not just in light

---

<sup>62</sup> See generally Eric A. Zacks & Dustin A. Zacks, *Not a Party: Challenging Mortgage Assignments*, 59 ST. LOUIS U. L.J. 175 (2014).

<sup>63</sup> See generally William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547 (2004).

<sup>64</sup> See *id.*

<sup>65</sup> See generally Cathryn Miller-Wilson, *Harmonizing Current Threats: Using the Outcry for Legal Education Reforms to Take Another Look at Civil Gideon and What It Means to be an American Lawyer*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 49 (2013).

<sup>66</sup> *Heiberger v. Clark*, 169 A.2d 652 (Conn. 1961).

of the economic self-interest of the professional guild, but what maximizes access to law for our society's most vulnerable populations.

## V. State constitutional clauses protect the right to counsel in certain civil actions

Determining who gets to be a lawyer has significant consequences for who has *access* to a lawyer. But state courts, thanks to the structural choices inscribed in their constitutions, have an even more direct way of increasing access to justice: by establishing a right to counsel for certain important rights. Although often called “civil *Gideon*,”<sup>67</sup> the concept actually embraces several distinct approaches to solving the “justice gap,” the divide between indigent clients who need lawyers and lawyers who can afford to take on those clients. Some advocates propose a statutory scheme, perhaps keyed to a dedicated tax; some propose a relaxation of the standards limiting the unauthorized practice of law to authorize lower-cost, lesser-trained legal advisers; some urge dramatically expanding pro bono requirements for attorneys, who would be assigned civil cases by the courts; some focus attention on federal Constitutional claims; and some simply support higher public support for legal aid organizations. But another approach centers on using state court litigation to press claims founded on state constitutional principles, resulting in a right to counsel in the most high-stakes civil cases directly comparable to the right to counsel in criminal cases established in the original *Gideon*.<sup>68</sup>

The contours of such a right would naturally vary from state to state. But the most promising areas of law for the establishment of a civil right to counsel would be those touching on core features of a person's identity. For example, in a Montana case, the state supreme court considered a mother who had her parental rights terminated without benefit of counsel.<sup>69</sup> Using the state constitution's equal protection clause to rise above the federal floor, the court held that the parent's statutory entitlement to an attorney in an abuse/neglect proceeding must also be applied where her parental rights were involuntarily terminated in an adoption proceeding. Upon determining that the right to parent is fundamental, the court applied a “strict scrutiny” standard of review—a federal notion commonly applied in a state constitutional context. The opinion did not engage in any federal analysis, except to note that the question is “open” under the federal Constitution; following *Michigan v. Long*, the court concluded its opinion with a clear statement that the decision rested independently on state grounds. Neither did the court make any reference whatsoever to unique Montana factors. Unapologetically, the court interpreted its own equal protection clause according to its own best understanding and in doing so diverged from federal doctrine, thereby guaranteeing access to justice for indigent parents during the trauma of termination proceedings.

Other state constitutional bases for civil *Gideon* might include the state due process clauses, state clauses guaranteeing a right to a remedy, “open courts” clauses, and even the inherent power of the courts to operate fairly. In addition to parental rights, other areas of law that appear promising for expansion of the right to counsel under state constitutions include evictions, adoption, foreclosure, public benefits, and even consumer debt collection. Just as with the right to counsel in

---

<sup>67</sup> See generally Tonya L. Brito, David J. Pate, Jr., Daanika Gordon, and Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223 (2016).

<sup>68</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). See generally Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21 (2007).

<sup>69</sup> *J.N.S. v. A.W.*, 339 P.3d 414 (Mont. 2014).

criminal cases, financial support for this expansion of access to civil justice would likely come from some combination of public appropriation at the state and/or local level. If the compensation scale were insufficient to attract enough lawyers, courts could use their power to regulate the bar<sup>70</sup> to assign lawyers involuntarily, as they sometimes do in the criminal context. Because of the close link between access to an attorney and the proper functioning of the courts, state judiciaries would likely be near the zenith of their power to order appropriate funding for the programs.

## **VI. State courts have constitutional authority to secure their own functionality**

Many judges who are otherwise sympathetic to a vigorous protection of the judiciary's powers under the state constitutions seem to quaver at the problem of enforcement. For example, in the famous *de facto* school desegregation case from Connecticut, *Sheff v. O'Neill*, the state supreme court issued a strong and quite controversial decision ordering the legislature to desegregate the Hartford schools. But the command included no express sticks or carrots, and indeed, the legislature had to be sued two more times before the rudiments of compliance became visible.<sup>71</sup>

It can sometimes seem that judges perceive themselves to be part of the team, an arm of the state meant to smooth over legal problems rather than serve as a check on the political branches' more audacious policy ambitions. And the struggle to devise appropriate yet effective enforcement mechanisms has yet to be won. After all, no court can just put all the legislators in jail for civil contempt if they fail to pass an appropriation. But a strong judiciary is not possible without strong enforcement powers, and some courts have found creative ways to protect the rule of law without fomenting debilitating backlash or sinking into popular disdain and illegitimacy.

The first line in the sand in defending the judiciary's prerogatives is the funding of the courts themselves. Access to justice for the injured and the wronged is meaningless if dockets are too large for timely proceedings, judges' working conditions are too spartan to support careful decision-making, or resources are granted and withheld politically to undermine judicial independence. In Pennsylvania, the state supreme court issued one of the most assertive decisions anywhere to protect the basic functioning of the judiciary.<sup>72</sup> Certain trial-level courts there are funded not by the state legislature but by local units of government. In the midst of a profound fiscal crisis of its own, the City of Philadelphia appropriated more than 15% less to the local state courts than they had requested in an already bare-bones budget. The judges sued.

When the case ultimately reached the top of the state judiciary, the supreme court was thoroughly convinced that the appropriations approved for the support of the Philadelphia court were grossly insufficient. Turning to the state constitution, the supreme court concluded that by creating courts, the constitution empowered them to demand sufficient funding to operate. In other words, the courts had an inherent power to insist on a certain basic level of funding below which they

---

<sup>70</sup>For example, in *Persels and Assoc. LLC v. Banking Comm'r*, 122 A.3d 592 (2015), the Connecticut Supreme Court invalidated, on state constitutional grounds, a statute purporting to authorize the Banking Commissioner to regulate attorneys engaged in debt negotiation in lieu of the judiciary's relevant attorney regulations. The court held that only the courts could define the obligations of holding a law license.

<sup>71</sup> See generally Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277 (2002).

<sup>72</sup> See *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971).

could not carry out their constitutional obligations. The supreme court ordered the Philadelphia municipal legislature to fund the courts, despite the many other serious demands on its treasury.

More recently, in New York, the state high court also ordered the political branches to appropriate money for the courts that the representatives did not wish to spend. In *Maron v. Silver*, the New York Court of Appeals determined that, because of *inaction* by the legislature, inflation had diminished the salaries of state judges to such an extent that the constitutional separation of powers was violated.<sup>73</sup> The legislature had repeatedly approved budgets that included increases in judicial compensation, but had consistently refused to appropriate the money allocated in the budget (at least without a concurrent increase in the legislators' own salaries). So the judges finally brought a lawsuit against both houses of the legislature, their leaders, the governor, the comptroller, and even the court administrator. The high court agreed with the judges, but merely declared the legislature's failure unconstitutional without issuing an injunction. Instead, the court concluded its opinion with the line, "We therefore expect appropriate and expeditious legislative consideration." The court's decision, it held, was authorized by its inherent right to interpret the constitution. Ultimately, the City Council was compelled to appropriate money to satisfy the seven-figure damages award decreed by the supreme court.<sup>74</sup>

As in *Carroll v. Tate* and *Maron v. Silver*, courts can use their inherent powers, or extrapolations from their constitutional separation of powers clauses, to protect their own resources. While no one argued in either case that the judges were making less than a living wage, both sets of plaintiffs demonstrated concrete effects on the ability of the courts to carry out their functions with a highly qualified bench backed by sufficient resources to provide just and efficient services.<sup>75</sup>

Although neither *Carroll* nor *Maron* demonstrated a vigorous judicial enforcement mechanism to back up what were certainly unpopular opinions, other examples do show courts holding the legislature to account. In a 2002 case, the high court of Massachusetts required the legislature to fund a public campaign-finance program that had passed by popular initiative over staunch legislative objection.<sup>76</sup> When the legislature simply refused to comply with the court's command, observers sensed a conundrum. The court could hardly hold the entire legislature in contempt; some of the members might well have supported the necessary appropriation.

The court did not want to commit its own violation of separation of powers by directly appropriating the money or commanding the Treasurer to pay the fund without appropriation. Instead, the Massachusetts court devised a solution both novel and deeply traditional: a judicial foreclosure sale. The court vested a single justice with ongoing jurisdiction to enforce the decree, and that justice started selling state property. She started with surplus equipment from a state warehouse, which served only to poke the bear—the legislators got even angrier, but still did not appropriate the funds. Finally, she began the process to sell state *land*, at which point the legislators blinked

---

<sup>73</sup> 925 N.E.2d 899 (2010).

<sup>74</sup> See G. Gregg Webb and Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12 (2004).

<sup>75</sup> See generally Andrew W. Yates, Note, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 DUKE L.J. 1463 (2013).

<sup>76</sup> See *Bates v. Campaign Fin. Ref.* 763 N.E.2d 6 (Mass. 2002).

and the appropriation went through.<sup>77</sup> The elegance of this approach is how it blends unyielding insistence that the court's decree be honored with an ancient and well-understood enforcement mechanism almost banal in its conventionality. Such an approach, while inarguably aggressive and thus probably a last-ditch effort, could guarantee victorious civil litigants dependent on legislative action that the courts will protect their rights.

## VII. State constitutional clauses protect state workers

While lawsuits against state officials are typically “civil” in the sense of not criminal, “civil rights” cases are commonly categorized apart from private law cases. But the states wear many hats. In addition to their role as governments, in which they are susceptible to judicial oversight at the insistence of citizen plaintiffs, states also carry out important proprietary functions. Their performance of these functions subjects them to many of the same legal burdens shared by other employers, property owners, and buyers/sellers. Access to civil justice for state workers is a small subset of the larger problem of vulnerable workers and their capacity to seek help from the courts, but it is an important subset. State constitutions play an important part in the employer-employee relationship between the state and its workers, and they model that relationship for private employers.

For example, in a recent case from Illinois, the state supreme court considered that state's constitutional “pension protection clause.”<sup>78</sup> State constitutions might be mocked for their detail and small-bore miscellany, but underlying all of that detail is often a textual expression of the people's deeply-held values and their grave pessimism about their elected representatives' ability to live by those values. The states' pension clauses are a vivid example of this.

State constitutional pension protection clauses often read like they were written by a computer posing as an accountant pretending to be a lawyer. Michigan's, for example, says:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.<sup>79</sup>

The text sounds boring, technical, and about as far away from the constitutional poetry of “to create a more perfect union” as it is possible to get. In the Illinois litigation mentioned above, a nearly identical text formed the basis for a challenge by Chicago public workers to that city's habitual underfunding of its pension obligations, which in turn led to reduction in benefits. The supreme court expressly rejected financial exigency as an exception to the clause prohibiting the reduction of benefits, saying that the constitutional clause would be meaningless if the legislature or local governments could evade it whenever they saw fit to do so. All beneficiaries of the pension plan

---

<sup>77</sup> See Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277, 302 n.155 (2002).

<sup>78</sup> *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 50 N.E.3d 596 (Ill. 2016).

<sup>79</sup> MICH. CONST. ART. IX, § 24. Even as I write this clause, Microsoft Word's green underline is telling me that the text is ungrammatical.

were entitled to their full pensions, regardless of whether the city or state ultimately bore the financial burden.<sup>80</sup>

In the recent bankruptcy of Detroit, the state's pension protection clause would have barred the diminution in pension payments ultimately endorsed by the federal bankruptcy court. That result was only possible because of the Supremacy Clause, which privileges the requirements of the federal Bankruptcy Code over even constitution-level state law.<sup>81</sup>

These obscure clauses, directly affecting only government workers, apply to civil justice more broadly in at least two ways. First, they demonstrate the considered judgment of the people of the state that the protection of promised employee benefits is a virtue, and a virtue of such significance that it deserves constitutional expression. This creates opportunities for argument by analogy in protecting workers' rights against private employers. Second, the constitutional protections for state workers are really a protection for the state itself. By promoting the recruitment and retention of highly qualified workers, these clauses help protect the power of the state itself.

Each state carries out the responsibilities of sovereignty through the hands of its workers. When it comes to whose hands are guarding against unreasonable hazards in private workplaces, assuring the quality of healthcare facilities, or licensing professionals to protect the public, ordinary people rely on state employees. The state constitutions' protection of those workers helps solve many of the problems before tragedy strikes or litigation ensues. Even when private malfeasance does lead to litigation, the expertise and experience of the state workforce can lead to evidence that allows injured parties to meet their burden of proof.

### **VIII. State constitutions empower state Attorneys General**

Among the state workers crucial to protecting the public and its access to justice are the states' top law officers, the attorneys general. As with so many of the other areas I discuss in this paper, there are major differences between the state A.G.s and their federal counterparts—and those differences rarely get sufficient attention from the bench and bar. First, all but one of the states have independently elected attorneys general; they report directly to the people, not the governors. State attorneys general also derive their authority directly from state constitutions, not by delegation from the governors. And they have broad common law powers, inherited from early England, to pursue cases independently of the executive branch. Some A.G.s have both civil and criminal authority, while some have only civil authority.<sup>82</sup> All A.G.s have *regulatory* power as well as enforcement power; areas subject to attorney general regulation typically include non-profit organizations (for which the A.G.s serve functionally as shareholders), certain insurance matters, protection of people who lack legal capacity, and public bonding. All A.G.s serve as both state counsel (advising agencies formally and informally, helping with their transactions, and defending them in court) and as the people's advocate (litigating on behalf of the public, without any particular state agency as a client).

---

<sup>80</sup> Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago, 50 N.E.3d 596 (Ill. 2016).

<sup>81</sup> See *In re City of Detroit*, 504 B.R. 97, 150, 160-162 (2013).

<sup>82</sup> Connecticut, for example, has independent prosecutors selected by a special commission to preserve their independence from politics. The Attorney General has no criminal law enforcement authority.

One of the more distinctive powers of state A.G.s, a power that would be quite alien to those immersed in the federal system, is their common-law *parens patriae* authority.<sup>83</sup> This ancient power (again, derived from merry old England)<sup>84</sup> vests the A.G.s with the power to bring actions on behalf of the people. No state agency need be involved, and no governor's or legislature's permission is required. The doctrine typically permits the state A.G. to bring an action even if no one else would have standing, such as for aesthetic injuries, dignitary injuries, harm to inaccessible areas of state land,<sup>85</sup> or simply legal violations causing injuries too diffuse for any private individual to hold standing.<sup>86</sup> And these actions can be brought on behalf of the people of the state, not the state itself—*parens patriae* authority is distinct from litigation on behalf of the state government in its proprietary capacity.<sup>87</sup>

The tobacco litigation initiated by Mississippi's attorney general on behalf of the people of his state stands as the most important and successful exercise of *parens patriae* authority. The *Mississippi v. American Tobacco, et al.* Master Settlement Agreement stands as a shining example of the use by attorneys general of extraordinary powers to recover for losses to both the states themselves as proprietors and their people. Private class actions could never have accomplished the same comprehensive remedy. Other state A.G.s followed suit, using Mississippi's model. And once the states' victory was on the books, private plaintiffs could and did pile on, suing the tobacco companies with the legal theories and factual evidence already developed by the attorneys general.

In this way, preserving the strong, albeit vague, constitutional powers of the state attorneys general can have positive effects on access to civil justice. Injured parties who might not have been able to afford attorneys, or whose claims fell below the threshold of economic viability, could (and did) finally win redress for their injuries by piggybacking on the states' litigation.<sup>88</sup> Even if the efficiency of issue preclusion is not available to private litigants following on after the state A.G.s' victories, the simple knowledge of the facts uncovered in discovery in the states' litigation offers private attorneys an easier path forward against otherwise daunting defendants.

And what justifies this extraordinary set of powers, including the *parens patriae* power, for a state A.G.? In contrast to the federal model, state A.G.s are almost all elected. Their power comes directly from the people, and that leaves a direct political check on their offices. Notably, the political check does *not* come from gubernatorial oversight; governors cannot hire, fire, or command their own attorneys general.<sup>89</sup> This creates the possibility for one of the least intellectually interesting but practically important powers a state A.G. can possess: the right *not* to litigate. By and

---

<sup>83</sup> See generally Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 Ill. B.J. 684 (1998).

<sup>84</sup> See generally *Green v. Allen*, 24 Tenn. 170 (Tenn. 1844) (describing the English origins of the doctrine).

<sup>85</sup> See generally Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as The Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57 (2005).

<sup>86</sup> See, e.g., Kirsten H. Engel, *State Standing in Climate Change Lawsuits*, 26 J. LAND USE & ENVTL. L. 217 (2011).

<sup>87</sup> See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) (distinguishing between the state's cause of action in its proprietary capacity based on the state government's direct losses and its *parens patriae* cause of action on behalf of its citizens injured by the misconduct).

<sup>88</sup> Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (allowing non-mutual offensive collateral estoppel where the investor-plaintiffs relied on facts determined in a prior action by the S.E.C. against the same corporate defendant).

<sup>89</sup> See, e.g., Complaint, *New York et al. v. Pruitt*, No. 1:18-cv-773 (D.D.C. Apr. 5, 2018), available at [https://ag.ny.gov/sites/default/files/methane\\_complaint.pdf](https://ag.ny.gov/sites/default/files/methane_complaint.pdf). The Maine Attorney General joined the state as a plaintiff to this action, over her governor's vehement opposition.

large, state attorneys general tend to take seriously their obligations as the state government’s lawyer, and they are typically quite professional about offering zealous advocacy on behalf of defendant state agencies, even when the A.G. would decide the policy matter differently from the agency. But the exceptions—when A.G.s decide they can no longer defend a statute or state agency action—can create a major impact on the disputed legal question. For example, the California attorney general’s decision not to defend that state’s same-sex marriage ban simultaneously weakened the defense of the statute in court and signaled to the public that the ban was likely to fail. That signal energized the ban’s opponents and prepared the ban’s defenders for the legal, political, and cultural loss that soon came their way.<sup>90</sup>

## **IX. State constitutions empower state agencies**

While state attorneys general can use their authority to protect the public, especially as the availability of class actions continues to decline, state agencies can also use relatively unusual constitutional powers to create the conditions necessary for expanded access to justice.

Many states have specialized agencies that are functionally outside of the executive branch; the state constitutions have imbued them with independent authority. For example, in Michigan, our three most prominent public universities are each overseen by boards granted express authority over university policy by the state constitution. The board members are directly elected by the people, state-wide. As a result, the legislature can only influence the universities indirectly, through its appropriations. The boards retain the final say about the kind of education offered, and the courts have upheld the boards’ authority even in the face of statutory law to the contrary.<sup>91</sup> In Florida, the constitutional drafters were worried that political pressure to expand harvesting opportunities for hunters and fishers would harm the environment, so they created a special commission to regulate fish and wildlife. The executive-branch agency responsible for natural resources, the Florida Department of Wildlife, was directly accountable to the governor and did, indeed, create hunting and fishing rules that environmentalists believed would over-strain the affected populations. The Florida Supreme Court held that the constitutional commission’s regulations took precedence over the executive branch regulations;<sup>92</sup> an earlier case held that the commission’s regulations also superseded contrary statutes.<sup>93</sup>

The existence of state agencies with their own direct constitutional authority, unaccountable to either the governor or legislature legally or politically, means that marginalized groups without adequate access to the conventional political system in the legislature may find surprising opportunities to influence policy in more congenial fora. These independent agencies might conduct their work in a way that treats righting civil wrongs as a higher priority than the conventional branches do. They might also adopt regulatory policies that protect consumers, the environment,

---

<sup>90</sup> See generally Niraj Chokshi, GovBeat, *Seven Attorneys General Won’t Defend Their Own State’s Gay-Marriage Bans*, Washington Post (Feb. 20, 2014), available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans>

<sup>91</sup> See *Sterling v. Regents of U. Mich.*, 68 N.W. 253 (Mich. 1896).

<sup>92</sup> See *Fla. Dep’t of Natural Res. v. Fla. Game and Fresh Water Fish Comm’n*, 342 So.2d 495 (Fla. 1977).

<sup>93</sup> See *Whitehead v. Rogers*, 223 So.2d 330 (Fla. 1969).

students, or other politically weak classes more strongly than do the legislatures. And their enforcement methods—their inspections, investigations, and litigation—can expose wrongdoing that then invites private parties to pursue their own remedies in the civil justice system. Judicial protection for the autonomy and authority of these independent constitutional agencies can help to create alternative spaces for debate, open new opportunities for marginalized groups, and empower bolder protection for society’s vulnerable members.

## **X. Conclusion**

Each constitutional structure described in this paper affects how injured parties can—or cannot—obtain relief in the state courts. Access to justice depends on more than acknowledgment of the appropriate cause of action. Real access to justice requires institutions of government with the power and incentives to give meaning to that cause of action, to assure that litigants get fair treatment and have democratic access to the state officials who *make the rules*.

Ultimately, within every personal-injury or similar civil action, there is the seed of a constitutional claim. Every claim is an assertion that the courts have power to redress that injury; that the legal violation derives its applicability from a legitimate law-making institution; and that state officials stand willing and able to enforce the law. These state constitutional questions, implicit in every case, can be brought out into the open by skilled advocates and learned judges. Sometimes what look like even the most ordinary cases will end up turning on deep questions about the structure of state government. And when these cases, which first arrived in the lawyer’s office looking like run-of-the-mill personal injury cases, get translated into legal discourse as separation-of-powers claims or justiciability claims, they can shift how power is allocated across the state. They can inspire new—maybe odd—alliances, where judges who would normally be skeptical of the cause of action stand strong against intrusions on judicial authority. And these civil actions turned structure-of-government cases can alter the state’s democratic accountability, opening new avenues of influence for communities who would otherwise be shut out of political discussion and decision-making.

Most, if not all, of the particular structures I describe in this paper have no analogue in the federal system. They may seem strange to lawyers who are trained in federal law-centered law schools and to a public immersed in federal-law rhetoric. But at least by volume, it is these distinctive state arrangements that constitute the normal American practice; and it is the federal system that is strange. To preserve access to justice for the indigent and marginalized, state courts must insist on the preservation of these constitutional arrangements. Where state constitutional text does something startling, like give an agency power over fishing licenses that exceeds the legislature’s, state courts must resist the temptation to read the constitutional text as if it were federal, with the federal presumptions and the federal limitations. State courts must embrace the weirdness of their own constitutions.

To do that best, state courts must first and foremost protect themselves. Rather than seeing themselves as team players with responsibility for papering over whatever policy choices the political branches make, state judiciaries can draw confidence from their constitutions. Looking at the structural arrangements described in this paper and the rest of the constitutional institutions and their incentives, state courts can come to the appropriate conclusion that state constitutional

drafters and ratifiers have never viewed their legislatures and governors as worthy of excessive deference. The constitutions are jammed with quiet expressions of distrust in the political officials of the states. Bold, self-confident judiciaries can stand up for the ratifiers of state constitutions—the people themselves—by holding the other institutions of government to account. Doing so will, in turn, protect access to civil justice and the courts' own legitimacy as the best place to find that justice. The constitutional texts contain plenty of reason for state courts to assert themselves. All that the people ask is for judges who will give these texts their due.