The Common Law as a Guide to State Constitutional Interpretation

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I. INTRODUCTION

The Roberts Court is continuing with its most recent predecessors, the Burger and Rehnquist Courts, in the erosion of constitutional protections of individual rights and liberties from state action. As the United States Supreme Court is becoming less protective of individual rights and liberties, it is left to the highest courts of the respective states to reinvigorate those protections. Each state constitution includes a declaration of rights that, similar to the federal Bill of Rights, serves to protect individual liberty from governmental intrusions.¹ An independent interpretation of state constitutional provisions is an important aspect of state power and independence, as well as a necessary counterpart of constitutional federalism designed to guarantee individual liberties.²

Each state constitution provides for its own scheme of governance, including its commitments to the protection of individual rights and liberties. As the U.S. Supreme Court is responsible for the ultimate interpretation of federal constitutional provisions, it is left to each state’s highest court to ultimately interpret its own state constitution.³ In interpreting their own constitutions, state courts have the ability to rely on different grounds and distinguish their law in a way that expands upon the rights granted within the Constitution and Bill of Rights.⁴

In the federal system of the United States, state constitutions provide “a font of individual liberties.”⁵ The protections offered by state constitutions

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implement “the independent protective force of state law,” which is “neither sub-
ordinate to nor mere ‘mirror [of] the federal Bill of Rights.”6 State constitutional
rights provisions have independent force, the protections of which “often extend
beyond those required by the Supreme Court’s interpretation of federal law.”7
State constitutions must be recognized as independent documents. In their pro-
tection of individual rights and liberties, state courts must not be allowed to ig-
nore their responsibilities in interpreting these documents’ ultimate meanings.8

Often, limits on government encroachment on individual rights may be made
subservient to the affirmative responsibilities to provide certain governmental
services.9 A state’s declaration of rights and its dual sovereignty, however, both
“suggest that the protection of individual liberties is, in fact, a central respon-
sibility of state governments, not a mere limit on their powers.”10 Protection of
individual rights is not only a critical responsibility of both the federal and state
governments, as indicated by the presence of state and federal bills of rights, but
“is also one of the guiding purposes behind the division of powers and functions
between state and national governments.”11 “When a state court appeals to a
state constitution to protect civil rights and liberties . . . state constitutions may
always be used to supplement or expand federally guaranteed constitutional
rights”; a state court, however, may never decrease those protections.12 Thus,
federal constitutional law serves as a floor below which state courts cannot fall.13

Federalism recognizes that state constitutions are independent from the U.S.
Constitution, “and that state courts may exercise this independence so as to read
state constitutional rights more generously than their federal counterparts.”14
The practical consequence of this dual sovereignty is that federal standards for
protecting individual rights under the Fourteenth Amendment as applied to the
states provide a minimal level of protection—a “floor.” States remain free to
exceed the federal floor by providing protections for individual rights and liber-
ties that exceed the federally mandated minimum. Again, states may provide for
more protection of individual rights, but they cannot fall below those set by in-
terpretations of the U.S. Constitution and the Fourteenth Amendment.15

6. See id. (quoting Brennan, supra note 5, at 491).
7. See Brennan, supra note 5, at 491.
8. See Robert K. Fitzpatrick, Note, Neither Icarus nor Ostrich: State Constitutions as an Independent
under theory of judicial federalism).
9. See Developments in the Law, The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324,
1345 n.64 (1982).
10. See id. (noting federal and state division of powers).
11. See id. at 1344 (highlighting presence of bills of rights in all state charters).
12. See id.
13. See Developments in the Law, supra note 9, at 1334 (stressing supremacy of federal law).
Language contained in decisions of the U.S. Supreme Court “that state courts may interpret their constitutions more expansively than the federal constitution are not the source of state power.”16 Instead, these opinions are acknowledging that state authority is controlling “in the absence of countervailing federal rights.”17 The Supremacy Clause of the U.S. Constitution prohibits states from enforcing laws that violate the Constitution; our constitutional system of dual sovereignty “permits serial, or at least dual, claims of unconstitutionality.”18 The United States system thus “provides a double source of protection for the rights of our citizens.”19

While state constitutions can be a source of individual liberty, state courts must read their own constitutional provisions to prohibit state laws or actions that abridge their citizens’ individual rights or liberties, even where federal protections have been denied. As scholars have cautioned, “state constitutionalism presents a use-it-or-lose-it situation: either use the state constitution or lose the protections it provides.”20

This Article will argue that in the face of the Supreme Court’s diminution of individual rights, it is imperative for states to intercede and provide additional protections for individual liberty through their own state constitutions. The common law of numerous states has evolved to protect and address liberty amidst contemporary problems, a trend that will likely need to continue under the current makeup of the Court. Part II will trace recent Supreme Court decisions emphasizing the erosion of individual rights and highlighting a reduction of individual protections under the Fourth, Eighth, First, and Fifth Amendments as well as efforts to undermine voting rights.21 Part III will discuss the history of the dual primacy of federal and state constitutions, the Supreme Court’s treatment of this duality, and methodologies of interpreting state constitutions vis-à-vis the U.S. Constitution.22 Part III will also discuss factors state courts consider when interpreting provisions of their state constitutions which may depart from the

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17. See Williams, supra note 16, at 376 (noting ruling on state constitution removes necessity of addressing federal constitutional arguments); Joseph Blocher, Reverse Incorporation of State Constitutional Law, 84 S. Cal. L. Rev. 323, 334 (2011) (recognizing states need not construe identical rights according to federal doctrine).


19. See Brennan, supra note 5, at 503 (describing strength of federal court system).


21. See infra Part II.

22. See infra Sections III.A-C.
federal constitution.\textsuperscript{23} Part IV will discuss the fundamental principles of an evolving common law.\textsuperscript{24} Part V will highlight significant areas and decisions where state common law has expanded individual rights including expansions of tort liability, contract protection, property rights, will invalidation, and individual privacy and self-determination.\textsuperscript{25} Finally, Part VI will pose a framework for state courts to interpret their own state constitutions to be more protective of individual rights.\textsuperscript{26}

II. DIMINISHMENT OF INDIVIDUAL CONSTITUTIONAL PROTECTIONS UNDER THE ROBERTS COURT

Recent decades of Supreme Court decisions have been marked by a diminution of individual rights in relation to state action.\textsuperscript{27} This trend has continued in recent years, throughout the tenure of Chief Justice John Roberts. This retrenchment is most dramatically observed in a long line of five-to-four decisions, with the so-called liberal Justices dissenting from the more conservative Justices.\textsuperscript{28} These decisions diluted the protections afforded by the Bill of Rights in a number of significant areas.

A. The Fourth Amendment

In \textit{Hudson v. Michigan},\textsuperscript{29} Hudson claimed his Fourth Amendment rights were violated when the police procured a search warrant for drugs and weapons but failed to follow the “knock and announce” requirement before entering his home.\textsuperscript{30} The police seized a gun and cocaine in the home, and the government charged him with unlawful drug and firearm possession.\textsuperscript{31} Hudson sought the protection of the exclusionary rule because the police failed to follow proper procedures during the search.\textsuperscript{32} The majority held the exclusionary rule did not apply to violations of the “knock and announce” requirement, as the nature of the rule was not to prevent police from conducting a search where supported by

\begin{itemize}
  \item \textsuperscript{23} See infra Section III.D.
  \item \textsuperscript{24} See infra Part IV.
  \item \textsuperscript{25} See infra Part V.
  \item \textsuperscript{26} See infra Part VI.
  \item \textsuperscript{27} See infra Part III.
  \item \textsuperscript{28} See Keith E. Whittington, \textit{The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review}, 89 NOTRE DAME L. REV. 2219, 2220 (2014) (explaining how Roberts Court labeled conservative, striking down fewer state laws than past Courts).
  \item \textsuperscript{29} 547 U.S. 586 (2006).
  \item \textsuperscript{30} See id. at 588 (defining knock and announce rule requiring police to wait approximately thirty seconds before entering residence).
  \item \textsuperscript{31} See id. (noting Hudson argued method of entry violated Fourth Amendment right even though police possessed warrant).
  \item \textsuperscript{32} See id. at 588-89 (stating Hudson argued seizure of evidence stemmed from unlawful entry).
\end{itemize}
a valid search warrant. The dissent noted that by condoning this violation, the majority weakened the Fourth Amendment prohibition of unreasonable searches and seizures.

Similarly, in *Herring v. United States*, police stopped Herring based on an outstanding arrest warrant in their database. After searching Herring’s car, police seized drugs and a gun. Herring claimed the evidence was obtained illegally because the arrest warrant, which justified the search, was invalid; the warrant had been recalled months earlier but the database was never updated. The majority held that even though Herring’s Fourth Amendment rights were violated, the circumstances did not require exclusion of the evidence because the error was the result of mere negligence. The dissent argued that the majority’s ruling would allow police to make careless mistakes with little accountability for their unlawful actions.

In the search for Fourth Amendment protections against unreasonable search and seizure, the Court has held that the exclusionary rule does not apply to every Fourth Amendment violation, which leaves no remedy for a constitutional wrong. In each case there was a serious infringement on the individual’s privacy rights; yet, the Court has limited the reach of the exclusionary rule, leaving no remedy for the constitutional violations. The dissents in both *Herring* and *Hudson* offer the notion that the Fourth Amendment and the exclusionary rule go hand in hand, so that when the Fourth Amendment is violated, the automatic remedy must be the suppression of what was seized due to the illegal search.
In *Florence v. Board of Chosen Freeholders*, Florence was arrested for an outstanding warrant after a traffic stop and was strip searched at two jails; both searches occurred when he was entering the jail. He claimed his Fourth Amendment rights were violated when he was strip searched without any reasonable suspicion, arguing that persons arrested for minor offenses cannot be subjected to invasive strip searches unless prison personnel have a reasonable suspicion that the prisoner has contraband secreted. The majority held that strip searches for inmates entering the general population do not violate the Fourth Amendment because it is done to ensure the safety of other inmates and guards. The dissent noted that strip searches done without suspicion that a person has drugs or contraband violates the Fourth Amendment due to the severity of the search and its extraordinary intrusion. The dissent argued that, by allowing strip searches of individuals when there is no reasonable suspicion that they possess contraband, the majority has vitiated the most intimate privacy rights of a criminal suspect.

B. The Eighth Amendment Infringements

In *Kansas v. Marsh*, a jury sentenced Marsh to death after a conviction of capital murder. He challenged the imposition of the sentence on the grounds that a Kansas statute unconstitutionally favors the death penalty by imposing it when aggravating and mitigating circumstances are balanced. The majority upheld the death penalty statute and concluded there was no violation of the Eighth Amendment because the weighing equation assists the jury in determining a life or death sentence. The dissent found the statute to be “morally absurd” and argued that the Eighth Amendment provides that “a tie goes to the defendant when life or death is at issue.”

44. See id. at 323-24 (providing petitioner strip searched and instructed to lift his genitals and cough and squat).
45. See id. at 324.
46. See id. at 330-34, 339 (detailing safety considerations in correctional facility).
47. See *Florence*, 566 U.S. at 343-45 (Breyer, J., dissenting) (arguing Fourth Amendment prohibits strip search for misdemeanors without reasonable suspicion). Justice Breyer explained, “A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person’s body, is a serious invasion of privacy.” Id. at 344-45.
48. See id. at 355 (stating seriously invasive policy unjustifiable).
50. See id. at 166 (describing jury findings).
51. See id. at 165-66 (presenting issue); KAN. STAT. ANN. § 21-4624(e) (repealed 2011) (stating if jury finds aggravating circumstances not outweighed by mitigating circumstances, then death penalty applied).
52. See *Marsh*, 548 U.S. at 175, 177 (holding Kansas’s weighing equation procedures in line with Eighth Amendment requirements).
53. See id. at 203, 207 (Souter, J., dissenting) (quoting State v. Marsh, 102 P.3d. 445, 458 (Kan. 2004)).
Two challenges addressed the constitutionality of the method of execution. In *Glossip v. Gross*, the prisoner challenged the constitutionality of lethal injection, claiming that the states—Oklahoma and Missouri—methods constitute cruel and unusual punishment. The majority held in both cases that the “Eighth Amendment does not guarantee a prisoner a painless death” and some risk of pain is inevitable during execution. The dissent in *Glossip* noted that the constitutionality of the punishment must be evaluated according to current prevailing social and legal standards. According to the dissent, the majority failed to utilize the safeguards of the Eighth Amendment to protect the men.

In *Bucklew*, the petitioner’s rare disease caused tumors to grow on his face; he argued that execution by lethal injection would cause him to suffer more than what is constitutionally acceptable. The dissent concluded that because of his rare medical condition, the manner of executions was unconstitutional based on the medical evidence of how much pain he would endure.

C. The First Amendment Infringements

In *Morse v. Frederick*, a high school student alleged that his First Amendment rights were violated when he received a ten-day suspension for waiving a banner that portrayed the message “BONG HITS 4 JESUS” at a school-approved activity. The majority upheld the decision to suspend, holding that the freedom

55. 139 S. Ct. 1112 (2019).
56. *See Glossip*, 576 U.S. at 867 (contending execution method by state violates Eighth Amendment); *Bucklew*, 139 S. Ct. at 1118 (arguing use of lethal injection fails constitutionality due to prior medical condition). The prisoners in *Glossip* contended that the method of execution was unconstitutional because it created an “unacceptable risk of pain” by administering the first of three lethal drugs that failed to “render a person insensible to pain.” *See Glossip*, 576 U.S. at 867. In *Bucklew*, Bucklew conceded to the constitutionality of his execution but contended that due to his specific medical condition, the method of lethal injection violated the Eighth Amendment. *See Bucklew*, 139 S. Ct. at 1118.
57. *See Bucklew*, 139 S. Ct. at 1124; *Glossip*, 576 U.S. at 869.
58. *See Glossip*, 576 U.S. at 973–74 (Sotomayor, J., dissenting) (arguing if no humane execution method exists, execution cannot pass cruel and unusual punishment test). Justice Sotomayor explained that the drug midazolam is the initial drug used in the injection and is used to make the petitioner unconscious, but evidence shows that it does not maintain unconsciousness and it creates “an objectively intolerable risk of severe pain.” *Id.* at 969.
59. *See id.* at 977–78 (alleging failure to apply Eighth Amendment duty and protections to prisoners).
60. *Bucklew*, 139 S. Ct. at 1111 (providing conditions leading to excessive pain from lethal injection). Bucklew suffered from vascular tumors—clumps of blood vessels—that grow in his head, neck, and throat. *See id.* He claimed that this condition could prevent the pentobarbital from circulating properly in his body during the lethal injection. *See id.*
63. *See id.* at 396–98 (providing summary of facts relating to First Amendment claim); *see also U.S. Const. amend. I* (protecting freedom of speech).
of speech rights of public-school students warrant less protection than the First Amendment rights of adults because of the unique school environment. The dissent forcefully replied that the student was punished solely for expressing a view with which the school did not agree. According to the dissent, the First Amendment’s constitutional protections are not limited by age.

In *Town of Greece v. Galloway*, two town residents, Galloway and Stephens, challenged their town’s practices of beginning town meetings with a prayer delivered by only Christian clergy members, alleging these practices violated the Establishment Clause of the First Amendment as it favored Christianity over other religions. The Court held the prayers did not violate the Establishment Clause because they were intended to be heard by the policymakers—and not the public—and the town welcomed anyone to give a prayer, although most leaders were Christian. The dissent noted that the town made no effort “to promote a similarly inclusive prayer practice” or to involve other religions. The majority, according to the dissenting Justices, allowed for a particular religion to pronounce prayers at a town meeting while disregarding the effects on other religions.

In *Espinosa v. Montana Department of Revenue*, three mothers whose children attended a private Christian school challenged a Montana Department of Revenue rule that prohibited a state scholarship program’s award money from being used at religious schools. The majority held that the Montana Department of Revenue’s rule violated the Free Exercise Clause because it discriminated against religious schools and families whose children attend those schools. The dissent noted that the majority’s holding infringed upon First

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64. See *Morse*, 551 U.S. at 404-06 (affirming decreased rights of students in public schools); id. at 410 (upholding Frederick’s ten-day suspension).
65. See id. at 436-37 (Stevens, J., dissenting) (discussing majority’s failure to consider school’s true motive for suspension).
66. See id. at 434-35 (explaining how majority’s opinion causes “serious violence to the First Amendment”); Gregory P. Magarian, *The Harrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1354 (2015) (describing Court’s response to First Amendment cases). Justice Stevens explained the permissibility of punishing someone when their conduct is “likely to provoke the harm that the government seeks to avoid”; the banner displayed by Frederick, however, was intended to draw attention from television cameras and was not intended to provoke other students to smoke marijuana. See *Morse*, 551 U.S. at 435, 444 (Stevens, J., dissenting).
68. See id. at 571-73 (summarizing underlying facts).
69. See id. at 591-92 (holding prayers do not violate First Amendment).
70. Id. at 614 (Breyer, J., dissenting) (criticizing town’s lack of inclusivity efforts).
71. See *Galloway*, 572 U.S. at 620-21 (Kagan, J., dissenting) (explaining Constitution prohibits citizens from asserting religious beliefs during services regarding governmental regulations and dealings).
72. 140 S. Ct. 2246 (2020).
73. See id. at 2251-52 (describing tax credits granted to individuals and businesses who donate to private, nonprofit scholarship organizations). The Montana Legislature explained that the Montana Constitution prohibited government aid to sectarian schools. See id. at 2252.
74. See id. at 2262 (reversing Montana Supreme Court’s decision).
Amendment protections required by the Establishment Clause and “risks the kind of entanglement and conflict that the Religion Clauses are intended to prevent.”

In Manhattan Community Access Corp. v. Halleck, Halleck argued that the Manhattan Neighborhood Network (MNN) violated her free-speech rights when it did not allow her access to public channels because of the content of the film that she had produced to be aired on MNN channels. The majority held that MNN is not a state actor, so it is not subject to First Amendment restraints and have complete control and discretion over what is aired on its public access channels. The dissent argued that MNN is a state actor, even while claiming to be a private actor, because it has the same responsibilities as a city government that delegated its powers to a putative private enterprise. The majority turned a blind eye to what the Constitution demands, and the Court ruled on behalf of private entities over the rights of individuals, who now have no recourse to a public forum to promote their protected ideas to the public, as guaranteed by the First Amendment.

D. The Fifth Amendment

In three major cases with five-to-four decisions, the Roberts Court has limited the protections of the Fifth Amendment, including due process protections, the right against self-incrimination, and the prohibition of double jeopardy.

In Salinas v. Texas, the Court made clear that the Fifth Amendment will not always protect individuals during interactions with police nor does it protect silence of those in police custody. During a police investigation, Salinas answered police questions, but was not under arrest or read his Miranda rights, and remained silent during one question asked. Years later, during trial, he attempted to invoke his Fifth Amendment rights because he was unsure of his status during the initial questioning. The majority held there was no constitutional

75. See id. at 2281 (Breyer, J., dissenting). Justice Breyer states, “The Court has consequently made it clear that the Constitution commits the government to a ‘position of neutrality’ in respect to religion” and the majority goes against the set precedent, allowing no separation of state and church. See id. at 2282 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963)).
76. 139 S. Ct. 1921 (2019).
77. Id. at 1927-28 (describing petitioners’ film about MNN’s alleged neglect of East Harlem Community in New York).
78. See id. at 1934 (explaining Free Speech Clause prohibits only governmental, not private, speech).
79. See id. at 1945 (Sotomayor, J., dissenting). Sotomayor argues that “private actors who have been delegated constitutional responsibilities like this one should be accountable to the Constitution’s demands.” Id.
82. See id. at 181; Tracey Maclin, The Prophylactic Fifth Amendment, 97 B.U. L. Rev. 1047, 1048 n.3 (2017) (explaining holding of Salinas).
83. See Salinas, 570 U.S. at 182.
84. See id. (noting petitioner sought to overturn conviction on Fifth Amendment grounds).
violation because Salinas had not expressly invoked his privilege under the Fifth Amendment during the initial questioning.\textsuperscript{85} The dissent criticized the majority decision as unfair to defendants who may not know how to technically invoke their rights by identifying the Fifth Amendment by name.\textsuperscript{86} The majority decision, Justice Breyer claimed, undermines the protection of the Fifth Amendment and leaves defendants with no way to avoid self-incrimination; both their answer or their silence can be used against them.\textsuperscript{87} The decision disadvantages individuals who are ignorant of their constitutional rights.\textsuperscript{88}

Similarly, in \textit{Berghuis v. Thompkins},\textsuperscript{89} Thompkins argued that the police obtained his confession in violation of the Fifth Amendment because he refused to sign any paperwork stating he had been read his \textit{Miranda} rights.\textsuperscript{90} The majority held that Thompkins had waived his right to remain silent when he voluntarily and knowingly made a statement to the police.\textsuperscript{91} The dissent noted that the majority was making a “substantial retreat from the protection against compelled self-incrimination” by allowing one’s \textit{Miranda} rights to be waived from “utter[ing] a few one-word responses.”\textsuperscript{92}

In \textit{Kerry v. Din},\textsuperscript{93} Din filed a visa petition for her husband that was denied based on a provision of the Immigration and Nationality Act barring eligibility due to “terrorist activities.”\textsuperscript{94} The U.S. Embassy in Pakistan offered no additional explanation for the rejection.\textsuperscript{95} The majority held that the lack of an

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  \item[85.] See \textit{id}. at 181.
  \item[86.] See \textit{id}. at 201-02 (Breyer, J., dissenting) (highlighting Salinas, not represented by counsel, likely not aware of technical requirements to invoke rights). Justice Breyer expressed his view that the “Fifth Amendment here prohibits the prosecution from commenting on the petitioner’s silence in response to police questioning.” \textit{Id}. at 193.
  \item[87.] See Salinas v. Texas, 570 U.S. 178, 194-95 (highlighting predicament defendant faces).
  \item[88.] See Anna Strandberg, \textit{Note, Asking for It: Silence and Invoking the Fifth Amendment Privilege Against Self-Incrimination After Salinas v. Texas}, 8 CHARLESTON L. REV. 591, 593 (2014) (explaining suspect without legal knowledge might not invoke privilege against self-incrimination at proper time). The petitioner in \textit{Salinas} did not invoke his rights because he was unaware he could—and when he tried later it was too late. See \textit{Salinas}, 570 U.S. at 203 (Breyer, J., dissenting).
  \item[89.] 560 U.S. 370 (2010).
  \item[90.] See \textit{id}. at 374-76 (describing defendant’s interrogation).
  \item[91.] See Eve Brensike Primus, \textit{Disentangling Miranda and Massiah: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law}, 97 B.U. L. REV. 1085, 1106 (2017) (explaining \textit{Tompkins} established implied waiver of \textit{Miranda} rights). In \textit{Tompkins}, the majority chose to limit what the \textit{Miranda} rights were established to protect, holding instead that \textit{Miranda} rights can be waived in a matter of seconds and recognizing the “validity of implied waivers of suspects’ \textit{Miranda} rights.” \textit{Id}.
  \item[92.] See \textit{Tompkins}, 560 U.S. at 391 (Sotomayor, J., dissenting). Justice Sotomayor explained that even if Thompkins waived his right to remain silent, the State of Michigan did not satisfy its burden of establishing any sort of waiver and he was silent for almost three hours; meaning he had no intent to speak with the police. \textit{Id}. at 400.
  \item[93.] 576 U.S. 86 (2015).
  \item[95.] \textit{See Din}, 576 U.S. at 89-90.
\end{itemize}
explanation did not violate the Due Process Clause of the Fifth Amendment. The dissent noted that the issue deals with one’s fundamental right to live with one’s spouse and therefore entitles Din to due process. According to the dissent, the majority denied Din the constitutional right to enjoy the institution of marriage, as recognized by the Court; the Embassy’s simple dismissal of her claim without explanation deprives her of “basic procedural due process protection.”

E. Voting Rights Infringements

The Voting Rights Act of 1965 (VRA) enforces the Fourteenth and Fifteenth Amendments by prohibiting racial discrimination in voting. In Bartlett v. Strickland, county commissioners claimed North Carolina’s redistricting plan violated the state constitution. State officials claimed the VRA required them to draw election district lines to allow Black voters to elect the candidate of their choice. The majority held that the Civil Rights Act and the VRA do not guarantee minority voters an electoral advantage for them to elect their chosen candidate when combined with the crossover votes. The dissent argued that a district can be redrawn if the population is large enough to elect its chosen candidate when combined with the crossover voters and that the majority failed to account for how people actually vote. The Strickland holding will encourage states to create “majority-minority” districts instead of crossover districts (which are more beneficial for minority voting power) so they can avoid liability under section 2 of the VRA.

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96. See id. at 101 (holding no process due to Din under Constitution). The Court indicated that the Fifth Amendment requires due process of law only in a proceeding that denies a person “life, liberty, or property.” See id. (holding government explanation more than Due Process Clause required).
97. See id. at 107 (Breyer, J., dissenting) (asserting Din should prevail on constitutional claim).
98. See id. at 108-110.
100. 556 U.S. 1 (2009).
101. See id. at 8 (summarizing Pender County’s claim).
102. See id. (summarizing State’s “unusual” defense).
103. See id. at 20, 25-26 (holding section 2 of VRA only applies where minority group could form majority in single-member district). Crossover voters are those who “cross over” to support the minority’s preferred candidate in a district where the minority makes up less than half of the voting age population. See id. at 13 (defining crossover district).
104. Strickland, 556 U.S. at 27 (Souter, J., dissenting). Souter stated that the majority “has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics” and has provided no protection for the districts under section 2 of the VRA. Id. at 43-44.
In *Husted v. A. Philip Randolph Institute*,106 civil rights groups alleged that the Ohio Secretary of State violated the VRA and the Help America Vote Act (HAVA) when the state removed inactive registrants from the registered voter lists.107 The majority held the Act did not violate the VRA or HAVA because the sole basis of the voters’ removal was not based on the failure to vote.108 The dissent countered by arguing the process does rely on the failure to vote when removing individuals from the voter lists and the majority’s decision ignores the driving purpose behind the VRA, which is to address voter suppression laws.109

When there is a five-to-four decision—and the majority is comprised of conservative Justices—the impact of dissenting opinions becomes especially valuable. Here, the dissents are important because they underscore that the Roberts Court has curtailed individual liberties to uphold state laws and actions. More significantly, the erosion of constitutional protections of individual rights and liberties during the Roberts era is seen in not only decisions with a five-to-four majority but in a host of other decisions made by the Roberts Court on issues including Fourth Amendment violation claims,110 Eighth Amendment violation claims,111 First Amendment violation claims,112 Fifth Amendment violation

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107. Id. at 1841 (describing civil rights groups’ claims).
108. See id. at 1846-47 (holding Ohio law does not violate Failure-to-Vote Clause).
109. See id. at 1863-64 (Sotomayor, J., dissenting). Justice Sotomayor stated that the purpose of the VRA is to counteract the history of voter suppression, but in *Husted*, the majority is allowing voters that have not been as active to be removed on that basis alone, failing to protect the integrity of the electoral process. Id.
claims, and other illustrative individual rights violation claims.

III. INTERPRETING STATE CONSTITUTIONS IN RELATION TO THE FEDERAL CONSTITUTION

A. History of the Constitutional Framework

The dual primacy of state and federal constitutional protections of individual rights and liberties is deeply embedded in the history of the development of both federal and state constitutions. While it is often claimed that the United States Constitution, created in 1787, is the oldest written constitution still in use today, the Constitution of the Commonwealth of Massachusetts dates even farther back to 1780. New York adopted its original constitution in 1777, followed by the


116. See S.B. Benjamin, The Significance of the Massachusetts Constitution of 1780, 70 Temp. L. Rev. 883, 883 (1997) (noting Massachusetts Constitution of 1780 provided model for U.S. Constitution); Fitzpatrick, supra note 8, at 1834 (providing history of state constitutionalism). Largely drafted by John Adams, the Massachusetts Constitution is believed to be the first articulation of separation of powers through a tripartite system of government. See Benjamin, supra, at 884-85 (describing Massachusetts Constitution oldest in continuous use). Adams was particularly concerned with securing individual liberty against excesses of governmental power. See id. at 888 n.14 (recounting writings on power and liberty dating back almost twenty years before drafting Massachusetts Constitution).

State constitutional provisions protecting individual rights were the “historical norm.” As James Madison suggested during the ratification debates, state constitutions were the primary guarantors of these individual rights. At the founding, states’ recognition of individual rights came first through state constitutions, which served as guideposts for restraints on the federal government.

The protection of individual rights and liberties is not exclusive to the federal courts, rather it is a “shared function,” which may be pursued by both the federal and state courts. Originally, only state constitutions provided for the protection of the individual rights of their citizens. Indeed, the U.S. Constitution did not initially have a bill of rights. In 1791, when the federal Bill of Rights was adopted, it only applied to the federal government. The adoption of the Fourteenth Amendment, however, broadly expanded the Bill of Rights and began to carve out a more active role for the federal government in protecting individual rights.

The individual rights guarantees of the Bill of Rights followed preexisting state constitutional guarantees and thus deserve no constitutional primacy.
Therefore, the Federal Constitution delegates power not solely among the legislative, executive, and judicial branches, but also vertically to the state level.\footnote{126}{In this way ‘a double security arises to the rights of the people.’\footnote{127}}

\section*{B. Review of the U.S. Supreme Court’s Recognition of State Constitutional Primacy}

As noted above, the duality of the protections of individual rights and liberties inherent in both the federal and state constitutions have been recognized and refined by the United States Supreme Court. Additionally, the power of state courts to interpret their own constitutions is both fundamental and long established. The Federal Constitution does not prohibit state courts from interpreting their own constitutions; furthermore, the United States Supreme Court lacks judicial authority to direct state courts to change their interpretations.\footnote{128}

In \textit{Michigan v. Long},\footnote{129}{the U.S. Supreme Court reconsidered its prior rulings concerning the doctrine of adequate and independent state grounds for a decision.\footnote{130}{Under this revised doctrine, the Supreme Court will review a state court decision that rests primarily on federal law or is “interwoven” with federal law, but not one that rests on “adequate and independent state grounds.”\footnote{131}{Because state law is unreviewable by federal courts, a Supreme Court decision on the federal issue could not affect the outcome of the case and would therefore be an advisory opinion beyond the Court’s Article III jurisdiction. In \textit{Long}, the Court held that it would consider a state court decision to rest on adequate and independent state grounds if it “indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent state grounds.”\footnote{132}{The Court requires state courts to explicitly state when they are basing their decision}}}} the U.S. Supreme Court reconsidered its prior rulings concerning the doctrine of adequate and independent state grounds for a decision.\footnote{130}{Under this revised doctrine, the Supreme Court will review a state court decision that rests primarily on federal law or is “interwoven” with federal law, but not one that rests on “adequate and independent state grounds.”\footnote{131}{Because state law is unreviewable by federal courts, a Supreme Court decision on the federal issue could not affect the outcome of the case and would therefore be an advisory opinion beyond the Court’s Article III jurisdiction. In \textit{Long}, the Court held that it would consider a state court decision to rest on adequate and independent state grounds if it “indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent state grounds.”\footnote{132}{The Court requires state courts to explicitly state when they are basing their decision}}}}
on state grounds; otherwise, the decision could be subject to review by the Supreme Court. 133

On the other hand, the independence of state law grounds for a decision must be clear. Under circumstances where a judicial opinion does not expressly state that the case rests on an adequate state law ground—one that is independent of federal law—then the Court assumes that “the state court decided the case the way it did because it believed that federal law required it to do so,” and the decision is subject to review by the Court. 134

C. Methodology of Interpretation

While it is firmly established that state courts may read their own constitutional provisions to ensure greater protection of individual rights and liberties than their cognate federal constitutional provision, they must have a principled basis for the expansion of these state constitutional provisions. Differing approaches to this constitutional interpretation have been suggested. Judges and constitutional scholars have struggled to delineate a clear interpretive framework to determine when the state courts should depart from federal precedent while analyzing similar provisions of their own state constitutions. The difficulty in this analysis is that “state constitutional law must go its own way not in order to achieve a particular result, but because it is jurisprudentially an independent body of law.” 135

Interpretation of state constitutional provisions independent of a federal court analysis of its own constitutional provisions is generally subscribed to three separate theories of analysis.

1. The Pure Independent or Primacy Approach

Courts that follow the pure independent position view state constitutional law as entirely distinct from its federal counterpart. 136 Constitutional pronouncements by the United States Supreme Court are entitled to no greater respect in state constitutional adjudication than those of any other court. State courts

133. See Gardner, supra note 2, at 775-76 (noting requirements for state courts to insulate their state law decisions from Supreme Court).
134. See Rush & Miller, supra note 20, at 1357-58 (quoting Long, 463 U.S. at 1041) (recognizing Supreme Court’s presumption of states deciding cases due to federal law requirements).
136. See e.g., Michigan v. Long, 463 U.S. 1032, 1038 (1983) (arguing state constitution provides greater protection, though not ultimately accepted by Court); State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (relying on their own constitutions which provide greater protection for individual rights than U.S. Constitution); People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (finding and relying on language in state constitution construed differently than provisions in U.S. Constitution).
adopting this approach conduct an entirely independent analysis of each issue to determine the proper reach of state constitutional law.

2. The “Lockstep” Approach

At the opposite end of the spectrum from the pure independents are those state courts adopting the “lockstep” approach to state constitutional adjudication. Courts employing this analysis begin with the premise that state constitutional provisions provide precisely the same level of protection as analogous federal constitutional guarantees and thus cannot be decided differently than controlling federal interpretation.

3. The Interstitial or Supplemental Approach

The other main position holds that federal constitutional questions should be addressed first and that state courts should turn to the state constitution only after it becomes apparent that the United States Constitution provides inadequate protection for the individual liberties at issue. Upon making that determination, the state court would then examine the state constitution to determine whether it provides the additional level of protection.

This approach is usually associated with a methodology of state constitutional interpretation, often labeled the “criteria” approach, which directs state courts to compare the state constitutional provision at issue to its cognate provisions in the U.S. Constitution, and to construe it to have a different meaning from its federal counterpart only if some objective indicium supports the divergent interpretation.


138. See Hale, supra note 137, at 941 (defining lockstep analysis).

139. See, e.g., State v. Williams, 459 A.2d 641, 650 (N.J. 1983) (interpreting defendant’s trial rights under U.S. Constitution first then under New Jersey Constitution); Whitworth v. Bynum, 699 S.W.2d 194, 195 (Tex. 1985) (considering U.S. Constitution first then consulting state constitution); Union Cent. Life Ins. Co. v. Chowning, 26 S.W. 982, 983 (Tex. 1894) (considering U.S. Constitution before state constitution in analyzing statute at issue); Traylor v. State, 596 So. 2d 957, 962-63 (Fla. 1992) (applying U.S. Constitution first before state constitution); see also Stewart G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977, 983-84 (1985) (outlining different approaches to analyzing state constitutional claims). Under this approach, a court first looks to the Federal Constitution when deciding whether a state action is valid, and if the litigant’s rights are “questionable” under the U.S. Constitution, then a court consults the state constitution. See Pollock, supra, at 984 (detailing application of “supplemental” approach).

140. Gardner, supra note 5, at 368; see Pollock, supra note 139, at 718 (describing third approach).
The interstitial model offers a three-step analysis to determine whether state courts should apply an independent decision based on its own constitutional provision when confronting a state constitutional issue.\textsuperscript{141} In assessing the first step, a court considers whether federal law requires a particular result because the state action falls below the federal floor.\textsuperscript{142} If a court answers this question affirmatively, the case can be decided on federal constitutional grounds without the need to address state constitutional law.\textsuperscript{143} If not, the court then asks whether there are certain facts that would call for a divergence from federal law.\textsuperscript{144} In situations where there are reasons to diverge, a court then needs to define the parameters of the state constitutional provision and determine “specifically, should the court employ a reactive approach, simply tinkering with the available federal doctrine, or should it employ a more self-reliant approach, building state constitutional doctrine for this area independently, without close reference to the federal doctrine?”\textsuperscript{145}

State courts following either the primary or interstitial approach must explain themselves. These state courts must on their own assess each claim based solely on their interpretation of state constitutional law.\textsuperscript{146} A state court deciding to expand protections of individual rights and liberties beyond the federal floor “first must determine whether the federally recognized rights themselves are incorporated in the state constitution and only then must determine whether those protections are more expansive under state law.”\textsuperscript{147}

Whether a state court employs the primacy, interstitial, or dual sovereignty approach, it must articulate a principled basis for departing from federal constitutional precedent. “[I]t is not the sequence that is the most important methodological issue but rather the focus on truly independent state constitutional

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Under the primacy model, state constitutions are viewed as the “fundamental law” and serve as independent sources of rights. Courts applying the interstitial model view federal doctrines as the source of minimum rights and ask whether state constitutional provisions supplement or amplify federal rights. Courts adopting the dual sovereignty model examine both the federal Constitution and state constitutions even if a decision rests solely on state law grounds. Finally, under the lockstep method, state courts mechanically adopt the United States Supreme Court’s holdings interpreting the federal Constitution.


141. See Developments in the Law, supra note 10, at 1358 (discussing analysis for interstitial approach).
142. See id. (posing first question related to interstitial approach).
143. See id. (explaining outcome if federal constitutional law governs).
144. See id. (outlining step two of interstitial approach).
145. Developments in the Law, supra note 10, at 1358.
146. See Maltz, supra note 128, at 444.
147. See id.
interpretation, in whatever sequence it occurs. It is substance, not form, that counts most.”

D. Factors Considered

Regardless of which mode of analysis is selected, the state court must articulate which factors will influence its interpretation of a constitutional provision. The real question in determining state constitutional protections is not the “when” it is determined, i.e., where in the process (first for primacy and second for interstitial) but the “why,” i.e., why should more protections be provided by the state constitution over those afforded by the United States Constitution. Whether the interpretation is made on the basis of text or intent, “neither logic nor history requires that they accord state constitutional language the same meaning as the United States Supreme Court has accorded a comparable provision of the federal Constitution.” At the state level, states should interpret constitutions in the same manner as courts have traditionally decided questions of constitutional interpretation using “text, structure, history, controlling state precedent, and the values of the state polity.” The analysis that would allow for a divergence between federal and state provisions includes “differences in the constitutional text, structure, or history; differences in controlling state precedent; and differences in the concerns or values of the local populace.”

These may well be specific factors which allow for the divergence: whether state constitutional provisions exist that recognize rights not identified in the U.S. Constitution or that characterize particular rights in a significantly different way, history surrounding the adoption of a particular state constitutional provision, previously established state laws that create state constitutional rights, or values imbued in that state.

There exists a wide range of approaches to state constitutional interpretation. New Jersey Supreme Court Justice Alan Handler offered a compelling method of classification in State v. Hunt, in which he complained, “[t]here is

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150. See Gardner, supra note 5, at 368 (discussing method of interpretation).
151. See id. at 368 (explaining different approaches to reconcile state and federal constitutional interpretations).
152. See Developments in the Law, supra note 10, at 1361 (discussing reasons for divergence).
153. See Rush & Miller, supra note 20, at 1360 (outlining ranges of constitutional interpretation). The authors describe the approaches as historical (the intent of constitutional draftsmen), textual (the present sense of the provision’s words), structural (relationships among the people and government), prudential (practical wisdom about the court’s role with respect to the provision), doctrinal (jurisprudential principles), and ethical (moral values that are reflected in the constitution). See id. In State v. Jewett, the Vermont Supreme Court added two more: an economic and sociological approach, and a “sibling state approach,” based on what other states in similar situations have done. See 500 A.2d 233, 237 (Vt. 1985); Rush & Miller, supra note 19, at 1360 (noting ruling of Vermont Supreme Court).
154. 450 A.2d 952 (N.J. 1982).
a danger . . . in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. Justice Handler emphasized the importance of explaining standards for invoking state constitutions to protect individual rights. He identified seven criteria: textual differences between state and federal constitutions, historical evidence that the state provision was intended to be more protective than the federal counterpart, preexisting state law, differences in state and federal structure, matters of particular state or local concern, particular state history and traditions, and, lastly, state public attitudes.

But, in truth, many of these factors cannot adequately explain why a state constitutional provision is more protective than its federal counterpart. The text may not be vastly dissimilar, there may be little if any legislative history or structural differences that would allow additional restrictions on the sovereign. Yet the differences may lie in the particular concerns, attitudes, and values of the state populace; the principles considered to be part of a state’s traditions; and the values and norms expressed in prior state court decisions.

The language, history, and structure of state constitutional provisions do not often offer express authorization for differing interpretation and for reading state constitutional provisions as more protective of individual rights and liberties than the federal cognate provisions. As one critic of expanded state constitutional protections noted,

After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from federal cases discussing the federal Constitution. You are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more important to the people than others.

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155. See id. at 963 (Handler, J., concurring).
156. See id. at 965 (asserting state courts need sensitivity to federal jurisprudence).
157. See id. at 965-67 (explaining considerations on whether to invoke state constitution); see also State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (identifying substantially similar considerations).
158. See Steele & Tsolias, supra note 140, at 1372 (listing judicial factors used to determine differences in state and federal constitutions).
160. Gardner, supra note 2, at 765.
IV. COMMON LAW AND FUNDAMENTAL PRINCIPLES

The authority for expanding state constitutional protection lies not in any differences in the text, history, or structure of federal and state constitutions, but in the evolving standards of state common law. It is not the language of the text which serves as the basis for constitutional interpretation, but the contemporary norms as most persuasively expressed in the development of that state’s common law. Before the process of incorporating constitutional protections through the Fourteenth Amendment, the protection of the basic liberties was left to state courts interpreting state law. These state constitutional decisions often utilized “concepts of natural law, common-law developments, and other modes of reasoning that transcended state-specific texts or understandings.”\(^{161}\)

Historically, state courts make new law by purposefully improving their own common law.\(^{162}\) While most decisions based on common law principles consist of the routine application of existing legal rules, courts engaged in common law interpretation can announce their judicial decision making on the basis of “whether those rules will conduce to a good or a bad state of affairs.” In these situations, common law courts actively shape and remake the law.\(^{163}\)

As state courts develop new principles of common law based on evolving standards and values, they alter the law “with the deliberate aim of adjusting controlling legal principles to bring about better, fairer, and generally more desirable results.”\(^{164}\) As such, the common law is constantly changing as the attitudes of the state’s populace changes. The common law is not static and reflects the state’s changing fundamental beliefs and mores.\(^{165}\)

The common law historically has been judicial policymaking. It reflects the norms of a changing society. Judith Kaye, former Chief Judge of the New York Court of Appeals, explained that the common law “proceeds and grows incrementally, in principled fashion, to fit a changing society. In our justice system the state courts, not the federal courts, are largely responsible for developing the common law.”\(^{166}\)

Once the court establishes that the developing common law best demonstrates a state’s most basic and fundamental principles, that common law can then serve

\(^{161}\) Liu, supra note 135, at 1322-23.
\(^{162}\) See Gardner, supra note 127, at 1741.
\(^{163}\) Id. (quoting Melvin Aaron Eisenberg, The Nature of the Common Law 43 (1988)).
\(^{164}\) Id. at 1742.
as the basis for state courts to interpret their own constitutional protections.167 In this way, state courts utilize “local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee.”168 In fashioning the interpretation of the constitutional provisions, state courts incorporate public policy into their common law decision making.169

Chief Justice of the Massachusetts Supreme Judicial Court Lemuel Shaw described this perspective of state court interpretation of its own constitution when he wrote in 1857,

In considering constitutional provisions, especially those embraced in the [Massachusetts] Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of rights, we are rather to regard them as the annunciation of great and fundamental principles . . . than as precise and positive directions and rules of action . . . Many of them are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislators and judges, without any express declaration, that some of the framers of state constitutions, and even the convention which formed the Constitution of the United States, did not originally prefix a declaration of rights.170

Further, as Chief Justice Ellen Peters of the Connecticut Supreme Court has more recently expressed, “rights now denominated as constitutional had well-recognized common law antecedents.”171

It is the common law developed by the state’s attitudes, values, and evolving standards of justice that serves as the basis of interpreting its own constitutional provisions to best protect the rights of its own citizens.172

[T]he task of forging judicially enforceable floors to protect the chronically weak is analogous to the enunciation of a societal duty of care or a collective “good samaritan” doctrine, state courts should be at home with the process. Although the process may be couched as a construction of a provision of the state constitution, as the enunciation of an aspect of constitutional common law, or as the garden variety application of established tort principles to protect chronically

168. Sutton, supra note 18, at 173-74 (discussing state’s freedom in interpreting constitutions).
172. See Kaye, supra note 166, at 751 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
weak groups, state judges should recognize the process as the placing of old wine in new bottles.\footnote{173}

V. THE EVOLVING COMMON LAW

The common law changes to conform to the evolving standards of that state. What was once a law protective of economic interests has evolved into a recognition of individual rights and liberties fashioned on the doctrines of fairness and equity. The next section of this Article will examine the recent developing common law.

A. Lochner v. New York

Contemporary common law jurisprudence commenced with the\footnote{174} \textit{Lochner} era, which ran from 1897 through the 1930s.\footnote{175} Economic rights prevailed over individual rights and liberties. \textit{Lochner} represented a direct challenge to the two competing rights.\footnote{176} The state law provided that individuals who worked in bakeries and confectionery establishments could not work over sixty hours in one week.\footnote{177} The Court held that the law violated due process and struck down the hourly limitations that protected workers.\footnote{178} Thus began the era where the Court would strike down state attempts to regulate economic interests.\footnote{179}

This historical protection of economic rights in the common law has been abandoned in favor of protection of individual rights.\footnote{180} This movement is

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\item 176. See id. at 458 (recognizing expansion of economic liberties). In the \textit{Lochner} era there was an “expansion of United States between the Civil War and the Depression [that] produced a full flowering of due process protection for property and economic liberties.” \textit{Id}.
\item 177. See \textit{Lochner}, 198 U.S. at 46 (discussing offense for which defendant indicted).
\item 178. See id. at 74 (holding statute violated U.S. Constitution).
\item 179. See Bernard H. Siegan, \textit{Protecting Economic Liberties}, 6 Chap. L. Rev. 43, 85 (2003) (stating \textit{Lochner} ruling applicable to both common law and constitutional law principles).
\item 180. See Kaplan, \textit{supra} note 167, at 464 (explaining \textit{Lochner} era courts “used a brand of common-law constitutionalization to strike down legislative enactments”). This era has been abandoned with the switch to states expanding the protection they can provide that the U.S. Supreme Court has failed to. See id.; see also A.C. Pritchard & Todd J. Zywicki, \textit{Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation}, 77 N.C. L. Rev. 409, 519-20 (1999) (describing \textit{Lochner} Court taking guidance from common law, like freedom of contract). But see David E. Bernstein, \textit{Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism}, 92 Geo. L.J. 1, 53 (2003) (finding “[p]rotection of nontextual rights under the Due Process Clause largely disappeared for several decades”). Thus, there is a need for state courts to provide more protection than the federal government in order to protect and expand individual rights.
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evidenced by states liberalizing their own traditional common law by expanding individual protections in the areas of contracts, torts, property, and privacy.\textsuperscript{181}

\textbf{B. Expansion of Tort Liability}

States have expanded tort liability in multiple areas of tort law. In the area of premises liability, under existing precedent, courts were hesitant to burden the owner of property with any liability if someone was injured on their property; it was harder for the injured party to receive compensation for injuries. States have now abandoned that precedent, allowing property owners to be held liable for tortious injuries on their property, but only if the injured party is a lawful visitor.\textsuperscript{182} In \textit{Stamper ex rel. Stamper v. Kanawha County Board of Education},\textsuperscript{183} for example, liability was found where a child was injured while playing basketball on an outdoor court owned by an elementary school.\textsuperscript{184} Liability was similarly found in two cases in separate jurisdictions, \textit{Hover v. City of Bagley}\textsuperscript{185} and \textit{Goodson v. City of Racine},\textsuperscript{186} for injuries that occurred on city property. The court in \textit{Hover} held that the recreational use statute could not frustrate the claims of a party injured on land owned by a city.\textsuperscript{187} Likewise, in \textit{Goodson}, the court held that the city could not be exempt from liability for injuries sustained.\textsuperscript{188}

States have also expanded protections for individuals in slip and fall cases. Under the traditional approach, the plaintiff bore the burden of proving that the store owner or a worker caused the substance’s presence on the floor, that they knew or should have known of its existence, and the plaintiff must present evidence to prove how long it was on the floor.\textsuperscript{189} That standard has been abandoned by states that have adopted the mode of operation approach.\textsuperscript{190} \textit{Sheehan}
v. Roche Bros. Supermarket\textsuperscript{191} is a classic example where the plaintiff slipped and fell on a grape in a grocery store and brought a negligence action against the store.\textsuperscript{192} The court in Massachusetts adopted the mode of operation approach and declared that the store had notice of the grape on the floor, and plaintiff only had to prove that the unsafe condition was reasonably foreseeable.\textsuperscript{193} Other jurisdictions have also expanded liability to favor individual recovery for injuries sustained in slip and fall cases. In Baptist Medical Center v. Byars,\textsuperscript{194} the Supreme Court of Alabama allowed recovery for a nurse for injuries she sustained when she slipped and fell on a wet substance in front of a patient’s door.\textsuperscript{195} Also, in Dollar General Corp. v. Elder,\textsuperscript{196} a customer fell near the store’s entrance because the concrete was wet and slippery due to the rain.\textsuperscript{197} The Arkansas Supreme Court held that the wet concrete was unreasonably dangerous, and the landlord failed to maintain the store in good condition.\textsuperscript{198}

To be fair, tort liability has not been expanded without limitations. While the expansion of premises liability has allowed the plaintiff to recover damages for injuries they sustained while on the premises of property owned by others, courts have also protected landowners from liability when there was an open and obvious hazard. This is because ordinary care only needs to be used when there is a latent present danger; there is generally no duty to warn where the danger is visible.\textsuperscript{199} A landowner has to warn only an invitee of a danger if it is hidden or unknown to the invitee.\textsuperscript{200} But common law has developed so to balance the rights of injured individuals with the rights of property owners.

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\textsuperscript{191} See Roche Bros. Supermarket v. Donosco, 56 N.E.2d 1279 (Mass. 1944).
\textsuperscript{192} See id. at 1279 (discussing background of negligence case).
\textsuperscript{193} See id. at 1286 (stating fruit and vegetable debris present obvious risks within grocery mode of operation).
\textsuperscript{194} See Baptist Medical Center v. Byars, 932 S.E.2d 1285 (Ga. 2019).
\textsuperscript{195} See id. at 1285. Regardless of what a state chooses to call their approach—mode of operation or otherwise—it is very similar to the approach that Massachusetts uses, which is easier for the plaintiff to prove that the store was liable. See id.
\textsuperscript{196} See Dollar General Corp. v. Elder, 142 S.W.3d 601 (Ark. 2004).
\textsuperscript{197} See id. at 601 (describing allegations outlined in complaint).
\textsuperscript{198} See id. at 603, 605 (confirming plaintiff invitee and need to use reasonable care maintaining premise; outdoor and indoors). “In Arkansas, a property owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees.” Id. at 603.
\textsuperscript{199} See Draughn v. Evening Star Holiness Church of Dunn, 843 S.E.2d 72, 76 (N.C. 2020) (noting when danger open and obvious, courts find defendant had no duty to warn plaintiff). A plaintiff tripped while walking down a set of stairs, and the court held because the steps were fully visible to the plaintiff he could not recover against the church; the church was not liable because the danger was visible. See id. at 74.
\textsuperscript{200} See James Gordley, The Common Law in the Twentieth Century: Some Unfinished Business, 88 CALIF. L. REV. 1815, 1844 (2000) (highlighting person intended consequences if substantially certain conduct or lack thereof would produce such result). Historically, there have been instances where liability has been multiplied
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Liquor liability has also been expanded by states, which had previously held that at common law there was “no liability on the part of one selling or furnishing liquor to ‘an able bodied person.’”201 Today, a social host or seller of alcohol can be held liable for providing alcohol. In Delfino v. Griffin,202 a drunk driver caused a car accident that killed a passenger and the estate sued pharmaceutical representatives who purchased alcohol for the driver during a business lunch.203 The Supreme Court of New Mexico found these third parties were social hosts for purposes of determining liability.204 In Ennabe v. Manosa,205 the parents of a deceased party guest sued the host after she supplied alcohol to a guest who later struck and killed another guest while driving away from the party.206 The Supreme Court of California held that the host was liable for “the sale” of alcohol to a minor.207 Due to the expansion of liquor liability, those that sell or furnish alcohol can be held liable for injuries sustained.

This movement to expand tort liability in favor of individual recovery is also seen in medical malpractice liability.208 Medical malpractice has expanded liability to protect victims of latent injuries instead of only allowing recoveries that were foreseeable or visible to the naked eye.209 In Doe v. Cochran,210 the girlfriend of a patient became infected with herpes after the boyfriend’s physician incorrectly reported that the boyfriend had tested negative for herpes.211 The Connecticut Supreme Court held that the physician owed a duty of care to the plaintiff, even though she was not his patient.212 States are extending protection to those who have been affected by a physician’s negligence, even if they were

“in which a person who intended no harm or wrong has been held liable even though he did not act negligently.”  
Id. at 1845.  
201. See Jeanne Matthews Bender, Tort Liability for Serving Alcohol: An Expanding Doctrine, 46 MONT. L. REV. 381, 381 (1985) (quoting Cruse v. Aden, 20 N.E. 73, 74 (1889)) (explaining cannot recover for injuries from consuming alcohol bought or served).  
203. See id. at 920 (setting forth facts).  
204. See id. at 925 (stating inclusion of social hosts in Liquor Liability Act consistent with tort and regulatory licensing system).  
205. 319 P.3d 201 (Cal. 2014).  
206. See id. at 204-05 (describing guest running into street before other guest ran him over).  
207. See id. at 203-04 (qualifying defendant for exception to statute granting civil immunity for sale of alcohol).  
209. See id.  
210. 210 A.3d 469 (Conn. 2019).  
211. See id. at 472-73 (describing basis for negligence action against defendant doctor).  
212. See id. at 497 (reversing trial court finding of no duty owed to plaintiff).
not a patient themselves. In *Baptist Medical Center Montclair v. Wilson,* a mother brought an action when, during labor, complications led the baby to suffer brain damage causing its death. The Supreme Court of Alabama upheld the finding of malpractice and allowed the mother to recover damages.

State supreme courts are increasingly willing to support the rights of individuals who have suffered injuries as a result of the negligence of historically economically-protected interests.

C. Increased Protection in Contracts

In contracts, courts have shifted from protecting the economic liberties of businesses and corporations to protecting the party who suffers and has an unfair disadvantage. States have created these greater protections by amending their own state constitutions to include socioeconomic rights, which help fulfill multiple areas of rights for individuals that are public concerns, such as care and assistance for the most needy in society. State constitutions provide a source of public policy that help inform state courts when interpreting or implying a contract term, which could benefit the party trying to void or enforce a contract.

Beginning with adhesion contracts, where one party has more power than the other at formation, courts have held they are unenforceable due to the unfair power dynamic. For example, in *Woodruff v. Bretz,* *Inc.,* Woodruff sued Bretz, a motorhome dealership, alleging breach of contract and misrepresentation; Bretz responded by compelling arbitration due to a mandatory arbitration clause in the contract. The Supreme Court of Montana held the arbitration clause was unenforceable because the contract was one of adhesion as Woodruff did not reasonably expect to relinquish her right to sue Bretz after paying $17,000 to remove undisclosed urine contamination from the motorhome. In *OTO,*

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213. See Greaney & Comerford, supra note 182, at 83 (defining physician’s duty of care). The relationship between a patient and physician extends “not only to a patient but to others put at risk by the medical care provided.” *Id.* In *Cochran,* the patient’s girlfriend was put at risk when the doctor incorrectly reported that the patient tested negative for a sexual disease. *See Cochran,* 210 A.3d at 473.

214. 618 So. 2d 1335 (Ala. 1993).

215. See id. at 1337 (outlining facts of case leading to lawsuit).

216. See id. at 1339 (affirming hospital’s negligent acts or omissions proximately caused death of baby).

217. See Rush & Miller, supra note 20, at 1355 (noting individuals “[look] to state constitutions and state courts . . . for protections of their constitutional rights”). This is because state constitutions can offer “protections that are not provided by other sources.” *Id.* at 1368.

218. See Hershkoff, supra note 169, at 1546 (explaining state constitutional amendments “created a political space that traditional common law principles otherwise blocked”).

219. See id. at 1558 (noting importance of state constitutions to state court decisions).

220. 218 P.3d 486 (Mont. 2009).

221. See id. at 488 (noting buyer sued upon learning motor home contaminated with pet urine).

222. See id. at 494 (noting arbitration clause and contaminated condition not within buyer’s reasonable expectations).
L.L.C. v. Kho,223 Kho, an employee of OTO, filed a claim with the Labor Commissioner for unpaid wages, and OTO asked the court to compel arbitration pursuant to the employment agreement.224 The Supreme Court of California held that the arbitration agreement was unconscionable, and therefore, unenforceable, because the agreement contained harsh terms obtained through oppressive bargaining tactics.225 When a court finds a contract to be unconscionable, as with adhesion contracts, the contract will be void.

“The doctrine of unconscionability is necessary to ensure a minimal standard of decency within the unique factual circumstances of contractual and business relationships.”226 This doctrine protects the vulnerable from contracting parties looking to take advantage and allows a remedy for the vulnerable party.227 State supreme courts have voided unconscionable contracts to protect the vulnerable party. Wisconsin Auto Title Loans, Inc. v. Jones228 and Adler v. Fred Lind Manor229 are two such cases where courts found the contracts unconscionable. In Wisconsin Auto, the contract provided Jones, the indigent borrower, with an $800 loan yet required the car title as collateral.230 Jones defaulted, so Wisconsin Auto repossessed the car and moved to compel Jones to arbitrate his claims.231 The Wisconsin Supreme Court held the arbitration provision was unconscionable as one-sided because Jones had to arbitrate all claims, while Wisconsin Auto could go to court.232 In Adler, Adler, a terminated employee, brought action against Fred Lind Manor, his former employer, alleging that an arbitration agreement, including its attorney fee provision and 180-day limitation period to bring discrimination claims, was unconscionable and therefore unenforceable.233 The

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224. See id. at 686 (explaining employer tried to enforce arbitration clause in employment contract).
225. See id. at 697-98. Despite the court’s holding, California law significantly favors arbitration. See id. at 689. The enforceability of an arbitration clause, however, depends on the fairness of the bargaining process, as well as the resulting terms; if one party is extremely disadvantaged, a clause will not be enforced. See Sanchez v. Valencia Holding Co., 353 P.3d 741, 749 (Cal. 2015).
227. See id. at 113, 128 (explaining doctrine developed to “provide a judicial procedure for avoiding grossly immoral contractual bargains”). Today, this doctrine allows courts “to strike down contract terms that seek to improperly advantage one party over a more vulnerable party.” Id. at 128 (noting doctrine developed in equity courts).
228. 714 N.W.2d 155 (Wis. 2006).
229. 103 P.3d 773 (Wash. 2004) (en banc).
230. See Wis. Auto, 714 N.W.2d at 159-60 (listing facts making adhesion contract unconscionable).
231. See id. at 161-62 (explaining case facts and parties’ claims). The arbitration provision stated that “all disputes, controversies or claims . . . arising out of or related to this Agreement . . . shall be decided by binding arbitration.” Id. at 160-61.
232. See id. at 173 (recognizing substantive unconscionability when stronger party imposes one-sided arbitration on weaker party). The court defined unconscionability as “oppression or unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” Id. at 165.
233. See Adler, 103 P.3d at 777 (alleging arbitration would also violate Adler’s right to jury trial).
Washington Supreme Court held the attorney fee and 180-day limitation period provisions were substantively unconscionable and severed them from the arbitration agreement. This two cases demonstrate state courts’ protection of individual rights by leveling the playing field.

State courts have also recognized unequal bargaining power in contracts. This doctrine emerged due to the “perceived abuses of laissez-faire economic regulation and Lochner-era freedom of contract doctrine.” The Colorado Supreme Court held in Davis v. M.L.G. Corp. that a car rental company’s waiver “limited the scope of the physical damage waiver in an unconscionable manner.” In following this approach, courts recognize unequal bargaining power as a factor in determining unconscionability. In Eaton v. CMH Homes, Inc. the buyer sued the seller for fraud and breach of contract, and the seller moved to enforce an arbitration clause. The Supreme Court of Missouri severed an anti-waiver provision as unconscionable because it created a one-sided scenario in which the seller, CMH Homes, could pursue a lawsuit against the buyer, Eaton, while forcing Eaton to arbitrate any related defenses or counterclaims. The emergence of this doctrine solidifies protection for individuals who do not have equal footing involving the execution and enforcement of the contract.

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234. See id. at 791 (remanding for further determinations of procedural unconscionability and waiver). Justice Bridge explained that the attorney fee provision, requiring each party to bear costs and attorney fees, was substantively unconscionable because it weakened Adler’s statutory right to attorney fees and helped Fred Lind Manor keep Adler in a disadvantaged position. See id. at 786.


236. Id. at 194. The legal doctrine of inequality of bargaining power in the 1930s “changed from a rhetorical tool of organized labor and its judicial and academic sympathizers to a legal doctrine applied to contract in general.” Id. Bargaining power “became entrenched in contract law” following the adoption of the Uniform Commercial Code (UCC). Id.


238. See id. at 986.

239. See id. at 991 (holding determining unconscionability includes “a standardized agreement executed by parties of unequal bargaining strength”). The court ruled in favor of the customer because “[i]t is common knowledge that the detailed provisions of standardized contracts are seldom read by consumers” and “lessors should know that the simple, highly readable summary of the collision responsibility alternatives will lead an average customer to reasonably conclude that he is protected against most, if not all, risks.” Id. at 992.

240. 461 S.W.3d 426 (Mo. 2015).

241. See id. at 431.

242. See id. at 436-37 (severing offending provision but otherwise holding lack of mutuality not unconscionable). Unconscionability may result from unduly harsh terms, “high pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions.” Id. at 433 (quoting Brewer v. Mo. Title Loans, 364 S.W.3d 486, 489 n.1 (Mo. 2012)) (reciting state law of unconscionability).
In related fashion, state courts will refuse to enforce forum selection clauses in contracts only if the clauses are unreasonable.\textsuperscript{243} In \textit{Dix v. ICT Group, Inc.},\textsuperscript{244} Dix brought a class action in Washington against ICT Group for violation of the Washington Consumer Protection Act; the lower court dismissed the action stating Virginia was the proper forum for litigation.\textsuperscript{245} The Washington Supreme Court held the forum selection clause to be unenforceable as being against public policy.\textsuperscript{246} In \textit{T3 Enterprises, Inc. v. Safeguard Business Systems, Inc.},\textsuperscript{247} T3 Enterprises signed an agreement that contained a forum selection clause indicating the Federal Arbitration Act and Texas law would apply to any disputes.\textsuperscript{248} The Idaho Supreme Court held the forum selection clause was unenforceable under Texas law due to the unjust and unreasonable nature of the clause.\textsuperscript{249}

Similarly, courts have also refused to enforce choice of law provisions. This can be seen in \textit{Osborne v. Brown & Saenger, Inc.},\textsuperscript{250} where Brown, the employer, attempted to enforce a forum selection clause in an employment agreement after Osborne, an employee, sued Brown to challenge the agreement’s non-compete clause.\textsuperscript{251} The North Dakota Supreme Court held the employment contract’s choice of law and forum selection clauses were unenforceable.\textsuperscript{252} Both types of


\textsuperscript{244} 161 P.3d 1016 (Wash. 2007).

\textsuperscript{245} See \textit{id. at} 1017-18 (noting terms of agreement contained forum selection clause specifying Virginia forum for any suits).

\textsuperscript{246} See \textit{id. at} 1024 (explaining when clause unreasonable to enforce). The court explained the analysis to determine the enforceability of forum selection clauses:

\textit{[T]he clause may be found to be unreasonable if (i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed.}

\textit{Id. at} 1020 (quoting Gilman v. Wheat, First Sec., Inc., 692 A.2d 454, 463 (Md. 1997)). Judge Madsen held the forum selection clause would leave the plaintiffs no avenue for seeking relief because Virginia does not allow class action suits. \textit{Id. at} 1024.

\textsuperscript{247} 435 P.3d 518 (Idaho 2019).

\textsuperscript{248} \textit{Id. at} 523.

\textsuperscript{249} \textit{Id. at} 529, 531 (explaining Texas court would not enforce forum selection clause which contravenes Idaho public policy). Accordingly, a forum selection clause may be held unreasonable where it goes against the public policy of the state where the suit was brought. \textit{See id. at} 529.

\textsuperscript{250} 904 N.W.2d 34 (N.D. 2017).

\textsuperscript{251} See \textit{id. at} 36 (noting choice of law clause designated South Dakota).

\textsuperscript{252} See \textit{id. at} 37 (holding clause went against North Dakota’s public policy prohibiting non-compete agreements). Osborne, who worked in North Dakota, argued that it would be unfair and unreasonable to enforce the forum selection clause in light of North Dakota’s statute prohibiting trade restraints. \textit{See id. at} 35, 37 (declaring contracts void if impeding lawful profession, trade, or business). The court held “one may not contract for application of another state’s law or forum if the natural result is to allow enforcement of a non-compete agreement in violation of North Dakota’s longstanding and strong public policy against non-compete agreements.” \textit{Id. at} 38-39.
clauses have been determined to be unenforceable where they violate public policy or are unjust.

During the time of contract formation, there is an implied covenant of good faith and fair dealing. This requirement to act in “good faith” has been recognized for centuries, but it was not until the twentieth century that courts referred to this requirement as the implied covenant of good faith and fair dealing.253 The jurisdiction of Montana is one of a minority of states to imply this doctrine within employment contracts, which provides protection for individuals in their workplace.254 The Delaware Supreme Court held that a duty of good faith and fair dealing is implied in every contract. In Dunlap v. State Farm Fire and Casualty Co., Dunlap, a car passenger, was injured in a collision with a bus and sued State Farm, her automobile insurer, to recover for bad faith, alleging State Farm refused to cooperate by not paying the insurance claim.255 The court remanded the case for further proceedings, holding that State Farm’s refusal to cooperate could implicate a breach of the implied covenant of good faith and fair dealing.256 This doctrine protects an individual’s right to a guarantee that the party is bargaining in good faith.

The implied warranty of merchantability is another common law safeguard in the context of contracting; it provides an implied warranty that the goods are merchantable if the seller is a merchant.257 In Dale v. King Lincoln-Mercury, Inc.258 Dale purchased a car, and twenty-two days later the transmission failed.259 King Lincoln-Mercury stated that car was purchased under an express warranty.260 The Kansas Supreme Court held that King Lincoln-Mercury could not limit, exclude, or modify the implied warranty of merchantability and fitness for a particular use.261 In Henningesen v. Bloomfield Motors, Inc.262 Henningesen, a car purchaser, sued to recover damages from Bloomfield Motors resulting from


254. See Herschhoff, supra note 169, at 1564 (indicating Montana’s state constitution protects individuals in workplace). “Montana . . . contains in its state constitution a number of unusual provisions that relate to material well-being, to the importance of livelihood, and to the reciprocal relations of state citizens to care for each other.”

255. See Dunlap, 878 A.2d at 440 (claiming insurer acted in bad faith).

256. See id. at 445 (reiterating court’s holding).


259. See id. at 746 (detailing sequence of events following plaintiff’s car purchase).

260. See id. (discussing car dealership’s statement). The warranty stated, “30 day or 1000-mile warranty 100% on Drive Line & Air Conditioner.” Id (detailing express warranty).

261. See id. at 747 (articulating court’s holding). The court explained that the dealership cannot “simply extend[] to the consumer a limited and narrowly drawn express warranty.” See id. (striking down King Lincoln-Mercury’s argument).

an accident where it was alleged that the car was defective at purchase.\textsuperscript{263} The New Jersey Supreme Court held the attempted disclaimer of the implied warranty of merchantability was not valid, and the jury correctly held that the warranty was violated.\textsuperscript{264} The implied warranty, developed in the common law, protects individual consumers from oppressive contractual provisions.

\textbf{D. Expansion of Property Rights}

The common law has seen an expansion of individual rights in multiple areas of property law, including perhaps most significantly, invalidation of property restrictions based on race by state courts. Past precedent was that restrictive covenants based on race or color “standing alone cannot be regarded as violative of any rights guaranteed . . . by the Fourteenth Amendment.”\textsuperscript{265} State courts have moved away from that position and are now invalidating racial covenants, finding them contrary to due process protections. In \textit{Phillips v. Naff},\textsuperscript{266} Naff conveyed a lot to a Black person with a restrictive covenant stating that use and occupancy of all lands were restricted to white individuals.\textsuperscript{267} Phillips did not want a Black person living in the neighborhood and subsequently sued to enforce the covenant.\textsuperscript{268} The Michigan Supreme Court held that Phillips would receive no damages because the covenant alienated Naff’s use of the property.\textsuperscript{269} More importantly, the court agreed with the lower court, which concluded that the covenant constituted “an attempt to enforce indirectly a racial restrictive covenant, and in practical effect was repugnant to the 14th amendment to the Federal Constitution.”\textsuperscript{270} Similarly, in \textit{Viking Properties, Inc. v. Holm},\textsuperscript{271} Viking and

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\textsuperscript{263} See \textit{id.} at 73 (introducing plaintiff’s argument).
\textsuperscript{264} See \textit{id.} at 95 (outlining court’s holding).

A provision in a purchase order for an automobile that an express warranty shall exclude all implied warranties will not be given effect so as to defeat an implied warranty that the machine shall be fit for the purposes for which it was intended unless its inclusion in the contract was fairly procured or obtained.

\textit{Id.}

\textsuperscript{265} See \textit{Shelley v. Kraemer}, 334 U.S. 1, 13 (1948) (finding no constitutional violation in private contracts); \textit{see also} U.S. \textit{CONST. amend. XIV, § 1} (requiring “equal protection of the laws”). The \textit{Shelley} Court ultimately held that judicial enforcement of such covenants constituted a state action which \textit{did} violate the U.S. Constitution. \textit{See Shelley}, 344 U.S. at 20 (recognizing freedom from discrimination for property rights core objective of Fourteenth Amendment).

\textsuperscript{266} 52 N.W.2d 158 (Mich. 1952).
\textsuperscript{267} See \textit{id.} at 159 (excepting racially restrictive covenant).
\textsuperscript{268} See \textit{id.} (describing catalyst for suit).
\textsuperscript{269} See \textit{id.} at 164 (holding enforcement of covenant imposed burden on power of alienation). Phillips had attempted to differentiate his claim from \textit{Shelley} by seeking damages as opposed to an injunction. \textit{See id.} at 161 (arguing damages claim would not require judicial enforcement of discrimination).

\textsuperscript{270} \textit{See Phillips}, 52 N.W.2d at 159-60, 164.
\textsuperscript{271} 118 P.3d 322 (Wash. 2005) (en banc).
defendants, the homeowners, all acquired residential properties subject to a restrictive covenant that barred racial minorities from ownership.\textsuperscript{272} Viking sought to invalidate the entire covenant whereas the homeowners argued to sever only the racially restrictive language and maintain the density restriction in the covenant.\textsuperscript{273} The Washington Supreme Court determined that the racial restrictions in the covenant were severable from the rest of the covenant and were unenforceable.\textsuperscript{274}

Before the implied warranty of habitability was established at common law, residential property was governed by the doctrine of caveat emptor. That doctrine provided no protections to tenants and “made no implied warranties concerning the fitness, suitability, or condition of the premises”; essentially allowing tenants no remedies or rights against the landlord.\textsuperscript{275} The recognition by state courts of an implied warranty of habitability vitiated the doctrine of caveat emptor for residential leases and allowed the tenant multiple remedies against the landlord if the property was not maintained to standards of living.\textsuperscript{276} This new common law created a “tenants’ rights revolution of the past half-century [that] represent[ed] one of the most extraordinary reforms in modern Property law.”\textsuperscript{277}

In the classic case of Hilder v. St. Peter,\textsuperscript{278} Hilder lived in a home with deplorable conditions and brought an action against St. Peter, his landlord, alleging breach of the implied warranty of habitability; the trial court found in Hilder’s favor.\textsuperscript{279} On appeal, the Supreme Court of Vermont held that Hilder was entitled to monetary damages because St. Peter leased a home that did not meet habitable living standards.\textsuperscript{280} In some instances, this common law protection has been expanded beyond tenants. Along with the implied warranty of habitability protecting tenants, the Massachusetts Supreme Judicial Court extended the protection to guests

\textsuperscript{272} See id. at 324.
\textsuperscript{273} See id. at 324-25 (summarizing arguments).
\textsuperscript{274} See id. at 332 (holding court could sever unenforceable racial covenant from remainder of covenant).
\textsuperscript{276} See Weinberger, supra note 275, at 456 (noting changing needs of tenants required introducing new legal principles to leases). In the 1970s, Judge Wright concluded that the warranty of habitability “should be implied in all leases for space in urban dwellings,” imposing an obligation on landlords to make sure the dwellings would be habitable and safe for tenants, regardless of the area they were in. See id. at 455 (describing recommended changes to landlord duties).
\textsuperscript{277} Id. at 464 (presenting history of tenants’ increasing rights).
\textsuperscript{278} 478 A.2d 202 (Vt. 1984).
\textsuperscript{279} Id. at 205-06 (describing uninhabitable living conditions). Hilder never received a front door key, there was a broken kitchen window, the bathroom was clogged with feces, water pipes were leaking, raw sewage permeated the apartment, and plaster was coming off the wall. See id.
\textsuperscript{280} See id. at 211 (explaining holding of case).
of their tenants in *Scott v. Garfield.* 281 In this case, Scott visited an apartment that his friend leased from Garfield, the landlord, and sustained injuries after falling though a second-story porch railing and sued Garfield. 282 The court held that Scott could recover damages due to St. Peter’s breach of the implied warranty of habitability. 283

State courts have also brought new scrutiny to the enforcement of liquidated damage provisions in leases. Prior precedent rarely invalidated a liquidated damage provision contained in a lease. 284 In *Summers v. Crestview Apartments,* 285 Summers sued his landlord for wrongful withholding of the security deposit and misleading language in the lease. 286 The Supreme Court of Montana held that the lease was unenforceable, and the accelerated rent was liquidated damages, which again was contrary to Montana law. 287 Similarly, other courts have held that a disproportionate liquidated damage clause is actually an unenforceable penalty. 288

Another expansion of individual rights in property law is the invalidation of zoning ordinances. Zoning ordinances can harm individuals through exclusions “based on socioeconomic status” by zoning certain areas arbitrarily and “based on subjective notions of beauty.” 289 State courts can look at the validity and applicability of a local zoning ordinance and choose to not enforce it in order to protect those who would be harmed if the zoning is enforced. 280 In *National Land & Investment Co. v. Kohn,* 281 the Supreme Court of Pennsylvania scrutinized the validity of a local zoning ordinance that required four acres of land for new property development, thereby limiting the town’s expansion. 282 The court struck down the acreage requirement and held that a town may not adopt such an ordinance merely to limit the burden imposed on government services by

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282. See *id.* at 1003 (summarizing event leading to suit).
283. See *id.* at 1005 (allowing lawful visitor to recover under warranty of habitability).
285. 236 P.3d 586 (Mont. 2010).
286. See *id.* at 588 (detailing plaintiff’s claims). The tenant claimed that the accelerated rent was a liquidated damage provision, which Montana law prohibits. See *id.* at 590.
287. See *id.* at 593 (holding provisions of lease unconscionable and thus unenforceable).
288. See, e.g., *Stenor, Inc. v. Lester,* 58 So. 2d 673, 675 (Fla. 1951) (stating liquidated damages in excess of actual damages not permitted). The court specified that the retention of the security deposit disproportionate to actual damages was not an enforceable liquidated damage, but instead constituted a penalty. See *id.*
290. *Id.* at 772 (explaining state courts allowed to adjudicate applicability and validity of zoning ordinances).
292. See *id.* at 600.
growing populations. The common law has upheld challenges to zoning ordinances designed to favor economic forces over the interests of individual citizens.

In cases of eminent domain, the common law addresses the competing interests of a government taking land for a public purpose and just compensation to the individual whose property it took or diminished. State courts have been expanding “the range of property rights that qualify for protection from uncompensated expropriation,” ensuring that individuals will be compensated for the monetary value of their home or business. Although the U.S. Supreme Court sets the basic rules of eminent domain, states may expand those rights and offer greater protection for takings, and many have. State courts have consciously developed their common law to protect the property interests of their citizenry over more powerful economic interests.

E. Will Invalidation

State courts have expanded individual rights by invalidating wills that are shown to have been created under undue influence, not reflecting the true wishes of the decedent. Undue influence can have multiple meanings, but the Arkansas Supreme Court defines it as “malign influence which results from fear, coercion, or any other cause that deprives the testator” of his free will in distributing his property. This is often seen when a will favors particular parties. In Cook v. Huff, three children of the testator’s earlier marriage contested a will that Cook, the testator’s surviving wife, filed for probate, alleging undue influence by Cook. Affirming the jury verdict, the Supreme Court of Georgia noted that

293. See id. at 612 (concluding exclusionary zoning ordinance unconstitutional because failed to promote general welfare of community).

294. See Rachel A. Van Cleave, State Constitutional Interpretation and Methodology, 28 N.M. L. REV. 199, 201 (1998) (noting “states historically had the burden of serving as the primary protectors of individual rights”). The fact that states after Lochner era have stopped validating local zoning ordinances shows that they are finally serving as protectors for individuals. See id. It is important for independent interpretation by state courts of their own state constitutions because “it returns states to their original role of protecting the rights of the people in their states.” Id.


296. See Gerald S. Dickinson, Federalism, Convergence, and Divergence in Constitutional Property, 73 U. MIA. L. REV. 139, 166 (2018) (explaining some state courts took steps to “interpret their takings clauses to offer greater protection”).

297. See Fitzpatrick, supra note 8, at 1839 (explaining that state courts may grant more rights than federal government). State courts have looked at the Bill of Rights and written their state constitution to provide more protection than federal provisions. See id.


299. 552 S.E.2d 83 (Ga. 2001).

300. See id. at 85 (noting case concerns Cook’s appeal from trial verdict in favor of Huff).
the newest will’s terms were more generous to the wife than prior versions and
contradicted the testator’s long-standing intent as to the distribution of property. 301
Similarly, in In re Estate of Gaaskjolen, 302 the disinherited daughter
challenged the will on undue influence because it appointed the other daughter
sole beneficiary. 303 The South Dakota Supreme Court held that there was undue
influence based in part on testimony that the testator never knew her attorney nor
had she signed a new will. 304 Again, a state’s common law seeks to protect the
interests of the individual, in this case to protect the decedent’s intentions.

F. Expansion of Individual Determination

State common law can protect individual privacy and individual self-determi-
nation as seen in the areas of the right to die or the right to informed consent. At
common law, the state had such an interest in one’s well-being such that even
assisted suicide was a crime. 305 The common law has evolved to recognize the
individual’s interest to die. 306 Historically, common law proclaimed the right “of
competent individuals to control their person, free of restraint and interference
by others except by clear authority of law.” 307 The states claimed an interest in
preserving the patient’s life despite the patient’s wishes. 308 Neither common law
nor the U.S. Constitution recognized an individual’s right to refuse life-saving
medical treatment until the state common law recognized that right. 309 Under
new common law doctrine, states will only prevail over the patient’s constitu-
tional challenges if the court finds a compelling state interest. 310 State common
law has been able to balance the competing interests to protect the individual’s

301. See id. at 86-87 (holding trial court correctly denied Cook’s motion for directed verdict). The court
ultimately concluded that sufficient evidence of undue influence existed to support the jury’s verdict in favor
of Huff. See id. at 87.
302. 941 N.W.2d 808 (S.D. 2020).
303. See id. at 810 (noting Dora Lee’s will and codicil appointing Audrey sole beneficiary revoked recently
executed will).
304. See id. at 813, 819 (holding testator’s daughter subjected testator to undue influence). The court found
undue influence on three grounds: testimony from the testator before she died; terms of the original will, which
made both daughters beneficiaries; and the new will disinherited the daughter contesting the will. See id.
305. See Peter J. Riga, Privacy and the Right to Die, 26 CATH. LAW. 89, 89 (1981) (explaining history of
right to die if not from natural causes).
306. See id. at 95 (suggesting Constitution provides “at least a limited right”).
307. See Kaye, supra note 166, at 743 (discussing carefully guarded common law principles).
308. See Sonya Meyers Davis, Note, The Refusal of Life-Saving Medical Treatment vs. the State’s Interest
two bases for compelling life-saving treatment despite patient’s refusal).
309. Id. at 95 (noting no historical or constitutional recognition of individual’s right to refuse treatment).
310. See id. at 96-97 (noting constitutional right to die arises in circumstances involving no compelling state
interest).
rights to receive or decline treatment.311 In Satz v. Perlmutter,312 Perlmutter, a competent adult, was suffering from a terminal illness and refused medical treatment.313 The Florida Supreme Court affirmed his right to refuse treatment based on his fundamental right to privacy.314 In Norwood Hospital v. Munoz,315 Norwood Hospital brought an action to authorize administering blood without consent to Munoz, a patient who was a competent adult and Jehovah’s Witness.316 The Massachusetts Supreme Judicial Court held that the “patient had the right to refuse to consent to the blood transfusion” even though if she hemorrhaged she likely would have died.317 And in Thor v. Superior Court,318 a physician sought an order that would allow him to use surgical tubes to feed and medicate a prisoner who had refused medical treatment.319 The Supreme Court of California held that the physician had no duty to provide the life-sustaining procedures because the prisoner expressed that he did not want life-saving treatment.320 These decisions demonstrate how state courts have adapted the common law in the context of individuals’ right to privacy in their decisions about living, dying, or refusing medical treatment.

The right to informed consent has not always existed; before this doctrine, courts held that the doctor’s decisions prevailed. In response, the common law has recently recognized the doctrine of informed consent, which protects “the right of patient to participate to some extent in medical decisions” that would affect the patient directly.321 Under the applicable common law principles, if a

311. See Kaye, supra note 166, at 744 (recognizing New York allows common law right of adults to refuse even life-saving treatment). Courts have also shown a departure from the state’s interest by expanding the right of an individual to die. See id. at 744-45 (positing courts recognize dying patient’s right to privacy in common law doctrine).
312. 379 So. 2d 359 (Fla. 1980).
313. See id. at 360 (noting patient’s health condition and refusal of medical treatment).
314. See id. (recognizing terminally ill patient’s constitutional right to refuse life-saving treatment). The court adopted the lower appeals court’s opinion but expressly limited the precedential reach of its holding to the facts of the case before it and explained that the courts will have to address this issue on a case-by-case basis until the legislature steps in. See id. (noting lower court’s articulation of applicable legal principles and judicial restraint issue).
316. See id. at 1018 (explaining patient’s medical issue and religious background).
317. Id. at 1025.
319. See id. at 379 (describing case background).
320. See id. at 390 (summarizing basis for rejecting physician’s claim). Before concluding that the prisoner’s rejection of life-sustaining treatment discharged the physician’s duty of care, the court recognized the right of competent and informed adults to refuse medical care, even if doing so may result in death. See id. at 387 (explaining right ordinarily outweighs countervailing state interests).
321. See Sheldon F. Kutz, The Law of Informed Consent: From “Doctor Is Right” to “Patient Has Rights”, 50 SYRACUSE L. REV. 1243, 1244-45 (2000) (explaining doctor always right). Even in the nineteenth century “the hand of medical paternalism dominated the ethos of the time” and into the pre-mid-twentieth century, doctors dominated the patient-doctor relationship. See id. (discussing changes in American Medical Association (AMA) Code). The doctors would expect that “patients must (1) honor physicians; (2) have faith in them; and (3) ‘promise obedience’”; there was no room for asking questions or becoming well accustomed to the health of one’s self.
physician fails to inform a patient of all of the known risks of a procedure or medication, courts may hold the physician liable.\textsuperscript{322} This doctrine has shifted the focus from whether the treatment was simply authorized by the patient to whether their consent was informed, so that the patient could make a decision based on all available information.\textsuperscript{323} This doctrine allows a remedy for patients who suffer injury resulting from undisclosed risks.\textsuperscript{324}

The right to die, refusal of medical treatment, and right to informed consent have not been decided solely on constitutional grounds but on the values developed in the common law of the states. These common law decisions serve to protect individuals in their personal and private life decisions.

State courts, following the principles embedded in their common law decisions, can choose “to extend state constitutional rights even to the conduct of nongovernmental actors,” which ultimately guarantees more rights to their citizens.\textsuperscript{325} The values enunciated in a state’s common law guide a state court’s interpretation of the state’s own constitutional provisions in fashioning the rights and protections of its citizenry.\textsuperscript{326}

\section*{VI. NORMS, CORE VALUES, AND CORE PRINCIPLES}

As a state’s common law develops to be more protective of individual rights, it serves as recognition of the norms and values of that state. In turn, those norms provide a baseline from which the state court interprets its own constitutional parameters. In this way, state constitutions express the fundamental values of that state. These fundamental values, determined though the state common law, guide the state court when construing its state constitutions. The provisions of the state constitution which guard against infringement of rights and liberties is

\textit{See id.} at 1243 (quoting JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 7-8 (1984)) (noting physicians would abandon patients if did not submit to physician’s discipline). All states have the informed consent laws. \textit{See id.} at 1245 (noting doctors receive training on doctrine of informed consent).

\textsuperscript{322} \textit{See id.} at 1246 (defining when physician violates duty to inform patient). A physician cannot withhold “any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.” Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957) (providing jury instructions on physician’s duty).


\textsuperscript{324} \textit{See id.} at 85 (explaining doctrine provides remedy for injuries caused by undisclosed risks even if patient gave consent). This doctrine has also allowed some court to hold physicians liable for failing to disclose alternative procedures or an irregularity in the patient’s body that would make the outcome different than the intended outcome. \textit{See id.} (providing examples of failing to obtain informed consent).

\textsuperscript{325} \textit{See Hershkoff, supra note 169, at 1524} (explaining state courts not required to adhere to federal state action doctrine).

\textsuperscript{326} \textit{See Rush & Miller, supra note 20, at 1368} (explaining “state constitutions may offer protections that are not provided by other sources”).
the creation of the sovereign people of the state and reflect the fundamental values, and indirectly the character, of that people.\textsuperscript{327}

State courts interpret their constitution to reflect the state’s values and aspirations, which reflects the fundamental principle of independent interpretation of state law.\textsuperscript{328} Just as the common law evolves to reflect the state’s fundamental values, so must the interpretation of its state constitution. State courts must “interpret their constitutions to enable the state’s constitutional law to reflect modern values.”\textsuperscript{329}

Thus, constitutional interpretation mirrors its citizens’ aspirations and fundamental values. “A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life.”\textsuperscript{330} The character embraced in a state constitution is defined through the “state’s unique history, geography, economy, and relationship to the rest of the country.”\textsuperscript{331} The developing common law is influenced by the “evolving standards of decency that mark the progress of maturing society.”\textsuperscript{332}

As the common law defines principles of fairness, reasonableness, and equity, its state constitutional provisions are similarly defined in ways that are more egalitarian than the federal constitutional perspective.\textsuperscript{333} State common law acts to enforce its norms. Those norms, in turn, form the basis of constitutional protection of individual rights and liberties from infringement by state action.\textsuperscript{334}

In this way, constitutional interpretation involves the protection of core principles as evidenced by basic common law principles that reflect a permanent consensus of its people over the abridgement of rights by state action.\textsuperscript{335} It is the development of the common law that establishes contemporary standards of

\textsuperscript{327} Gardner, supra note 2, at 815-16 (characterizing state constitutions expressions of heterogeneous American communities, regional values, and local sovereignty).


\textsuperscript{329} See Peters, supra note 165, at 586 (arguing for state constitutional language construed to modern realities).


\textsuperscript{331} Justin Long, Intermittent State Constitutionalism, 34 Pepp. L. Rev. 41, 52 (2006).


\textsuperscript{333} See Hershkoff, supra note 169, at 1526-27; see also Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1168 (1993). Professor Kahn stated, “The state constitutionalism I envision is a process of giving voice to the state court’s understanding of the values and principles of the national community.” See Kahn, supra, at 1168.

\textsuperscript{334} See Hershkoff, supra note 169, at 1528.

\textsuperscript{335} Lia, supra note 135, at 1321 (explaining legitimacy of state constitutionalism).
restraint on the burden of individual rights.\textsuperscript{336} The principles embodied in a refreshed common law that reflects the state’s fundamental values serve as the basis for constitutional interpretation.\textsuperscript{337} The differences in the character and values of state common law justify state constitutional interpretation of a specific individual rights provision that diverges from its federal counterpart.\textsuperscript{338}

Seen from this perspective, state constitutions are “self-conscious expressions of the values and character” of the state’s citizens, and assign an innate “character” to state volk that finds expression in its unique charter.\textsuperscript{339} As the common law establishes core values of the state, the text is interpreted in light of that state’s “commitment to liberty, equality, and due process.”\textsuperscript{340}

\textbf{VII. CONCLUSION}

As the Roberts Court continues to diminish protections for individual rights and liberties, state courts must step into the breach. With federal protections weakened, individual liberties must search for state protections. While some will suggest that for states to provide greater protections than the federal courts is nothing but unprincipled decision making seeking a certain result, it is, rather, a principled application of state values and norms as understood through an analysis of that state’s common law.

As Justice Brennan enunciated decades ago:

If the Supreme Court insists on limiting the content of due process to the rights created by state law, state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a “property” and “liberty” that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.\textsuperscript{341}

\textsuperscript{336} Landau, \textit{supra} note 140, at 864 (recommended consulting available evidence to determine underlying principle of provision to apply to current circumstances).

\textsuperscript{337} See id. at 866-67 (explaining changing common law significant in constitutional interpretation, particularly for individual rights provisions).

\textsuperscript{338} Friedman, \textit{supra} note 3, at 791 (discussing state constitutional interpretations and diverging from federal counterpart).

\textsuperscript{339} JAMES A. GARDNER, \textit{INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM} 54-55 (2005).

\textsuperscript{340} See Kahn, \textit{supra} note 333, at 1159 (explaining constitution object of interpretive debate).

\textsuperscript{341} Brennan, \textit{supra} note 5, at 503 (highlighting state courts can safeguard more than just state-granted rights).