# STATE CONSTITUTIONAL FUSION VOTING CLAIMS: TEXTBOOK NEW JUDICIAL FEDERALISM IN NEW JERSEY*

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> In interpreting the New Jersey Constitution, we look for direction to the United States Supreme Court, whose opinions can provide "valuable sources of wisdom for us." But although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.[1]

In comparison to a victory in the United States Supreme Court ("SCOTUS"), state supreme court victories under state constitutions are decidedly second best.[2] Such decisions apply in only one state, can be overturned by easier constitutional amendment, and many judges can be punished for unfavorable rulings in future elections.[3] That said, however, state constitutional victories are very important in areas such as fusion voting.

Fusion voting permits an electoral candidate to be nominated by more than one political party—usually one major party and one minor

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1. State v. Hempele, 576 A.2d 793, 800 (N.J. 1990) (citations omitted).

2. Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010). I gave a partial response in Robert F. Williams, *State Constitutional Law Lecture: The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 972–74 (2020) [hereinafter Williams, *State of State Constitutional Law*].

3. *See* Williams, *State of State Constitutional Law*, *supra* note 2, at 272–73.

party.[4] The candidate runs on the ballots of both parties and the votes for both parties are combined for that candidate.[5] This way voters may support a minor party that represents their preferences while actually influencing the election by voting for a cross-nominated major-party candidate who has a realistic chance of winning; this avoids wasted, protest votes or "spoiler" votes.[6]

This technique of voting was widely used in this country, including New Jersey, until a wave of state legislative bans on the practice swept the country. New Jersey's bans were enacted in the 1920s.[7] Then, in 1997, in *Timmons v. Twin Cities Area New Party*, SCOTUS upheld the Minnesota ban in a "hands-off" decision, foreclosing *federal* constitutional challenges.[8]

This sets up a classic, *state* constitutional, new judicial federalism scenario: after the Supreme Court rejects a federal constitutional challenge on an issue, the matter is then left for "second looks" through state legislation, constitutional amendment, or judicial interpretation of the states' constitutions.[9] Litigation of this matter is now pending in the New Jersey courts.[10]

When lawyers present an argument to a state court that it should interpret a section, or sections, of a state constitution to provide more protection than recognized by SCOTUS, they should focus first on the

4. Jeffrey Mongiello, Comment, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 SETON HALL L. REV. 1111, 1113 (2011).

5. *Id.*

6. *See generally*, Elissa Berger, Note, *A Party that Won't Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK L. REV. 1381, 1381–85 (2005) (discussing the benefits of fusion voting and the arguments for eradicating anti-fusion laws).

7. H.R. Res. 196 §§ 59–60, 145th Leg. (N.J. 1921).

8. 520 U.S. 351, 353–54 (1997). Professor A.E. Dick Howard noted that when SCOTUS takes a "hands-off" approach to a matter that is a strong indicator that state courts should proceed on their own, without concern about SCOTUS's reticence. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 883, 938 (1976).

9. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 361 (1984) [hereinafter Williams, *Supreme Court's Shadow*].

10. Brief for Appellant in Opposition to Respondent's Motion to Dismiss at 1–2, *In re* Malinowski, No. A-3542-21T2 (N.J. Super. Ct. App. Div. 2023). The New Jersey Supreme Court denied a motion to accept the case prior to it being heard by the Appellate Division. Order on Motion to Dismiss at 1, *In re* Malinowski, No. A-3542-21T2 (N.J. Super. Ct. App. Div. 2023). *See generally*, Udi Ofer, *"Anti-Fusion Voting" Laws and the Problem with a Two-Party System*, ALM LAW.COM (July 17, 2023, 9:00AM), https://www-law-com.libproxy.rutgers.edu/njlawjournal/2023/07/17/anti-fusion-voting-laws-and-the-problem-of-a-two-party-system/?slreturn=20230711175342.

majority opinion.[11] The *Timmons* decision was deeply criticized soon after it was rendered.[12]

State constitutional law operates within, and in relation to, U.S. constitutional law. SCOTUS decisions rejecting or minimizing U.S. constitutional rights are not binding on state courts interpreting their state constitutions.[13] In fact, the Justices often express the view that state courts have every right to interpret their state constitutions to be more protective than U.S. constitutional doctrine.[14] Justice Scalia, in a death penalty sentencing case noted: "The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions."[15] State court decisions interpreting state constitutional law are insulated from SCOTUS review if they are based on an "adequate and independent state ground."[16] Further, SCOTUS does, on occasion, take a completely "hands-off" approach to U.S. constitutional claims, as in *Rucho* and *Dobbs*, thus leaving the matter to states under their constitutions, legislation, and even sometimes common law.[17] Arguably, it has done this with respect to state bans on fusion voting since its 1997 *Timmons* decision.

The Supreme Court can expand on or contract the "accordion-like" state constitutional space for rights through its decisions.[18] Just as it expanded such space for state law in *Rucho* and *Dobbs*, it has been taking a "hands-on" approach, and contracting space, in the areas of gun rights and religious rights.[19]

11. *See* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001, 1001–02 (2021).

12. *See, e.g.*, Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668 (1998).

13. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 145–46 (2d ed. 2023).

14. *Id.*

15. Kansas v. Carr, 577 U.S. 108, 118 (2016).

16. Michigan v. Long, 463 U.S. 1032, 1040 (1983).

17. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

18. Robert F. Williams, *Teaching and Researching Comparative Subnational Constitutional Law*, 115 PENN. ST. L. REV. 1109, 1112–13 (2011).

19. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, v. Bruen, 142 S. Ct. 2111, 2156 (2022) (holding that a New York law requiring "proper cause" to obtain a license to carry a handgun violated the Second Amendment); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432–33 (2022) (holding that a school disciplining a football coach for conducting a quiet, personal prayer on the field after games violated the First Amendment's Free Exercise Clause); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (holding that Maine's "nonsectarian" requirement for generally available tuition assistance violated the Free Exercise Clause of the First Amendment); Fulton v. Phila., 141 S. Ct. 1868, 1882 (2021)

State courts (or federal courts exercising supplemental jurisdiction)[20] may interpret their constitutions to exceed the "federal floor" of rights.[21] Additionally, adverse SCOTUS decisions are poor precedents for the interpretation of state constitutions. As Larry Sager has pointed out, SCOTUS often "underenforces" U.S. constitutional provisions in litigation against state and local governments because of "federalism concerns" in crafting a single rule to be applied in all fifty states.[22] Judge Jeffrey Sutton refers to this as a "federalism discount."[23]

The states' power to regulate federal elections is delegated directly from the U.S. Constitution. The Elections Clause provides that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators."[24] This is, of course, a direct constitutional requirement of federalism deference, permitting a wide variety of state regulation of federal elections.[25]

(holding that the Free Exercise Clause of the First Amendment was violated when the city stopped referring children to a foster agency that would not certify same-sex couples as foster parents); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2262–63 (2019) (holding that the Free Exercise Clause of the First Amendment was violated when tuition assistance was denied for parents that sent their children to religious schools).

20. 28 U.S.C. § 1367.

21. The "federal floor" of rights may not be as solidly defined as we think. *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228–31 (2008). Independent interpretations of state constitutional rights provide a positive form of "jurisdictional redundancy" that supplements federal minimum standards. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312–13, 1335 n. 147 (2017).

22. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978).

23. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018).

24. U.S. CONST. art. I, § 4, cl. 1.

25. The clause's reference to the "Legislature" of the states led to the radical "independent state legislature" theory, which contends that in federal elections, state election statutes governed without any possible involvement of state courts interpreting and applying their state constitutions. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 502–03 (2021). This theory leaves state election laws, including bans on fusing voting, exempt from state judicial review in litigation like that going on in New Jersey. *See* Brief for Appellant, *supra* note 10, at 2. On June 27, 2023, SCOTUS rejected the most extreme version of this theory. Moore v. Harper, 143 S. Ct. 2065, 2081 (2023). The Court did, however, declare that it had the power to review state court decisions to determine if they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 2089.

The New Jersey Supreme Court—in contrast to SCOTUS—has, for some time, recognized that its decisions in cases challenging state and local policies need not be influenced by federalism concerns: they apply only in New Jersey![26] Sager explains that the differing "strategic concerns" affect SCOTUS but, of course, not state courts.[27] Importantly, the dissents in SCOTUS decisions rejecting or minimizing U.S. constitutional rights claims can be quite persuasive in state constitutional interpretation.[28]

The dissenting opinions in *Timmons* by Justices Stevens (joined by Justice Ginsburg) and Souter (partially joining Justice Stevens) pointed out significant burdens imposed on political parties' rights by Minnesota's ban.[29] They further refuted the majority's recognition of valid state interests.[30] These arguments can be persuasive in state constitutional litigation. Still, however, there is a somewhat understandable "gravitational force" emanating from SCOTUS decisions, even when they are not binding.[31]

These perspectives can be brought to bear on the SCOTUS decision in *Timmons*, rejecting a U.S. constitutional rule permitting fusion voting in all fifty states.[32] The Court's deference to "the State's asserted regulatory interests"[33] represents clear "federalism deference." The Court's majority opinion concluded:

> We conclude that the burdens Minnesota's fusion ban imposes on the New Party's associational rights are justified by "correspondingly weighty" valid state interests in ballot integrity and political stability. . . . [T]he Constitution does not require

26. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 281 (N.J. 1973) ("There emerges from the [Supreme Court] majority opinion an evident reluctance to say the Federal Constitution supplies single solutions by which all the States are bound."); State v. Hempele, 576 A.2d 793, 800–01 (N.J. 1990) ("Cognizant of the diversity of laws, customs, and mores within its jurisdiction, the United State Supreme Court is necessarily 'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'" (quoting State v. Hunt, 450 A.2d 952, 962 (N.J. 1982) (Pashman, J., concurring))).

27. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 963–65, 969, 975–76 (1985).

28. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986); *see* Williams, *Supreme Court's Shadow*, *supra* note 9, at 375–76.

29. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 370–74 (1997) (Stevens, J., dissenting).

30. *Id.* at 374–77.

31. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705 (2016).

32. 520 U.S. at 369–70.

33. *Id.* at 364.

> Minnesota, and the approximately 40 other States that do not permit fusion, to allow it.[34]

State courts are not in any way required to "lockstep" their interpretations of state constitutions with SCOTUS's interpretations of the U.S. Constitution.[35] Of course, if state courts are aware that they may exceed U.S. constitutional norms, and are not engaging in "unreflective adoptionism," they may certainly agree with SCOTUS's interpretation of the U.S. Constitution.[36] This has been referred to as "reflective adoptionism."[37] The real problem arises when state courts engage in what I have called "prospective lockstepping," whereby a court not only agrees with the current U.S. constitutional doctrine but indicates that it will continue to do so in the future.[38] I have argued that this latter pronouncement cannot be seen as a valid, binding precedent because courts cannot decide interpretative methodology for future cases they have not even heard yet.[39] Two New Jersey Supreme Court decisions could be misread to suggest that New Jersey's free speech provision should be interpreted as "coextensive" with the First Amendment.[40] Neither case actually says that, and in any event, they should be limited to commercial speech.

A number of state courts render interpretations of their state constitutions together with a list of "criteria" or factors that they intend to follow when interpreting identical or similar state constitutional provisions to decide whether they should be more protective than U.S. constitutional doctrine.[41] These criteria, although very useful in plotting an argument for more protective interpretations of state constitutions, such as on fusion voting, can also serve as a hindrance if lawyers cannot point to any specific criterion on the list.[42] Former Chief Judge of the New

34. *Id.* at 369–70.

35. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 224–26.

36. *Id.* at 228–29. Unreflective adoptionism is "simply applying federal analysis to a state clause without acknowledging the possibility of a different outcome or considering arguments in favor of such a different, or more protective, outcome." *Id.* at 228.

37. *Id.* at 230–31.

38. *Id.* at 232–37.

39. *Id.* at 256; *see also* Doe v. State, 189 P.3d 999, 1005 (Alaska 2008); *cf.* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 103–04 (2020).

40. *See* Hamilton Amusement Ctr. v. Verniero, 716 A.2d 1137, 1141–42 (N.J. 1998); E & J Equities, LLC v. Bd. of Adjustment, 146 A.3d 623, 634 (N.J. 2016).

41. WILLIAMS & FRIEDMAN, *supra* note 13, at 176–92; State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring); State v. Williams, 459 A.2d 641, 650 (N.J. 1983).

42. WILLIAMS & FRIEDMAN, *supra* note 13, at 199–207.

York Court of Appeals, Judith Kaye, made the following comment on the criteria approach:

> *Second*, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an *ironclad checklist* to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. . . . I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law—wherever that may fall on the checklist.[43]

The New Jersey Supreme Court originated the criteria or factor approach in Justice Handler's concurring opinion in *State v. Hunt*, which became the court's majority view the next year in *State v. Williams*. The court has not consistently applied this approach,[44] but it is an effective checklist for presenting an argument to the New Jersey courts that they should interpret their constitution to be more protective of rights than the U.S. Constitution. Interestingly, Justice Handler illustrated most of his criteria by reference to New Jersey's free speech clause, which is central to the challenge to the ban on fusion voting.[45]

Turning now to the more specialized techniques of argument about the meaning and application of state constitutional provisions in areas such as fusion voting, there are a number of fairly unique approaches. First, in relation to the more familiar U.S. constitutional provisions, state constitutional guarantees of similar rights may be identically worded but still interpreted more protectively. However, state constitutional provisions are often worded slightly differently, leading to additional arguments that adverse SCOTUS precedents are not persuasive. For example, the California Constitution bans "cruel *or* unusual" punishments.[46] In the 1972 case of *People v. Anderson*, the California Supreme Court relied on that textual distinction to declare the death penalty unconstitutional under its state constitution.[47] Then, however, the California voters demonstrated one of the drawbacks of state

43. People v. Scott, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring).

44. Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 4 (2001).

45. *See Hunt*, 450 A.2d at 364–65.

46. CAL. CONST. art. I, § 17 (emphasis added).

47. 493 P.2d 880, 899 (Cal. 1972).

constitutional law by amending the California Constitution to overrule *Anderson*.[48]

Further, of course, there are many state constitutional rights provisions that have no federal analog, such as: the right to vote,[49] the right to free and fair elections,[50] a number of more expansive criminal procedure rights,[51] and a right to remedy for injuries.[52] Still further, there are many "positive rights" in state constitutions such as rights to education and environmental quality.[53] Some state constitutional rights, by contrast to the U.S. Constitution's "negative rights," express rights in an "affirmative" sense. For example, New Jersey's freedom of speech provision states: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."[54]

All of these textual arguments can support a more protective interpretation of state constitutional rights provisions in fusion voting cases. Some state constitutional provisions can even invite "majoritarian judicial review." By contrast to the more familiar U.S. constitutional

48. CAL. CONST. art. I, § 27.

49. *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014). The New Jersey Constitution, unlike the U.S. Constitution, has an explicit, textual right to vote. N.J. CONST. art. II, § 1, ¶ 3(a); *see also* ROBERT F. WILLIAMS & RONALD K. CHEN, THE NEW JERSEY CONSTITUTION 94–96 (3d ed. 2023). The New Jersey Appellate Division has stated that this provision created a "democracy canon" for interpreting statutes. Afran v. County of Somerset, 581 A.2d 1359, 1360–61 (N.J. Super. Ct. App. Div. 1999) ("This canon of construction is indeed so critical to the preservation of our democratic institutions that it has been applied to the state constitution itself."); *see also* New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1033–34 (N.J. 2002) ("The right of choice as integral to the franchise itself . . . is grounded in the core values of the democratic system established by the framers of our Federal Constitution when this country was founded.").

50. *See*, *e.g.*, PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); N.C. CONST. art. I, § 10 ("All elections shall be free.").

51. Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1, 3 (2014).

52. WILLIAMS & FRIEDMAN, *supra* note 13, at 141.

53. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67, 147 (2013).

54. N.J. CONST. art. I, ¶ 6. New Jersey has a separate right of assembly, which is also affirmative. N.J. CONST. art. I, ¶ 18. The right of assembly provision was apparently copied from the Massachusetts Constitution. *See* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1657, 1733–34 (2021); *see also* WILLIAMS & CHEN, *supra* note 49, at 85 (explaining that the right of assembly provision provides an affirmative right).

protection of disfavored minorities,[55] fusion voting can be seen as majoritarian.

State constitutional history (convention records, commission records, and legislative debates on proposed constitutional amendments) are often more complete, accessible, and recent than the well-known, but sparse, U.S. convention records.[56] Such records are not without their problems,[57] but can shed important light on the meaning of state constitutional provisions in fusion voting cases.

In the New Jersey fusion voting controversy, there was a very minor discussion of the topic at the 1947 Constitutional Convention. A delegate introduced a proposal to authorize fusion voting in the constitution.[58] It was referred to a committee, which decided not to approve it or to recommend it to the full Convention,[59] and nothing on the matter was submitted to the voters when they approved the new constitution. There is therefore no connection between this obscure proposal and the "voice of the people" that gave legal status to the 1947 New Jersey Constitution.[60]

Professor Jonathan Marshfield's recent scholarship suggests a state constitutional separation-of-powers doctrine that is significantly different from the federal, Madisonian concept of ambitious officials checking each other.[61] Rather, he warns that the evolution of the state doctrine reflects the concern that "ambitious government officials were likely to collude across government institutions and offices. Political power was a gravitational force that overtook all other distinctions in law and society."[62]

The fusion voting litigation does not utilize these arguments' separation of powers claims, as separation of powers doctrines are not designed to protect government officials but rather to protect people from governmental tyranny.[63] State constitutional separation of powers issues can be treated quite differently from the federal doctrines. First, federal

55. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328–31 (1982).

56. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 358–59.

57. Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1172 (2022).

58. Proceedings of the New Jersey Constitutional Convention of 1947, July 7, 1947, Vol. 2 at 1010, https://historicalpubs.njstatelib.org/.

59. Proceedings of the New Jersey Constitutional Convention of 1947, July 16, 1947, Vol. 3 at 650.

60. WILLIAMS & FRIEDMAN, *supra* note 13, at 355–58.

61. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 1) (on file with author).

62. *Id.* at 37.

63. *See* Williams, *State of State Constitutional Law*, *supra* note 3, at 976.

doctrines have never been applied to the states ("incorporated") so there is no "floor" below which states may not go when interpreting their state constitutions.[64] This does not mean, however, that U.S. constitutional separation of powers does not, as a practical matter, exert some gravitational force.[65]

By contrast to the U.S. Constitution, about forty state constitutions contain *textual* statements on separation of powers.[66] State courts sometimes rely on these clauses,[67] and sometimes they do not.[68] There is a wide variety of governmental arrangements in the states, such as elected judiciaries, plural executives, and executive agencies.[69] Consequently, a state-specific doctrine of separation of powers needs to be considered.[70] For example, the Supreme Court of California has relied on the "strong legislature" model[71] whereas the New Jersey Supreme Court has relied on the "strong governor" model.[72] Issues like legislative delegations and legislative appointments to executive agencies are good examples of state-specific interpretation.[73] All of these state separation of powers approaches, like state constitutional rights claims, must proceed only on a state-by-state basis and lack the promise of national solutions.

State constitutions, in addition to containing a wide range of rights guarantees and provisions distributing and limiting governmental power, also contain many "policy" provisions; this has been an increasing feature of state constitutions since the first ones were adopted.[74] These will have no analog in the U.S. Constitution. On average, forty percent of state constitutions consist of provisions dealing with policy matters, most

64. Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 94 (1998).

65. James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the United States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998).

66. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 269.

67. *See, e.g.*, Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978).

68. *See, e.g.*, Brown v. Heymann, 297 A.2d 572, 576–77 (N.J. 1972).

69. *See, e.g.*, Bd. of Regents of Higher Educ. of Mont. v. State, 512 P.3d 748, 755 (Mont. 2022) (holding that constitutionally-created regents, rather than the legislature, decide whether guns permitted on campuses).

70. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 270.

71. Marine Forests Soc'y v. Cal. Coastal Comm., 113 P.3d 1062, 1077–82 (Cal. 2005). *See generally* Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004).

72. *See, e.g.*, Commcn's Workers of Am., AFL-CIO v. Florio, 617 A.2d 223, 231 (N.J. 1992).

73. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 274–76.

74. *See* CHRISTOPHER A. SIMON, ET AL., STATE AND LOCAL GOVERNMENT AND POLITICS: PROSPECTS FOR SUSTAINABILITY 185 (2d ed. 2018); *see also* WILLIAMS & FRIEDMAN, *supra* note 13, at 5–6.

of which could be dealt with by ordinary legislation.[75] These deal with matters such as regulation of elections and environmental quality.[76] The New Jersey Constitution does contain policy provisions, but the number is significantly below the national average.[77]

Another technique of state constitutional interpretation is to look to out-of-state decisions on the same issue.[78] In the fusion voting case, there is only one case so far; the Pennsylvania Supreme Court, in a divided opinion, upheld that state's ban.[79] The lower court placed some reliance on *Timmons*,[80] as did the court.[81] The majority rejected arguments based on the "Free and Equal Elections Clause," equal protection, and free speech and association.[82] Significant dissenting opinions were filed.[83] The Pennsylvania court's analysis of fusion voting, both majority and dissent, are relevant for the New Jersey courts' consideration of the matter.

Finally, state constitutions are simply more "democratic" than the U.S. Constitution.[84] Governors are elected statewide, with no Electoral College to declare the candidate who lost the popular vote to be the winner.[85] State constitutional amendments are voted on statewide,[86] and state senators are subject to the federal one-person-one-vote requirement.[87] Most elected state supreme court justices run statewide, without gerrymandering.

None of the features of state constitutionalism I have mentioned guarantee favorable outcomes on fusion voting. But, in the absence of SCOTUS victories and national political success, these state options must be explored thoroughly. It is not my purpose here to argue the merits of the current New Jersey fusion voting litigation. I am not an election lawyer. Rather, I use this litigation as a partial example of the

75. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 40, 402–04.
76. *Id.* at 141–42 n.30.
77. WILLIAMS & CHEN, *supra* note 49, at 5–6.
78. *See* WILLIAMS & FRIEDMAN, *supra* note 13, at 391–92.
79. Working Families Party v. Commonwealth, 209 A.3d 270, 286 (Pa. 2019).
80. *Id.* at 276.
81. *See id.* at 285–86.
82. *Id.* at 271—86.
83. *Id.* at 286 (Todd, J., concurring in part, dissenting in part); *id.* at 288 (Wecht, J., concurring in part, dissenting in part).
84. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).
85. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 295 (2022).
86. John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 32 (2016) ("[E]very state but Delaware requires voters to approve amendments—all but seven states permit ratification by a bare majority vote.").
87. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (ruling that the electoral districts of state legislative chambers must be roughly equal in population).

kinds of arguments that can be effectively presented to state courts encouraging them to occupy the state constitutional space remaining after SCOTUS either rejects or minimizes federal constitutional rights. These lessons can be applied in a wide variety of similar circumstances.