number of signatures required to place an amendment on the ballot or in terms of the number of votes required to adopt an amendment. Lynn A. Baker has argued that these changes should not be made, because, given the federal safety net, minority people have as good a chance of achieving new rights through initiative as they do of losing existing rights.[17]

These principles, or key elements in thinking about state constitutional rights, should be kept in mind by those considering changes in the state constitutions that add, modify, or remove rights. They do not, of course, take the place of the policy arguments concerning the adoption or removal of specific rights guarantees.

The Evolution of State Constitutional Rights Guarantees

State declarations of rights were originally adopted during the revolutionary period separately from the structural provisions of state constitutions. Sometimes these compilations of rights were debated and adopted prior to the adoption of the constitution that structured state government. In fact, though, not all state constitutions originally had declarations of rights, but now all do. When the federal Constitution was proposed, part of the Antifederalist criticism of the document was that it did not contain a list of rights guarantees, as had become standard practice in the states. That defect was, of course, remedied several years later by the adoption of the Federal Bill of Rights, to include the first ten amendments to the federal Constitution. The state constitutional declarations of rights served as important and influential models for the federal Bill of Rights.

For most of the history of our country, of course, the federal Bill of Rights did not apply at all to state or local actions. Slowly, however, beginning early in the twentieth century and accelerating in the 1960s, the United States Supreme Court determined that many of the federal Bill of Rights provisions did apply, based on the Fourteenth Amendment, to limit the actions of states and local governments. This "selective incorporation," together with the aggressive judicial enforcement of federal constitutional rights guarantees by the Unites States Supreme Court from the 1950s through the 1970s, led to the domination of rights discussions by the federal constitution.

The state declarations of rights today still contain, primarily, seventeenth- and eighteenth-century ideas about rights. But, importantly, a number of states acted to add new rights to their constitutions in the second half of the twentieth century. Guarantees of the rights to collective bargaining were added in five states, protection of women's rights was added in more than a dozen states,

rights for people with disabilities were added in a few states, as was the right to bear arms, and, most recently, the victims' rights movement has led to the inclusion of victims' rights provisions in state constitutions. State constitutional declarations of rights include both matters that are recognized as of national importance, such as free speech, religious freedom, equality, criminal defendants' rights, and so on, as well as rights guarantees that are more local and regional in nature, such as fishing rights, natural resource protections, water rights, and so forth. Also, as noted earlier, state constitutions include both provisions that are recognizable as analogous to those in the federal Constitution and provisions that are not. A good example of provisions that have no federal counterpart is the "open courts" or "right to remedy" provisions (which can be traced back to the Magna Carta) that are contained in about forty states' constitutions. The history of state constitutional rights guarantees makes it clear that a society's, including a state polity's, ideas about rights can change over time, and can vary according to region of the country.

The Relationship of State and Federal Constitutional Rights

In our federal system, as in many nations governed by constitutional federalism, federal constitutional rights merely provide the *minimum* of enforceable rights. The states, and their state constitutional rights guarantees, provide an additional source of rights beyond the federal minimum. These rights may take the form of judicial interpretations of state constitutional provisions that are similar or identical to federal constitutional guarantees (and are therefore of less importance for this volume), or they may be reflected in state constitutional rights guarantees that have no analogue, or are dissimilar (and therefore in addition to) federal constitutional rights. It must be remembered that these provisions may or may not appear in the article on rights. It is, of course, technically possible for a state to recognize *less* rights in a particular area under its state constitution, but it must still enforce the minimum federal rights as a matter of national law.

State judicial decisions interpreting any of these kinds of rights provisions, which are clearly based on the state constitutional right at issue, may not be reviewed by the United States Supreme Court because there is no relevant question of federal law involved.

These important relationships and distinctions between state and federal constitutional rights suggest that it is a mistake to view the state constitutional rights guarantees as simply "little" versions of the more familiar federal Bill of Rights.

The Current Picture of State Constitutional Rights

Civil Liberties: Freedom of Speech, Assembly, and Religion

Freedom of Speech

Many state constitutions protect the freedoms of speech and the press in much more explicit terms than the federal Constitution. Art. I, par. 6 of the New Jersey Constitution provides a good example: "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" The New Jersey Supreme Court has distinguished this type of clause from the negative federal constitutional provision in the First Amendment, indicating that the state provision is an *affirmative* right.[18] On this basis, the New Jersey Supreme Court has recognized the right to free speech, including leafletting, in privately owned shopping malls.[19] This ruling has implications for other forms of privately owned property, such as gated communities, condominiums, nursing homes, and so on.[20] Many other state supreme courts, however, have not given such an expansive interpretation to the identical language in their own state constitutions.[21]

Freedom of Assembly

A number of state constitutions contain a separate clause guaranteeing the freedom of assembly, such as New Jersey's art. I, par. 18: "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." This clause also gave support to the New Jersey Supreme Court's ruling permitting free speech and leafletting privately owned shopping malls, but similar provisions have not supported the same result in other states. A related provision in some state constitutions guarantees the right of "remonstrance."[22]

Religion

As is the case with the freedoms of speech and assembly, many state constitutions are much more explicit and detailed with respect to religion guarantees than is the federal First Amendment. For example, Ohio's art. I, sec. 7 reads as follows:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall

> be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of it own mode of public worship, and to encourage schools and the means of instruction.

It is important to note that clauses like this also explicitly protect the "rights of conscience." The Ohio Supreme Court has relied explicitly on that provision to protect a prison guard's claimed right to wear long hair based on religious conviction, under circumstances where the federal Constitution would not provide such protection.[23]

The state constitutions contain a wide variety of different, explicit religion guarantees.[24] Many state constitutions contain, in addition, explicit prohibitions on the involvement of religion in public schools, based on the Blaine Amendment.[25] The existence of such clauses has major implications for a variety of the proposals for alternatives to public schools.[26]

Rights of Those Accused of Crime

Criminal procedure rights were among the earliest and most important rights protections in English law. The familiar rights against self incrimination, cruel and unusual punishment, unreasonable search and seizure, double jeopardy, and rights to confrontation of witnesses, jury trial, indictment, speedy trial, and assistance of counsel were all important rights under English law and were carried forward into the first state constitutional declarations of rights. Many of these ancient rights have developed rather standard or accepted meanings, at least at their core. Therefore, proposals to change these rights formulations should be carefully considered, because courts will most likely view a change in language as intending a change in meaning.

Criminal procedure rights may be broken into two categories: (1) those that apply during the investigatory and charging phase of the criminal process, and (2) those that apply during criminal trials. For example, the right against unreasonable search and seizure applies during the investigatory phase (and is most often enforced prior to trial through motions to suppress illegally seized evidence), while the right to confront witnesses applies during the criminal trial phase.

Despite the early origins of these familiar criminal procedure rights, some state constitutions have modified them in the second half of the twentieth century to address modern circumstances more clearly. For example, in Florida the search and seizure clause, art. I, sec. 12, was modified in the 1960s to protect against "the unreasonable interception of private communications by any means . . ."[27] The Michigan search and seizure guarantee, art. I, sec. 2, was also modified in the 1930s and again in the 1950s to state:

> The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.[28]

Of course an illegal seizure of these items under federal law will lead to their exclusion despite this clause.[29]

As in other areas of the judicial interpretation of state constitutional guarantees that are similar to federal constitutional guarantees, minor differences in wording of criminal procedure guarantees have supported state constitutional interpretations that are independent from federal constitutional interpretation. For example, in the famous 1972 California decision, *People v. Anderson,*[30] the California Supreme Court ruled the death penalty unconstitutional, relying on the California constitution's "cruel *or* unusual" language, in contrast to the federal constitution's "cruel *and* unusual" wording. Another example was the Utah Supreme Court's 1980 decision in *Hansen v. Owens*[31] dealing with self-incrimination. The Utah court interpreted its provision ("no person may be compelled to give evidence against himself") to be more protective than the federal Fifth Amendment provision that no person shall be required "to be a witness" against himself. The Utah court, however, reversed itself five years later based on debates at the Utah Constitutional Convention indicating no intent to adopt meaning different from the federal Constitution.[32] Finally, a number of state courts have relied on the specific "face-to-face" language of their confrontation clauses to interpret such rights guarantees more strictly than required under federal constitutional law.[33]

Despite the overall importance of criminal procedure guarantees under state constitutions, and despite the fact that there is a high volume of litigation under these clauses, there have been surprisingly few serious proposals to add to or change these "rights of the accused." In the criminal procedure area particularly the interpretations of the federal constitution by the United States Supreme Court can have a very strong influence on the court interpretations of identical or similar state constitutional guarantees.

Civil Litigation Rights

There are a number of state constitutional rights provisions that protect litigants' (usually plaintiffs) rights in the civil litigation context. A number of these have played a central role in the debate over "tort reform."

Tort reform proposals include caps on damages, limitations on punitive damages, statutes of repose, mandatory alternative dispute resolution, modification of joint liability rules, as well as a number of other approaches. Interestingly, there are virtually no federal constitutional claims that arise for plaintiffs who feel aggrieved by such state legislative restrictions. It is state constitutions, rather, that provide a wide variety of avenues of constitutional challenge. General state constitutional provisions on open courts and the right to a remedy,[34] civil jury trial, due process and equal protection, and separation of powers have provided fertile grounds for successful constitutional challenges to tort reform measures. Also, general legislative process restrictions contained in state constitutions, such as the single-subject limit, have supported the invalidation of omnibus tort reform measures.[35] In addition, some states' constitutions contain specific provisions aimed directly at preserving tort remedies. For example, the Kentucky Constitution contains the following two provisions:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.[36]

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporation and person so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom it belongs; and until such provision is made the same shall form part of the personal estate of the deceased person.[37]

The Arizona Constitution provides that "[n]o law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."[38] The Oklahoma Constitution provides: "The defense of . . . assumption of risk shall, in all cases whatsoever, be questions of fact, and shall, at all times, be left to the jury."[39]

The issues of state constitutional law and tort reform have become even more prominent because high-visibility decisions in a number of states have struck down various tort reform measures on state constitutional grounds. State high courts in Indiana,[40] Illinois,[41] Oregon,[42] and Ohio[43] struck down a variety of tort reform laws purporting to restrict plaintiffs' rights. The area of tort

reform and state constitutional law may raise somewhat different legitimacy questions than were raised by the criminal defendants' rights and civil liberties issues that have dominated the New Judicial Federalism. In the area of civil liberties and criminal defendants' rights, there are often federal constitutional provisions that are similar or identical to the state constitutional provisions applied by state courts. This can raise legitimacy questions about state courts resolving constitutional claims under their own state constitutions but in the shadow,[44] or glare,[45] of earlier federal constitutional decisions rejecting similar rights arguments. Whereas the key question in federal constitutional law involves the legitimacy of judicial review itself, the central question in state constitutional law has concerned the legitimacy of state constitutional rulings that diverge from, or "go beyond," federal constitutional standards.[46] In cases involving constitutional challenges to tort reform, in contrast, there are no pertinent federal provisions, and thus the main controversy (as at the federal level) has involved state courts overturning legislative pronouncements.

Rights of Prisoners

Several state constitutions include provisions granting rights to prisoners. The Oregon Constitution is a good example, containing provisions stating that criminal punishments should be "founded on the principles of reformation, and not of vindictive justice,"[47] that convictions may not "work corruption of blood, or forfeiture of estate,"[48] that "all penalties shall be proportioned to the offense,"[49] and that no "person arrested, or confined in jail, shall be treated with unnecessary rigor."[50] The Wyoming Constitution also provides that prisoners shall not be treated with "unnecessary rigor" and that the "erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for."[51] The Georgia Constitution provides that "nor shall any person be abused in being arrested, while under arrest, or in prison."[52]

Discussing the Oregon provisions, and their origins, Justice Hans Linde of the Oregon Supreme Court stated:

> Provisions like these have antecedents as early as New Hampshire's 1783 constitution, coming to Oregon by way of Ohio and Indiana. They reflect a widespread interest in penal reform in the states during the post-Revolutionary decades. The clauses are not as universal as more familiar parts of the bills of rights, and ideas of humanitarian "reform" have changed with time and among the states. . . . But while constitutional texts differ the present point is that many states thought a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude.[53]

These kinds of provisions, although not widely present in current state constitutions, are prevalent enough, and completely distinct from federal constitutional rights, that they should be taken into consideration.

Victims' Rights

The victims' rights movement that arose beginning in the 1980s and 1990s realized that state constitutional revision was a process that could be used to establish constitutional rights.[54] This demonstrates that state declarations of rights can include rights favored by conservatives as well as liberals. Several state constitutions now include such rights, such as the right to notification of criminal and sentencing proceedings, the right to make statements at such proceedings, and the right to be treated with "fairness, compassion and respect" in the criminal process.[55]

Various issues have arisen with regard to the judicial enforcement of these new victims' rights guarantees. For example, in 1998 the Rhode Island Supreme Court held that the victims' rights amendment was neither self-executing nor did it provide a direct cause of action for money damages when officials violated it.[56] In other states conflicts have materialized between the asserted rights of victims and those accused of crime.

Equality Guarantees

Governmental decisions to treat people differently from others are often challenged as depriving some persons of protected rights. These equality arguments have been made most often under the federal Fourteenth Amendment's equal protection clause.[57] Most state courts have not developed doctrine independent of the federal equal protection clause under their state constitutional equality provisions.[58] Instead, they seem content not to read into such provisions anything other than what the United States Supreme Court has interpreted the equal protection clause of the Fourteenth Amendment to mean.

Most state constitutions do not contain an "equal protection" clause.[59] But they do contain a variety of equality provisions. In some states, broad guarantees of individual rights have been interpreted to require equal protection of the laws generally.[60] Further, most states have generally applicable provisions prohibiting special and local laws, the grant of special privileges, or discrimination against citizens in the exercise of civil rights or on the basis of sex. Finally, many state provisions guarantee equality in specific or limited instances—from requiring "uniform" or "thorough and efficient" public schools to requiring uniformity in taxation. Virtually all of these provisions differ significantly from the federal provision. They were drafted differently, adopted at different times, and aimed at different evils.

A number of state constitutions contain language similar to the classic language of equality in the Declaration of Independence. Sec. 1 of the Virginia Declaration of Rights, adopted a month before the Declaration of Independence, provides:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[61]

Other constitutions contain a different type of general equality provision intended to prohibit grants similar to royal privileges. Sec. 4 of the 1776 Virginia Declaration of Rights, for example, provides that "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[62]

Another type of general equality provision is the Common Benefits Clause of the Vermont Constitution, which states:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.[63]

Only a few states have such a provision. In 1999 the Vermont Supreme Court interpreted the Common Benefits Clause to require the state to recognize marriage of same-sex couples, or, alternatively, grant such persons domestic partner benefits.[64]

A number of states include in their constitutions a curb on granting "special" or "exclusive" privileges, after a series of abuses by the relatively unfettered state legislatures responding to powerful economic interests. For example, art. I, sec. 20 of the 1859 Oregon Constitution, which was patterned after Indiana's 1851 constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." These provisions commonly are found in state bills of rights—not in the legislative articles. They reflect the Jacksonian opposition to favoritism and special treatment for the powerful, as well as the earlier, Revolutionary-era rejection of British hereditary or class-based societal distinctions.

Although these provisions may overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences. As Justice Hans Linde of the Oregon Supreme Court has noted, Oregon's art. I, sec. 20 and the federal equal protection clause "were placed in different constitutions at different

times by different men to enact different historic concerns into constitutional policy."[65] A provision like Oregon's, then, does not seek equal protection of the laws at all. Instead, it prohibits legislative discrimination in favor of an economically powerful minority.

Closely related to the provisions prohibiting grants of special or exclusive privileges are prohibitions on "special" and "local" laws. These provisions, found in the legislative articles of state constitutions, contain either general or detailed limitations on the objects of legislation[66]: special laws are those that apply to specified or a limited number of persons; local laws are those that apply to specified or a limited number of localities. In addition, notice requirements are usually included for those subjects that may be dealt with by local laws, giving residents of localities to be affected at least constructive notice of the legislature's intended action. The notice provisions for local laws can also provide a basis for invalidating state laws. The Florida Supreme Court found a statutory referendum requirement for constructing public housing, applicable only in one county, unconstitutional for failure to provide the proper notice before its enactment as a "local law."[67]

Though intended in part to curb legislative abuses, these proscriptions on special and local laws reflect a concern for equal treatment under the law. In 1972 the Illinois Supreme Court held that the state's no-fault automobile insurance act violated art. IV, sec. 13 of the Illinois Constitution, which provides that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable."[68] The statute required only owners of "private passenger automobiles" to purchase no fault insurance but imposed substantial limitations on tort recoveries of persons injured by any type of motor vehicle. In distinguishing Illinois' "equal protection" clause,[69] which had been added in 1970, Justice Schaefer observed:

> While these two provisions of the 1970 constitution cover much of the same terrain, they are not duplicates, as the commentary to section 13 of article IV points out: "In many cases, the protection provided by Section 13 is also provided by the equal protection clause of Article I, Section 2."[70]

He concluded that article IV, section 13 imposed a clear constitutional duty on the courts to determine whether a general law "is or can be made applicable," and that "in this case that question must receive an affirmative answer." The constitutionally infirm portions of the statute were therefore invalidated.

Prohibitions on special and local laws have broad application, but they do appear limited to the legislatures, and therefore not to cover executive action. As with other state equality provisions, many state courts interpret special laws provisions by applying federal equal protection analysis.

In the 1960s a number of state constitutions were amended to include provisions prohibiting discrimination in the exercise of civil rights. Pennsylvania, for example, added a provision in 1967 which directs that "[n]either the Commonwealth nor any political subdivisions thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."[71] Similar provisions in other states typically limit the proscription to discrimination on the basis of race, color, or national origin.[72] These antidiscrimination provisions are products of the civil rights movement in the 1950s and 1960s.

Prohibiting this type of discrimination has become increasingly important as state governments have expanded from mere regulation into the provision of services. When state governments merely regulated conduct, prohibiting them from denying persons' civil rights was an effective limit—they did not have the leverage of attaching "unconstitutional conditions" to the provision of services; therefore, it was not as easy to favor one right over another. When the state acts as a service provider, however, as it does in programs such as Medicaid, it has the opportunity, in Professor Lawrence Tribe's words, "to achieve with carrots what [it] is forbidden to achieve with sticks.[73] Thus, these provisions prohibiting discrimination against persons in the exercise of their civil rights are needed to keep states from picking and choosing among citizens' rights they seek to advance or repress.

Several states adopted constitutional provisions banning various forms of sex discrimination at the end of the nineteenth century.[74] Generally speaking, however, the "state ERA" is a phenomenon of the 1970s—the most recent manifestation of equality concerns in state constitutions. More than a third of the states now have amendments prohibiting sex discrimination. As the Maryland Court of Appeals noted:

> [W]e believe that the "broad, sweeping, mandatory language" of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications.[75]

Despite their powerful mandate, most jurisprudence under these new provisions is dominated by federal equal protection analysis. Indeed, most state courts addressing sex discrimination claims seem preoccupied with federal equal protection constructs, largely undermining the state provisions.

Although many states have interpreted generally applicable rights provisions to guarantee equality under the law, other provisions, not usually found in bills of rights, expressly require equality in specific instances. When applicable,