HISTORY, TRADITION, AND FEDERALISM

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INTRODUCTION

The Supreme Court's invocations of history and tradition for determining the meaning of the federal Constitution have an uneasy—and, so far, under-theorized—relationship to principles of federalism. The Court speaks regularly of "this Nation's history and tradition."[1] Most recently, *Dobbs*, in which the Court overturned *Roe* and *Casey* to hold there is no federal right to abortion, makes clear that in order to be protected from state interference under the Due Process Clause of the Fourteenth Amendment, a right—whether a right protected by the Bill of Rights and incorporated against the states or an unenumerated fundamental right—must be "deeply rooted in our history and tradition and . . . essential to our Nation's scheme of ordered liberty."[2] So, too, in *Bruen*,[3] in which the Court invalidated a New York statute requiring individuals who wished to carry a concealed firearm outside the home to obtain a license based on a showing of "proper cause,"[4] the Court held that "when the Second Amendment's plain text covers an

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1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

2. *Id.* at 238.

3. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

4. *Id.* at 12.

individual's conduct, the Constitution presumptively protects that conduct" and therefore "to justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[5] It is not at all clear, though, that the Court really means the *nation's* history and tradition (and its scheme of ordered liberty). For in determining whether or not a claimed right meets the test, the Court's analysis invariably entails an examination of laws and practices of individual *states*. When the Court finds, from its state-by-state review, evidence of history and tradition (or, as in *Dobbs* and *Bruen,* a lack of such evidence),[6] the finding is about the histories and traditions of individual states, one by one, and perhaps even of a large set of individual states, but it is not obviously a finding about the history and tradition of the nation as a distinct entity.

This phenomenon is a near-inevitable product of our system of federalism. The Bill of Rights is widely understood to have codified *pre-existing* rights.[7] State law—and particularly state constitutions and state court decisions interpreting them—therefore serve as an important resource for understanding the Bill of Rights' provisions.[8] Likewise, when (as the Court has instructed) identifying or

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5. *Id.* at 17.

6. *See Dobbs,* 597 U.S. at 250 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."); *Bruen,* 597 U.S. at 38-39 ("We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement.").

7. *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 147-56 (1998) (discussing the "declaratory" theory by which provisions of the Bill of Rights are viewed as "declaratory of certain fundamental common-law rights"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 YALE L.J. 1193, 1206 (1992) ("To a nineteenth-century believer in natural rights, the Bill was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed."); Jud Campbell, *Natural Rights and the First Amendment,* 127 YALE L.J. 246, 295 (2017) ("[T]he impetus for a [federal] bill of rights was a desire to enumerate well-recognized rights, not create new ones.").

8. *See* McDonald v. City of Chicago, 561 U.S. 742, 818 (2010) (Thomas, J., concurring in part) (writing that "[a]fter declaring their independence, the newly formed States

construing the scope of a federal right implicates the existence or scope of past legal regulation,[9] and regulatory power is reserved to (or has been exercised primarily by) state governments, it makes considerable sense to examine how each state has regulated. In both instances, though, the approach reflects a conception of 'nation' that is a lumping of the nation's parts. As with all lumping, the approach carries an obvious risk. In imagining our nation[10] from its parts, absent some reliable methodological tool to ensure that only true likes are grouped together, the inquiry risks exaggerating similarities among the states and discounting their differences.[11]

The search for federal meaning in state law is not just in tension with federalist principles supporting variation in and

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replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage" and that "[s]everal years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government," such that "[c]onsistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text.").

9. *See Bruen*, 597 U.S. at 24 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

10. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

11. There are reasons, of course, to doubt that litigation in federal court over the meaning of a federal constitutional provision is a sound vehicle for identifying and understanding with nuance the laws, practices, and histories of the states. Federal judges might have experience interpreting and applying the laws of particular states, but they are not experts in the laws of every state. An investigation of state laws through litigation's narrow lens—to ascertain whether there is a history and tradition supporting a claimed right—is not an obvious means to yield nuanced or comprehensive understandings. In *Bruen,* the Court in a footnote breezily advised that because "in our adversarial system of adjudication, we follow the principle of party presentation," judges "are entitled to decide a case based on the historical record compiled by the parties." *Bruen,* 597 U.S. at 25 n.6. That proposition is dubious and inconsistent with the Court's own best source of historical materials: amicus briefs from informed and fair-minded scholars. My concern in this essay, though, is more with the enterprise of using state law to generate federal meaning than with the capacities of judges and the yields of litigation, issues that other authors have explored and for which some useful remedies likely exist.

independence of state government design. It also represents a peculiar treatment of the U.S. Constitution. The Court has never fully explained why the meaning of a federal constitutional provision is to be yoked to state law. Can it be that the federal Constitution only protects rights *already* protected in the states and that it therefore serves, at most, as a clean-up charter to deal with occasional outliers?[12] The history and tradition inquiry presents a perplexing irony: state courts are routinely criticized for lock-stepping,[13] interpreting state constitutional provisions reflexively to mean the same thing as federal provisions, but perhaps the Supreme Court is at fault for failing to give independent meaning to the federal Constitution and instead just following along with a collapsed account of state law.

One possibility is that the Court follows Thomas Cooley,[14] who thought *general* principles of American constitutionalism were discernable through a careful examination of the constitutional law of individual states. As Professor Kahn explains:

> Cooley looked to the cases coming from the different state courts to find the common principles of state constitutionalism–and, ultimately, of American constitutionalism. Just as his

12. This category would include the Court's recent decision in *Timbs v. Indiana,* in which the Court held the excessive fines clause of the Eighth Amendment is incorporated against the states under the Fourteenth Amendment. 139 S. Ct. 682 (2019). In reaching that conclusion, the Court found that the protection against excessive fines was "fundamental to our scheme of ordered liberty" with "deep roots in our history and tradition." *Id.* at 686-87. Supporting that determination, the Court said, was the fact that in 1868 "the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines." *Id.* at 688. Further, the Court explained: "Today, acknowledgment of the right's fundamental nature remains widespread . . . [A]ll 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality." *Id.* at 689. In Indiana, the state supreme court had already instructed that "the state constitution imposes the same restrictions as the Eighth Amendment." *Id.*

13. *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018) (criticizing lock-stepping); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 193-232 (2009) (discussing various criticisms of lock-stepping).

14. *See generally* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

> contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court's interpretive effort. The diversity of state courts, each claiming a unique authority, did not prevent their engagement in a common interpretive enterprise.[15]

Whatever the merits of this approach,[16] the Court has never articulated—much less defended—an understanding of history and tradition, for purposes of federal interpretation, that is grounded in general principles "independent of any particular state's formal text, history, and precedents"[17] and of state constitutionalism as a species of the common law. As Judge Kevin Newsom explains, it is not clear how an inquiry into tradition fits with commitments to textualism and originalism.[18] It would seem equally challenging to reconcile a Cooley-inspired approach with those commitments.

If the Court's turn to history and tradition means building federal constitutional law from state law bricks, far more attention is needed to explain and justify the enterprise and to its methodological challenges. This essay highlights and offers commentary on some of the attendant issues. Part I situates the analysis by highlighting some relevant differences between state constitutions and the federal Constitution and between state constitutional law and federal constitutional law. Part II explores challenges in building federal constitutional law from state law sources. Part III discusses state court responses to the Court's uses of state law in the Second

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15. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism,* 106 HARV. L. REV. 1147, 1163 (1993).

16. There are many critics. *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 13 (2023) (in place of merely "'an undifferentiated body of general principles existing independent of any particular constitution,'" urging attention also to "differences in state constitutional text, constitutional history, judicial precedent, . . . [and] judicial philosophy.") (quoting James A. Gardner, *The Positive Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 126-27 (1998)).

17. Kahn, *supra* note 15, at 1163.

18. Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation*, 47 HARV. J.L. & PUB. POL'Y 745, 748 (2024).

Amendment cases and in *Dobbs*. A brief conclusion proposes a mechanism for more reliable uses of state law in discerning history and tradition in federal constitutional interpretation.

I. STATE CONSTITUTIONS ≠ CONSTITUTION OF THE UNITED STATES

State constitutions are not equivalent to—they differ significantly from—the federal Constitution. The point might seem obvious, but it bears emphasis. As Professors Bulman-Pozen and Seifter rightly observe, "[a]lthough reams of state constitutional law literature have focused on the few clauses common to the state and federal documents, most state constitutional provisions have no federal analogue, and state constitutions have a different orientation toward individual rights, the relationship between the individual and the community, and the role of government."[19] State constitutions were adopted by different mechanisms than those that led to the adoption of the federal Constitution[20] and they are neither its "miniature versions" nor its "clones."[21]

A. Substance

There are significant substantive differences between state constitutions and the federal Constitution. Such differences have implications for the meaning of state constitutional provisions in ways that may undermine their usefulness for construing and applying the federal Constitution. A state constitution's provisions often reflect a unique history.[22] Compared to the federal Constitution, state

19. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality,* 123 COLUM. L. REV. 1855, 1862 (2023); *see id.* at 1864-78 (surveying how state constitutions list many more rights than does the federal Constitution, protect community-regarding rights, create government duties to protect rights, and secure democratic rights).

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

21. WILLIAMS & FRIEDMAN, *supra* note 16, at 39.

22. *See, e.g.,* Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 729 (Va. 2023) (recounting origins of state constitution's religion provision and origins of the First Amendment and writing, "Mixing these provisions together skews their separate histories and

constitutions are far easier to amend and have been amended many more times.[23] State constitutions are far longer than is the federal Constitution, which does not "partake of the prolixity of a legal code,"[24] while state constitutions contain many "policy-oriented" provisions[25] that read like ordinary statutes.

Even when language in a state's constitution might sound similar to that found in the federal Constitution, there are often very significant textual distinctions. State constitutions protect many more rights than does the federal Constitution and contain rights provisions with no federal counterpart. For example, state constitutions specifically protect the right to vote[26] and the right to privacy.[27] Such provisions mean that a narrow focus on state provisions with federal analogs will necessarily give an incomplete account of what the state constitution, as a whole, actually protects.

While the federal Constitution is generally described as a "negative" charter, protecting rights by constraining what government is

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purposes."). Some state courts have emphasized the importance of state history and tradition (though they have not necessarily found that history and tradition to lead to distinct applications). *See, e.g.*, State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020) (rejecting double jeopardy challenge under state constitution and explaining that "[i]n construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions.").

23. *See* SUTTON, *supra* note 13, at 51 ("[S]tate constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter."); Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191, 194 (2023) ("While roughly 12,000 amendments have been proposed to both the U.S. Constitution and the fifty state constitutions, state constitutions have been amended more than 7,000 times for the U.S. Constitution's twenty-seven.").

24. M'Culloch v. State, 17 U.S. 316, 407 (1819).

25. Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1338 (2001) (distinguishing "policy-oriented" provisions from "framework" provisions).

26. *See, e.g.*, ILL. CONST. art. III, § 1 ("Every United States citizen who has attained the age of 18 or any other voting age required by the United States for voting in State elections and who has been a permanent resident of this State for at least 30 days next preceding any election shall have the right to vote at such election.").

27. *See, e.g.*, FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from government intrusion into the person's private life"); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

permitted to do, state constitutions also contain positive rights and entitlements to government assistance. Indeed, state constitutions often describe in positive terms rights that are protected in the federal Constitution as limitations on government. For example, while the First Amendment says government shall "make no law . . . abridging the freedom of speech," a state constitution provides also that "any citizen may freely speak, write, and publish his sentiments on all subjects."[28] State constitutional rights also tend to be described in much greater detail than are federal protections deemed analogous.[29]

Rights in state constitutions are also often coupled with a recognition of the interests of other people[30] or a more general responsibility to the community.[31] Some state constitutions contain rights that are enforceable against private actors.[32] At the same time that they safeguard rights, many state constitutions identify roles for government in promoting a virtuous citizenry.[33]

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28. VA CONST. art. I, § 12. *See Vlaming,* 895 S.E.2d at 717 (observing that "[w]hile the First Amendment's prohibition against government restriction speaks solely in the negative . . . the Virginia clause speaks in both negative and affirmative terms").

29. *See, e.g., Vlaming,* 895 S.E.2d at 717 (explaining the need to interpret state constitutional protection for religious liberty independently, quoting paragraph-long provision of Article I, Section 16 of the Constitution of Virginia, and noting that "[t]his fulsome language stands in stark contrast to the single clause in the First Amendment addressing religious liberty").

30. *See, e.g.,* ILL. CONST. art. I, § 4 ("All persons may speak, write and publish freely, being responsible for the abuse of that liberty.").

31. *See, e.g.,* MONT. CONST. art. II, pt. II., § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.").

32. *See, e.g.,* ILL. CONST. art. I, § 17 ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property."); N.Y. CONST. art. I, § 11 ("No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.").

33. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 269 (2006) ("[S]tate constitution makers have frequently determined that a polity . . . should take

Especially striking, "[m]ost state constitutions do not contain an 'equal protection' clause" of the kind found in the Fourteenth Amendment, but state constitutions "do contain a variety of equality provisions."[34] These are often detailed in the way the federal Equal Protection Clause is not. For example, the Michigan State Constitution provides more specifically that "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."[35] Other equality measures take the form of requiring uniformity in taxation, public schooling, and other government programs.[36] These state equality provisions "were drafted differently, adopted at different times, and aimed at different evils"[37] than was the federal Equal Protection Clause.

B. Timing and Methodology

Differences of timing and interpretive methodology also loom large. Use of state constitutions (and other state-law sources) to help determine the public meaning of federal constitutional provisions requires temporal correspondence. If, for instance, the question is the public meaning of "due process of law" in the Fourteenth Amendment, we need evidence from state constitutions as of 1868. As Judge Newsom explains, from an originalist perspective, "evidence that significantly post-dates that provision's adoption isn't just second-best, it's positively irrelevant."[38] But the states did not, of course, all simultaneously ratify state constitutions in 1868 such that we can neatly consult sources of public conversation and engagement at the time of ratification for textual meaning. That leaves, then, contemporaneous pronouncements that do exist—perhaps in

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active steps to form certain character traits, and that this should be done through constitutional provisions.").

34. WILLIAMSON & FRIEDMAN, *supra* note 16, at 242.

35. MICH. CONST. art. I, § 2.

36. WILLIAMS & FRIEDMAN, *supra* note 16, at 242.

37. *Id.*

38. Newsom, *supra* note 18, at 747.

1868 state court decisions—along with earlier sources whose meaning holds firm across intervening years.

The challenge, though, is that more than half of the states have had *multiple* state constitutions. A state's later constitutions often repeat provisions from its own earlier constitutions. State constitutions are, therefore, "layered"[39] in far more complicated ways than is the federal Constitution, presenting far greater complexities in synthesizing provisions adopted by different people at different points in time. For example, many state courts take the position that if a later constitution repeats language from an earlier constitution, meaning is fixed not at the time that later constitution was ratified but at the time the repeated provision first appeared in a constitution of the state.[40] Such state practices present significant challenges for relying upon state law as a source of federal meaning. One risk is that the federal interpreter just does not understand the backdating practices of the state court and, therefore, fails to see that evidence of meaning at Time 2 is actually evidence of meaning at an earlier Time 1. A second problem is that even if it makes sense to attribute to the ratifiers of a state constitution earlier meaning from a prior constitution of that same state, it is far from evident why such earlier meaning could also be attributed to the ratifiers of a *federal* provision.

More generally, mismatches between federal and state interpretive methodologies might seriously undermine the usefulness of state constitutions (and other sources of state law) for construing federal provisions. Different state courts follow different

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39. Robert F. Williams, *State Constitutional Law After Dobbs and Bruen*, STATE COURT REPORT (2023), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-law-after-dobbs-and-bruen.

40. *See, e.g.*, *Vlaming*, 895 S.E.2d at 719 ("When a constitutional provision has remained unchanged throughout Virginia constitutional history, we apply the original meaning of the provision when first adopted."); Elliott v. State, 824 S.E.2d 265, 269 (Ga. 2019) ("[W]e generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary."). *See generally* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 354-61 (2022) (discussing courts backdating original meaning).

interpretive methods[41] and deem different sources relevant to the interpretive effort.[42] Casual reliance on state court decisions about the meaning of state law, without a clear understanding of the state court's interpretive methodology, does not inspire confidence.[43]

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41. *Compare* State v. Schneider, 197 P.3d 1020, 1025 (Mont. 2008) ("[W]e . . . conduct an independent review to determine the separate and particular intent of the framers of the Montana Constitution. That intent is first to be determined from the plain meaning of the words used. Where the meaning cannot be determined entirely from the plain wording, we consider the relevant legislative intent, which in the case of constitutional interpretation is the 1972 Constitutional Convention.") *with* O*levik* v. State, 302 Ga. 228, 235 (2017) ("We interpret a constitutional provision according to the original public meaning of its text, which is simply shorthand for the meaning the people understood a provision to have at the time they enacted it.") *and with* Carey v. Morton, 79 N.E.2d 442, 443 (N.Y. 1948) ("It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.").

42. *See* WILLIAMS & FRIEDMAN, *supra* note 16, at 353-96 (surveying state court methods of state constitutional interpretation and sources considered). *But see* Bulman-Pozen & Seifter, *supra* note 19, at 1858 ("While scholars and jurists have debated substantive lockstepping, a subtler but more concerning practice of methodological lockstepping has begun to take hold. Many state courts are deciding cases using techniques developed by federal courts to implement the federal Constitution.").

43. Consider *Heller's* breezy discussion of Massachusetts caselaw:

> The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence . . . ." Pt. First, Art. XVII, in 3 Thorpe 1888, 1892. . . . [I]f one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a state-organized military force. But . . . the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." Commonwealth v. Blanding, 20 Mass. 304, 313–314. The analogy makes no sense if firearms could not be used for any individual purpose at all.

Heller, 554 U.S. at 602. It is inconceivable that in a different sort of case the Court would deem a state court's passing reference in a libel case reliable evidence of the existence and scope of a state constitutional right.

II. STATE LAW AS HISTORY AND TRADITION

Differences of substance, timing, and methodology pose challenges to uses of state law for discerning the meaning of the federal Constitution. This Part takes up two specific issues of interpretation: first, uses of state law for determining the meaning of provisions of the Bill of Rights and, second, more general interpretive challenges that arise from state court interpretations of state constitutional provisions with textual analogs in the federal Constitution.

A. State Law and the Bill of Rights

The Court has often made the observation that the Bill's provisions codified pre-existing rights.[44] That proposition is sound, but only in a very general sense. It does not follow that *all* states protected rights (later codified in the Bill of Rights) in the exact same way as each other, that permissible regulations of rights were consistent across states, or that there is a perfect congruence in either respect between pre-existing state protections and the rights that the Bill of Rights codified. Indeed, and unsurprisingly, even as there exist general similarities between the provisions of the Bill of Rights and pre-existing state-level protections, individual states varied in their protections for and regulations of rights,[45] and provisions of the Bill of Rights matched the practices of some states more closely than others.

Heller illustrates the resulting interpretive challenges. The *Heller* Court stated that its interpretation of the Second Amendment as not limited to keeping and bearing arms as part of a militia was "confirmed by analogous arms-bearing rights in state constitutions that

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44. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("We look to [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing right*."); *id.* at 599 ("[T]he Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a 'right inherited from our English ancestors' . . . .") (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)) (second alteration in original).

45. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1441–42; Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265, 274–82 (2023).

preceded and immediately followed adoption of the Second Amendment."[46] But the state constitutional provisions the Court invoked in support of this conclusion vary considerably and they do not match well the text of the Second Amendment itself.

Of the four state constitutions *preceding* the Bill of Rights that the *Heller* Court cites, two specifically protected a right of the people to "bear arms for the defence of themselves";[47] the two others referred to bearing arms for the common defense or the defense of the state.[48] As for state constitutions after 1791, the *Heller* Court explained that by 1820, nine additional states had adopted what the Court calls "Second Amendment analogues."[49] Again, though, there were considerable differences across these nine—differences that the designation of "analogue" obscures. As the Court itself reports, four states protected a right of the people to "bear arms in defence of themselves and the State," and three gave each individual a "right to bear arms in defence of himself and the State."[50] The *Heller* Court treats all seven provisions to mean the same thing (an individual right): it describes the latter three as simply using "even more individualistic phrasing" than the prior four.[51] "The people . . . themselves" is not obviously an "individualistic" phrase. One might instead conclude that by comparison to "defence of himself," the phrasing is not individualistic at all; we would surely think it odd if the Court said all seven provisions protect only a collective right and "defence of themselves" is an "even more" collective phrasing than is "defence of himself." Two other state constitutions after 1791 referenced only arms-bearing for the "common defence."[52] It is not obvious—and the *Heller* Court doesn't fully explain this point—why "defence of themselves" is in the same

46. *Heller,* 554 U.S. at 601–02.

47. *See id.* at 601 (emphasis omitted) (discussing the founding-era Pennsylvania Declaration of Rights and Vermont constitution).

48. *See id.* at 601–02 (discussing the founding-era North Carolina Declaration of Rights and Massachusetts constitution).

49. *Id.* at 602.

50. *Id.; see also id.* at 584–85 & n.8 (collecting sources).

51. *Id.* at 602.

52. *Id.*

category as "defence of himself" rather than in the same category as "the common defence."

None of this is to say that the Court erred in concluding that the Second Amendment protects an individual right apart from any involvement in the militia. (I happen to think the Court in *Heller* and *McDonald* was correct, though on a Reconstruction-era rather than antebellum rationale.)[53] The point is that the *Heller* Court's use of state constitutions—its flattening of difference, its inattention to nuance—is far from compelling.

Significantly, *Heller* involved the quite straightforward question of whether individuals enjoy the right to keep and bear arms apart from militia service. When even as to that issue, the Court's use of state constitutions falls short, it is hard to be optimistic about reliance upon state constitutions to resolve more complex questions—whether in the Second Amendment context or beyond—about the nature and scope of federal rights.

Context matters also, and here the context is federalism. A significant challenge in invoking state constitutions (and state law more generally) as a basis for construing and applying provisions of the Bill of Rights is that those provisions, when added to the Constitution in 1791, cannot be understand outside of their federalism context. Two factors bear emphasis. First, the provisions of the Bill applied to a national government already limited to its enumerated powers. State governments are very different. Under their state constitutions, state governments (and particularly state legislatures) have general (if not plenary) powers: they "may undertake any action that is not specifically prohibited; they need not look to their constitutions for authorization."[54] Given the very different nature

53. *See* AMAR, *supra* note 7, at 259 ("Creation-era gun bearing was collective, exercised in a well-regulated militia embodying a republican right of the people, collectively understood. Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self-regarding 'privileges' of discrete 'citizens' to individual self-protection.").

54. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law,* 85 CORNELL L. REV. 656, 694 (1999); *see* Whittington v. State, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996) ("[W]hile the Indiana Constitution does not grant unlimited legislative power, neither does it establish a system of expressly enumerated

of federal and state government, it is perhaps misleading even to speak of rights-protecting analogues. Even when textual provisions protecting rights are identical (or close to it), the governments against which those rights are held are not analogous entities. Second, the provisions of the Bill of Rights had at their inception a strong federalism-reinforcing theme.[55] In other words, yes, the provisions secure rights but a good part of the way in which they do that is by limiting the power of the federal government vis-à-vis the state governments. That theme is entirely lacking from the rights provisions of state constitutions.

B. In and Out of Step

Other interpretive challenges quickly emerge when federal courts look to state law to discern the meaning of the federal Constitution. Ordinarily, federal judges *defer* to state supreme courts on the meaning of state law.[56] But in the context of deriving from state law

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powers. We never probe the terms of the constitution for a source of governmental authority, because power is *generally* vested in the legislature, and the outer boundary of that general power is marked by the requirement that it be exercised to advance peace, safety, and well-being.") (citations and internal quotation marks omitted).

55. *See* AMAR, *supra* note 7, at xii ("Individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations . . . designed to create an educated and virtuous citizenry.").

56. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635–36 (1875). Various attendant doctrines reflect a commitment to the authority of state courts to determine questions of state law. *See, e.g.*, R.R. Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941) (instructing that federal courts should abstain to permit a state court to resolve an unsettled question of state law that would make resolution of the federal constitutional issue unnecessary); Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory."); King v. United Ord. of Com. Travelers, 333 U.S. 153, 158 (1948) ("[W]hen the issue confronting a federal court [sitting in diversity] has previously been decided by the highest court in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts.").

evidence of a national history and tradition, significant problems arise.

Some state supreme courts give provisions of their state constitutions the *same* meaning the Supreme Court gives to analogous provisions of the federal Constitution[57] (and some state constitutions so require).[58] Other state supreme courts insist that state constitutional provisions are to be construed independently of the federal Constitution.[59]

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57. Approaches vary. *See* WILLIAMS & FRIEDMAN, *supra* note 16, at 226-41 (discussing different types of lock-stepping). Examples abound. *See, e.g.,* People v. Caballes, 851 N.E.2d 26, 42 (Ill. 2006) ("This court's approach to analysis of cognate provisions in the Illinois and United States Constitutions has been described as 'lockstep.' . . . However, . . . it is an overstatement to describe our approach as being in strict lockstep with the Supreme Court. The approach that this court has taken is more properly described as either an interstitial or perhaps a limited lockstep approach."); City of Chicago v. Alexander, 89 N.E.3d 707, 713 (Ill. 2017) (holding that the right to assemble in the state constitution is to be interpreted in lockstep with the assembly clause of the First Amendment); State v. Johnson, 729 N.W.2d 182, 189 (WI 2007) ("The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect persons from unreasonable governmental searches and seizures. In general, our cases have ordinarily construed the search and seizure protections of the state and federal constitutions coextensively.").

58. *See, e.g.,* FLA. CONST. art. I, § 17 ("[T]he prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

59. *See, e.g.*, State v. Wilson, 543 P.3d 440, 445 (Haw. 2024) ("The Hawai'i Constitution often offers 'greater protections' than the federal constitution. When the two contain look-alike provisions, Hawai'i has chosen not to lockstep with the Supreme Court's interpretation of the federal constitution. Rather, this court frequently walks another way. Long ago, the Hawai'i Supreme Court announced that an 'opinion of the United States Supreme Court . . . is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by . . . the Hawai'i Constitution.'") (alterations in original) (citations omitted) (first quoting State v. Santiago, 492 P.2d 657, 664 (Haw. 1971); and then quoting State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974)); State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) ("Although this Court has previously construed [Art. I, § 8 of the state constitution] as 'synonymous with the "due process of law" provisions of the federal constitution,' we have also recognized that 'this Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution.' Thus, we will examine [a U.S. Supreme Court decision] and explain why we reject its analysis.") (citations omitted) (first quoting State *ex rel.* Anglin v. Mitchell, 596 S.W.2d 779, 786 (Tenn. 1980); and then quoting Burford v.

With respect to states in the first category, the federal judge who looks to the state constitution, as interpreted by the state court, in order to decide if there is a relevant history and tradition that supports a federal right, engages in an uncertain exercise. For the state court, authoritative on state law, takes the view that a state constitutional right exists if a federal right exists—the very thing the federal court is seeking to ascertain by looking to state law. Lock-stepping at the state level would seem to render unhelpful such uses of state law.

A particular version of the problem exists for *Heller*-style investigations of early state constitutional analogues to the Bill of Rights. Notwithstanding the Supreme Court's 1833 ruling in *Barron v. Baltimore*[60] that the Bill of Rights did not constrain the states,[61] some antebellum state courts took the view that provisions of the federal Bill or the principles it reflected *did* apply to state governments,[62] or

State, 845 S.W.2d 204, 207 (Tenn. 1992)); Deras v. Myers, 535 P.2d 541, 549 (Or. 1975) (state speech and assembly provisions provide stronger protections than federal Constitution); State v. Briggs, 199 P.3d 935, 942 (UT 2008) ("[W]e do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution."); Wright v. State, 108 N.E.3d 307, 315 (Ind. 2018) ("This Court has said many times that although Article 1, Section 11 of the Indiana Constitution and the Fourth Amendment to the United States Constitution share vocabulary, they part company in application."); Woirhaye v. Mont. Fourth Jud. Dist. Ct., 972 P.2d 800, 803 (Mont. 1998) ("[W]e have refused to 'march lock-step' with the United States Supreme Court's interpretation of corresponding provisions in the federal constitution") (quoting State v. Bullock, 901 P.2d 61, 75 (Mont. 1995)); State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002) (invalidating under the state constitution pretextual arrests and noting that "[w]e depart from the standards established by the federal courts and rely instead on independent state grounds to determine what, in Arkansas, constitutes unreasonable police conduct warranting suppression"); People v. Haley, 41 P.3d 666, 672–77 (Colo. 2001) (relying on a state constitutional search and seizure provision as providing broader protections than the Fourth Amendment and invalidating as unreasonable a "dog sniff" of an automobile); Powell v. State, 510 S.E.2d 18, 21–26 (Ga. 1998) (striking down a state sodomy law on state constitutional privacy grounds, interpreted more broadly than federal protections).

60. 32 U.S. (7 Pet.) 243 (1833).

61. *Id.* at 250-51 (holding that the Fifth Amendment, like other provisions of the Bill of Rights, was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states").

62. *See, e.g.*, Nunn v. State, 1 Ga. 243, 250 (1846) (invalidating on Second Amendment grounds state statute making it a misdemeanor to sell or carry knives, pistols, and other

informed the meaning of applicable state constitutional protections.[63] Early state court pronouncements on rights were thus not necessarily independent of federal conceptions. That, too, presents a difficulty for construing federal provisions by reference to state sources: the state sources themselves might be infused with federal principles and values.

As for states in the second category, consulting state constitutions—and caselaw construing them—in order to determine federal meaning might end up in some tension with the deference ordinarily given state courts on the meaning of state law. The state court has said that the meaning of the state constitution is independent

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weapons and explaining that, textually, "[t]he language of the [*S*]*econd* [A]mendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning"); Wells v. Jackson, 17 Va. (3 Munf.) 458, 474 (1811) (opinion of Roane, J.) (invoking the particularity requirement of the Fourth Amendment in finding terms of a warrant inadequate); Larthet v. Forgay, 2 La. Ann. 524, 525 (1847) (in upholding a jury award of $2,000 in damages to the owner of a cigar shop searched during the execution of a warrant that authorized a search only of a neighboring cabaret, invoking the Fourth Amendment as "an affirmance of a great constitutional doctrine of the common law" that "should be enforced in its full spirit and integrity"); Campbell v. Georgia, 11 Ga. 353, 365 (1852) (in discussing relevance of Sixth Amendment to state criminal trials, explaining that the Bill of Rights "was primarily introduced for the purpose of preventing an abuse of power by the Federal Government," its "principles . . . were . . . the 'birthright' of our ancestors, several centuries previous to the establishment of our government" and "[i]t is not likely . . . that any Court could be found in America of sufficient hardihood to deprive our citizens of these invaluable safeguards"); State v. Cheevers, 7 La. Ann. 40, 41 (1852) (stating that while the Double Jeopardy Clause "is not, perhaps, applicable, as a constitutional principle, to offences against a State; yet, it is but the enunciation of a well established common law principle, and, as such, is expressly adopted by [a state statute]").

63. *See, e.g.*, Jackson v. Bulloch, 12 Conn. 38, 43 (1837) (describing a state constitutional provision as "almost a transcript" of the Fourth Amendment); Reynolds v. State, 3 Ga. 53, 63 (1847) (comparing the state double jeopardy provision to the federal provision); Jones v. Robbins, 74 Mass. (8 Gray) 329, 346 (1857) (explaining that while the Fifth Amendment Grand Jury Clause only applies to the national government, it informs the "less precise and explicit terms of our own declaration of rights"); Polly v. Saratoga & Wash. R.R. Co., 9 Barb. 449, 458 (N.Y. Gen. Term 1850) (describing the takings clause of the state constitution as borrowed from the Federal Constitution); Griffin v. Martin, 7 Barb. 297, 300 (N.Y. Gen. Term 1849) (describing the takings clause of the state constitution as derived from the Fifth Amendment); Green v. Allen, 24 Tenn. (5 Hum.) 170, 214–15 (1844) (citing the First Amendment in construing a state constitutional provision protecting religious freedom).

of the meaning of the federal Constitution. Independence does not necessarily lead to difference: the state court might engage in independent interpretation but still end up with an understanding of a state constitutional provision identical to how the Supreme Court understands a comparable provision of the federal Constitution. But the state court might determine that the state provision really does *not* mean the same thing as the federal provision and that the relevant differences matter. The state constitutional provision might do more or do less than the federal Constitution, exist for a different reason, trace to a different history, or reflect the unique traditions of the particular state. The federal court that, unaware of or just ignoring these state admonitions, treats the constitutional law of the state as a source of federal meaning, risks being unfaithful to what the state court has said about its own state's laws.

State courts pay attention, of course, to Supreme Court rulings. If state courts see the Supreme Court describing and using state law in ways that depart from the state court's own understandings, they might respond. The next Part turns to that phenomenon.

III. TALKING BACK

An outgrowth of the new judicial federalism[64] is a recognition of the potential value of dialogue between state and federal courts on constitutional questions.[65] When state courts, especially state

64. The "new judicial federalism" refers to the increased reliance by state courts on state constitutional provisions to protect rights, particularly in more robust ways than the Supreme Court interprets the rights-protecting provisions of the federal Constitution. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective,* 72 NOTRE DAME L. REV. 1097, 1097–98 (1997). An important impetus was Justice William Brennan's 1977 article urging state courts, in the wake of the Supreme Court's pullback from some of the Warren Court's rights precedents, to give the rights provisions of their state constitutions independent and more expansive meaning. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 489 (1977).

65. *See, e.g.*, Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism,* 19 GA. L. REV. 861, 901 (1985). ("[I]n the tradition of cooperative federalism, both state and federal systems have much to gain from institution of a dialogue between the courts of both systems."). For a different perspective, see Kahn, *supra* note 15, at 1156, (rejecting the notion that state constitutional interpretation be limited to state-specific sources and urging a common "interpretive enterprise,"

supreme courts, engage in an independent analysis of the provisions of their state constitutions, they generate approaches and conclusions that can inform and shape how federal courts, and particularly the Supreme Court, interpret and apply the federal Constitution. In other words, state courts interpreting the state constitution can both learn from and provide input for the decisions of the Supreme Court under the federal Constitution.[66] Such dialogue is presumed friendly and polite because the lane markings are clear—the Supreme Court is authoritative on the federal Constitution, the state's highest court on the state constitution—and the exchange need not produce agreement.

A different kind of interaction between state courts and the Supreme Court is evident in the history and tradition context. This involves instead state courts talking back to the Supreme Court: criticizing the Court's uses of state law to generate holdings under the federal Constitution. Examples involving the recent Second Amendment line of cases and *Dobbs* illustrate the phenomenon.

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involving state and federal courts, to "understand the appropriate role for the rule of law in a democratic order" and recognizing also interpretive diversity). For a critique, see Justin Long, *Intermittent State Constitutionalism,* 34 PEPP. L. REV. 41, 67–68 (2006) ("[T]he project is ultimately hollow. There can be no constitutionalism without a constitution, and no consensus on 'American constitutionalism' will ever be found, no matter how well-reasoned the state courts are in their rebuke of contemporary Federal Supreme Court decisions. The failure of a universal common law as a governing principle in American courts teaches us that much.") (footnote omitted).

66. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 HASTINGS CONST. L.Q. 93, 97–98 (2000) ("In acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in constitutional provisions . . . . Given the Supreme Court's relatively isolated institutional position, such engagement can inform interpretive debates among judges, scholars, and citizens about the meaning of constitutional text, and thereby balance the interpretational judgment of the Supreme Court.") (footnotes omitted).

A. Second Amendment Cases

The Supreme Court of the State of Hawai'i has been particularly critical of the Court's recent Second Amendment decisions. In a 2024 case rejecting challenges under the federal and state constitutions to a state licensing requirement for possession of firearms in public, the Hawai'i court held that *Bruen* did not invalidate licensing requirements under the Second Amendment, and that because the "text of . . . [the state provision], its purpose, and Hawai'i's historical tradition of weapons regulation support a collective, militia meaning," the state constitution protected no right at all to carry firearms in public places.[67] The court's opinion is a vigorous response to the Supreme Court, with two apparent goals: to rebut the Supreme Court's notions of consistent and discernable American traditions in *Heller* and *Bruen*, and to challenge the Court's own textual interpretation of the Second Amendment itself.

The state constitution's arms provision, in article I, section 17,[68] is "nearly identical" in text to the Second Amendment, with differences between the two of just "two commas and three capital letters."[69] In considering both state and federal challenges to the licensing laws, the Hawai'i court, rejecting lock-stepping, said it was proper to "interpret the Hawai'i Constitution before [interpreting] its federal counterpart" and that "[o]nly if the Hawai'i Constitution does not reach the minimum protection provided by a parallel federal constitutional right should this court construe the federal analogue," such that "we . . . may not get to the United States Constitution" at all.[70] But that was a sleight of hand. In construing the state constitution's provision, the court *immediately* turned to the Second Amendment. "Since article I, section 17 imitates the Second Amendment," the court explained, "it is helpful to look at what the

67. State v. Wilson, 543 P.3d 440, 447 (Haw. 2024).

68. The provision reads: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAWAI'I CONST. art I, § 17.

69. *Wilson,* at 447.

70. *Id.* at 445.

Second Amendment's words mean."[71] And the court's ensuing analysis was as much about the Second Amendment as it was about the state provision.

According to the Hawai'i court, *both* the federal and state constitutions "use military-tinged language . . . to *limit* the use of deadly weapons to a military purpose,"[72] and neither contains "words . . . describ[ing] an individual right."[73] Notwithstanding *Heller*, the Hawai'i court wrote that "[t]o English speakers—in 1791, 1868, and now—the first clause [of the Second Amendment] narrows the right that the second clause confers."[74] As to the Hawai'i constitution, the court wrote: "Our framers had options. They could have worded the constitution to plainly secure an individual right to possess deadly weapons for self-defense. But they didn't."[75] The court distinguished the Hawai'i provision—and therefore the Second Amendment—from the constitutions of other states that explicitly provide for an individual right of self-defense.[76] Further, the court claimed, these differing state-level protections for an individual right exist precisely in order to supplement the more limited collective right the Second Amendment secures: "Until *Heller*, the Supreme Court had never ruled that the Second Amendment afforded an *individual* right to keep and bear arms. Because the Second Amendment provided a collective right, most states conferred an individual right through their constitutions."[77] Hawai'i, though, elected no supplemental right. While recognizing that "[f]ederalism principles allow states to provide broader constitutional protection to their people than the federal constitution," the court explained, Hawai'i did not expand upon the Second Amendment.[78] The court wrote:

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71. *Id.* at 448.
72. *Id.* (emphasis added).
73. *Id.* at 449.
74. *Id.* at 448.
75. *Id.* at 449.
76. *See id.* at 449–50.
77. *Id.* at 450.
78. *Id.*

> Hawai'i chose to use civic-minded language. Article I, section 17 textually cements the right to bear arms to a well regulated militia. Its words confer a right to "keep and bear arms" only in the context of a "well regulated militia." Article I, section 17 traces the language of the Second Amendment. Those words do not support a right to possess lethal weapons in public for possible self-defense.[79]

In sum, the contrast with the text of other state constitutions demonstrated that neither Hawai'i's constitution nor the Second Amendment protected an individual right.

Turning next to the "public purpose" of the state constitution's provision—an element of state constitutional interpretation—the Hawai'i court doubled down on its readings of state and federal arms protections. The court reported that "the authors and ratifiers" of the state constitution "imagined a collective right," one that "align[ed] with what the Second Amendment meant in 1950" when, in adopting its first state constitution, "Hawai'i copied the federal constitution's language"—and subsequently, when the same provision was retained in state constitutional conventions in 1968 and 1978.[80] Indeed, the court explained, the 1950 convention delegates adopted the Second Amendment text more or less unchanged, precisely in order to "preserve the Territory's [existing] firearms regulations."[81] State processes were thus additional evidence of both state and federal constitutional meaning. According to the court:

> When the Hawai'i Constitution was first ratified, courts throughout the nation's history had *always* interpreted and applied the Second Amendment with [a] militia-centric view . . . . This was what everyone thought. . . . State and federal courts had also, with few exceptions, upheld laws regulating firearms use and possession.[82]

The Supreme Court was just wrong. "*Heller* flipped the nation's textual and historical understanding of the Second Amendment"

79. *Id.*
80. *Id.* at 450–51.
81. *Id.* at 450.
82. *Id.* at 451.

based on an historical analysis that "historians quickly debunked."[83] Worse, the Hawai'i court thought the Supreme Court engaged in deliberate distortion. The court wrote:

> History is prone to misuse. In the Second Amendment cases, the Court distorts and cherry-picks historical evidence. It shrinks, alters, and discards historical facts that don't fit. . . . Judges are not historians. Excavating 18th and 19th century experiences to figure out how old times control 21st century life is not a judge's forte. . . . Worse, judges may use history to fit their preferred narratives. . . . History is messy. It's not straightforward or fair. It's not made by most. . . . *Bruen*, *McDonald*, *Heller*, and other cases show how the Court handpicks history to make its own rules.[84]

Further, the Hawai'i court thought that, besides just the wrong way to assess modern gun control laws,[85] the Court's history-and-tradition approach was inconsistent with the *traditional* mode of constitutional interpretation:

> *Bruen* unravels durable law. No longer are there the levels of scrutiny and public safety balancing tests long-used by our nation's courts to evaluate firearms laws. Instead, the Court adlibs a "history-only" standard. The Supreme Court makes state and federal courts use a fuzzy "history and traditions" test to evaluate laws designed to promote public safety. It scraps the

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83. *Id.* at 453.

84. *Id.*

85. *Id.* at 453–54. The court explained:

> Time-traveling to 1791 or 1868 to collar how a state regulates lethal weapons—per the Constitution's democratic design—is a dangerous way to look at the federal constitution. . . . We believe it is a misplaced view to think that today's public safety laws must look like laws passed long ago. . . . Lethal weapons share little resemblance to weaponry used centuries ago. . . . Gun use has changed, too. A backward-looking approach ignores today's realities. . . . The United States Supreme Court disables the states' responsibility to protect public safety, reduce gun violence, and safeguard peaceful public movement. . . . [I]t makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution.

Id. at 454.

> traditional techniques used by federal and state courts to review laws passed by the People to protect people.[86]

Academics and media commentators routinely disparage the Supreme Court. Nonetheless, for the highest court of a state to accuse Supreme Court justices of "handpick[ing]" evidence in order to make their "own" rules" is remarkable.

As to the nation's history and tradition, the Hawai'i court explained that its state did not fit the Supreme Court's account in *Bruen*. The state's own history and tradition simply did not support any right to carry weapons in public. The court explained that under the laws of the Hawaiian Kingdom (1833–1893), the provisional government (1893–1898), and the territorial government (1898–1959), possession of weapons was "heavily regulated"[87] so as to prohibit possession in public. The court explained that Hawai'i's several pre-state constitutions, beginning in 1840, included provisions drawn from the U.S. Constitution but contained no right at all to keep and bear arms; the state's 1950 constitution itself protects only a militia-specific right.[88] Summarizing the entire record, the court concluded, "Hawai'i's historical tradition excludes an individual right to possess weapons. Hawai'i prohibited the public carry of lethal weapons—with no exceptions for licensed weapons—from 1833-1896. Unlicensed public carry of firearms has been illegal from 1896 to the present. Hawai'i has never recognized a right to carry deadly weapons in public; not as a Kingdom, Republic, Territory, or State."[89] The nation's history and tradition, as set out in *Bruen*, was not that of Hawai'i.

Of course, Hawai'i's record does not instantly unsettle the Supreme Court's assessment of the nation's tradition and history.[90]

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86. *Id.* at 453 (citation omitted).

87. *Id.* at 456.

88. *Id.* at 458-59.

89. *Id.* at 459.

90. *Wilson* was not the first criticism of the Supreme Court's methodology out of Hawai'i. In a case involving application of the minimum contacts test for personal jurisdiction in state court, Justice Todd Eddins wrote a concurring opinion, ostensibly triggered by Justice Gorsuch's suggestion to revisit *International Shoe,* see City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173, 1208 (Haw. 2023) (Eddins, J., concurring)

The Court has not resolved whether the relevant cut-off point for identifying a tradition relevant to the Second Amendment is 1791 or 1868.[91] But it clearly does not think it is 1950, when Hawai'i adopted its current constitution, or 1959, when, with three amendments to its 1950 constitution (none pertaining to arms), Hawai'i was admitted to the Union as the fiftieth state. A response to the Hawai'i court's protestations might, therefore, simply be that, as is true of the other twelve states admitted after 1868, Hawai'i is bound by the earlier history and traditions of the Union it joined. Still, that perspective might be unduly simple. The Court has insisted in

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(quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039, (2021) (Gorsuch, J., concurring).), that is highly critical of some of the Court's recent decisions. Eddins complained that at the Court, "[e]nduring law is imperiled," that "[e]merging law is stunted," and that "[a] justice's personal values and ideas about the very old days suddenly control the lives of present and future generations." *Id.* at 1208. In *Dobbs,* Eddins wrote, the Court "erased a constitutional right" and in *Bruen* it "cherry-picked history to veto public safety legislation, disturb the tranquility of public places, and increase homicide." *Id.* In Eddins's view, the Court has rendered "unacceptable" the "[t]raditional methods to interpret the Constitution," illustrated, he said by *Brown*'s refusal to "'turn the clock back to 1868'." *Id.* at 1209 (quoting Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 492–93 (1954)). According to Eddins, the Court's methodology fails to constrain judges and results in a skewed historical record. *Id.* Eddins, writing he is "just a state judge," thought Hawai'i's own approach to constitutional interpretation furnished lessons for the Supreme Court:

> [A] constitutional provision's public meaning at ratification may matter centuries or decades later. . . . But to the Hawai'i Supreme Court, it's not decisive, or the *only* way to interpret a constitution. In Hawai'i, the Aloha Spirit inspires constitutional interpretation. . . . "Aloha" is more than a word of greeting or farewell or a salutation. . . . "Aloha" is the essence of relationships in which each person is important to every other person for collective existence.
>
> The United States Supreme Court could use a little Aloha.

Id. at 1210 (quoting HRS § 5-7.5(a)).

91. *See Bruen,* 597 U.S. at 37 (acknowledging "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)" but declining to address this issue because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.").

other contexts on the "equal sovereignty of the states."[92] The Court has not articulated all of the ways in which states must be treated as equal sovereigns,[93] but perhaps there is something to the Hawai'i court's assumption that *its* traditions should matter along with those of other states. A possible argument, then, for looking past 1868 to discern state practices is that stopping at 1868 fails to treat states as equal sovereigns and that when Hawai'i entered the Union, its traditions became part of those of the nation. Even so, some concepts at least of the nation's history and traditions would allow for variation: there might be an overall national tradition even as some states (how many is subject to debate) were different. In any event, while Hawai'i might be the most distant state—temporally and geographically—the courts of other states have also voiced strong criticism of the Court's methodology in Second Amendment cases.[94]

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92. *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States.").

93. For academic explorations, see, e.g., Thomas B. Colby, *In Defense of the Equal Sovereignty Principle,* 65 DUKE L.J. 1087, 1170 (2016); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism,* 120 COLUM. L. REV. 835, 935-40 (2020); Leah M. Litman, *Inventing Equal Sovereignty,* 114 MICH. L. REV. 1207, 1209 (2016).

94. Consider this extraordinary statement by the highest court of Pennsylvania in a case involving a constitutional challenge to a town ordinance prohibiting the discharge of firearms except at designated shooting ranges:

> We close by adding our voice to the ever-growing chorus of courts across the country that have implored the High Court to answer some of the many questions *Bruen* both created and left unresolved—or even to reconsider its path entirely. Our Nation is gripped by a level of deadly gun violence our founders never could have conceived, and, respectfully, some of the Court's actions in recent years have done little to quell the legitimate fears of "the people." Doubtless, the federal Constitution is king, and the heavy burden of interpreting that all-important document falls solely to the head of the federal judiciary. Still, to many, the *Bruen* Court's word that the Second Amendment is meant to be adapted to the various crises of human affairs largely rings hollow since the Court has frozen its meaning in time in the ways that matter most. Worse yet, the Court seemingly moves the goalposts with each new case it takes, most recently by *sua sponte* discarding a test that was uniformly embraced by courts across the country and replacing it with a harsh "history-

B. Dobbs

State courts have also talked back on *Dobbs*. In a recent case involving a challenge to a ban on Medicaid-funded abortion, two members of the Pennsylvania Supreme Court (out of five who heard the case) concluded that the state constitution protects "the fundamental right to reproductive autonomy, which includes a right to decide whether to have an abortion or to carry a pregnancy to term."[95] Justice Christine Donohue (who wrote the majority and lead opinion in the case), joined by Justice David Wecht, located this right in Article I, Section 1 of the state constitution.[96] It provides: "Art. I § 1. Inherent rights of mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights,

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and-tradition" test no one asked for. We cannot help but wonder (and fear, really): What's next?

Barris v. Stroud Twp., 310 A.3d 175, 215 (Pa. 2024) (internal citation omitted).

Of particular concern to the Pennsylvania court was its perceived lack of guidance in *Bruen* on facial versus as-applied challenges:

> [B]efore us is a facial challenge to the shooting range exception to the Township's discharge ordinance. Ordinarily, a law is facially unconstitutional only where no set of circumstances exist[s] under which [it] would be valid. But *Bruen* teaches that Second Amendment challenges are different, and not subject to the difficult-to-mount standard that typically applies to facial attacks. . . . Indeed, the challengers in *Bruen* also levied a facial challenge. And yet, rather than engage any of its precedents touching upon facial challenges, the *Bruen* Court simply announced it was setting "*the* standard for applying the Second Amendment" without drawing any distinction between facial and as-applied claims . . . (emphasis added).

Id. at 203 (quoting *Bruen*, 597 U.S. at 24) (other quotations omitted). Other examples of state court criticisms include State v. Rumpff, 308 A.3d 169, 176–77 (Del. Super. Ct. 2023) ("Since the Supreme Court's pivotal decisions in *Heller* and *McDonald*, the lower courts have been left to grapple with the outstanding effects of the Supreme Court's failure to apply a set standard of review to Second Amendment cases. . . . [W]hile [in *Bruen*] the Supreme Court addressed how to determine whether *conduct* falls under the Second Amendment, the Supreme Court did not provide clarification as to how the lower courts were to go about determining *who* is entitled to Second Amendment protection.").

95. Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs., 309 A.3d 808, 917 (Pa. 2024) (remanding to lower court to assess funding exclusion under heightened standards governing state equal protection and Equal Rights Amendment claims).

96. *Id.*

among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Justice Donohue first emphasized the ways in which the state constitution differs from the federal Constitution. In so doing, she depicted the state constitution—and the Pennsylvania court's interpretation of it—as a reliable source of long-standing American rights.[97] That depiction brings *Dobbs* within the crosshairs.

Justice Donohue explained that "[t]he Pennsylvania Constitution, first adopted in 1776, predated the ratification of the United States Constitution;" it "constituted the first overt expression of independence from the British Crown;" it was meant to "reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681;" and that "[u]nlike the Bill of Rights, the Declaration of Rights was an organic part of the Pennsylvania Constitution, appearing in the first iteration of the document."[98] Moreover, the state constitution did not itself create rights: "Article I, Section 1 rights are inherent and indefeasible rights. . . . That the rights are inherent, secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic."[99] According to Donohue, "[t]he most prominent of the inherent rights of Article I, Section 1 is the right to privacy," a right she said that is "rooted in a person's inherent and indefeasible right to liberty and the pursuit of happiness."[100] Central to this right of

97. Donohue explains that "[t]he Federal Constitution has no counterpart to Article I, Section 1" and that while "the United States Supreme Court has, in the past, settled on the Due Process Clause of the Fourteenth Amendment of the United States Constitution as the source of a right to privacy," "[t]here is no similarity between the texts of these two provisions." Specifically, she writes, "Article I, Section 1 secures rights that are inherent and indefeasible, whereas the Fourteenth Amendment's scope is more circumscribed" in that "[a]ccording to the High Court, the Fourteenth Amendment's protections only extend to those rights explicitly mentioned by the text or those that are deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 897 (citing *Dobbs).*

98. *Id.* at 898.

99. *Id.*

100. *Id.* at 899.

privacy is the "right to be let alone"[101] as reflected in "two often overlapping interests: the interest in avoiding disclosure of personal matters and the interest in having independence to make certain kinds of important decisions."[102] A right to "reproductive autonomy" falls within this concept: "Whether or not to give birth is likely the most personal and consequential decision imaginable in the human experience. Any self-determination is dependent on the right to make that decision."[103]

This sounds initially like a discussion just of a state constitutional right. But Donohue turned to the federal Constitution and the Court's use of Pennsylvania law. On the right of decision-making, Donohue invoked Supreme Court cases, running from *Meyer v. Nebraska* to *Loving v. Virginia*, as "longstanding precedent . . . delineating the right to make certain bedrock decisions."[104] Given this line of cases, she observed, "we have not been asked to enforce these rights to make the important decisions based on our own Charter's privacy guarantees" and so "[c]omplacency with the status quo established by the United States Supreme Court jurisprudence applying the federal Constitution stalled development of our Charter's protections in this arena."[105] The court's previous lack of recognition of a state right to abortion also reflected the caselaw of the Supreme Court: "Over the past fifty years, given that [beginning with *Roe*] the right was firmly ensconced in the federal Constitution, there has been no opportunity to address the question of whether our Constitution protects the right to make decisions involving reproductive autonomy until *Dobbs*, when the federal right was retracted."[106]

As to interpreting the state constitution, Donohue wrote that because Article I rights are inherent, the court was not "constrained" in the way the *Dobbs* Court "believed it was" to evaluate whether

101. *Id.* at 901.
102. *Id.*
103. *Id.* at 906.
104. *Id.* at 905.
105. *Id.* at 906.
106. *Id.*

abortion is "deeply rooted in the 'history or traditions of the Commonwealth.'"[107] Donohue observed that such an approach is "not our Constitution's analytical framework since our Article I rights are inherent."[108] Nonetheless, she wrote, "[i]t is helpful to clarify the [historical] status of abortion in Pennsylvania,"[109] which, she wrote, the *Dobbs* Court had "selectively referenced."[110] In a footnote, Donohue added this:

> For instance, *Dobbs* relied on an 1850 Pennsylvania case to disprove arguments that a right to abortion was deeply rooted in the nation's history. *Dobbs*, 142 S. Ct. at 2252 & n.32, 2255 (citing Mills v. Commonwealth, 13 Pa. 631 (1850) as evidence that abortions were criminalized at all points of pregnancy in Pennsylvania and that, in other areas of the law, a fetus was regarded as a "person in being")).[111]

In her own assessment of the state's historical record, Donohue reached a different conclusion. She reported that "[a]lthough we have not uncovered any Pennsylvania specific discussion of the common law from the late eighteenth or early nineteenth century,

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* n.120. *See also id.* at 138 (Wecht, J., concurring) (writing that "[w]hat the *Dobbs* Majority got right was counting Pennsylvania among those states that criminalized abortion in the mid-1800s" but observing that the decision "came at the height of the separate spheres doctrine that confined women to strict, socially constructed roles as wives and mothers" and criticizing several aspects of *Mills,* including that in it the court "did not explain itself by way of precedent or otherwise" and went "much further than the facts warranted."). *See also* Members of Med. Licensing Bd. of Indiana v. Planned Parenthood Great Nw., Hawai'i, Alaska, Indiana, Kentucky, Inc., 211 N.E.3d 957, 995 (Ind.) (Goff, J., concurring in part & dissenting) reh'g denied, 214 N.E.3d 348 (Ind. 2023) (criticizing the majority's invocation of *Dobbs* and reference to "Indiana's long history of generally prohibiting abortion as a criminal act" as evidenced by the Indiana Territorial government enacting a receiving statute adopting English law that, through 1803 legislation, criminalized abortion after 'quickening' and explaining that "Indiana's reception statute adopted only the Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to 1607" and that "[b]ecause the English Act of 1803 [criminalizing abortion] came nearly two-hundred years after the cut-off date for receiving English laws, Indiana did not in fact receive it as part of its own law.").

scholars on both sides of the abortion debate have asserted that the quickening doctrine was a settled part of the common law at the opening of the seventeenth century," and "[t]hus at the time our Charter was adopted, abortions were available and performed and the government did not interfere in a woman's pregnancy until quickening."[112] Further, Donohue explained, again evidently in response to the *Dobbs* Court, that "[w]hat the history of the common law in Pennsylvania establishes is that views of morality may change regarding abortion and other practices.[113] In addition, Donohue offered a more general criticism of the use of history. In her view, "that history [of abortion regulation] is not determinative in the resolution of the issue presented in this case" because of a framing problem: "[t]o focus the issue on the abortion procedure itself denigrates the monumental impact on a woman making the decision to carry a pregnancy to birth or not. The constitutional question is whether that decision is the type of important decision that the privacy right protects."[114] In a concurring opinion, Justice David Wecht built on Donohue's analysis to provide an additional, and more strongly worded, criticism of *Dobbs*.[115]

The Pennsylvania court is not the only example of a state court pushing back on the Supreme Court's understanding of history and tradition in *Dobbs*. The Oklahoma Supreme Court has also provided

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112. *Allegheny Reprod. Health Ctr.*, 309 A.3d at 909.

113. *Id.*

114. *Id.*

115. As to framing, Wecht deemed it "a familiar tactic" to define a right "so narrowly that the right, so defined, will not be found in the applicable constitution" and that in *Dobbs,* the Court "reduced the issue before it to the narrowest possible articulation: the right to abortion, rather than the broader right to personal autonomy." *Id.* at 950 (Wecht, J., concurring). Wecht also criticized the Court's use of history and tradition both for its sources, *see id.* at 983 ("The history represented by Hale and Blackstone is not, as the *Dobbs* Majority seemed to believe, a neutral survey of history."), its selectivity, *see id.* ("The *Dobbs* majority engaged in historical fiction, disregarding evidence that undermined its views"), and its conclusions, *see id.* at 984 ("The deeply rooted history and tradition of every state at the Founding afforded women the liberty to obtain an abortion prior to quickening."). Wecht also encouraged litigants to bring claims for a federal right to abortion based on constitutional provisions other than due process. *See id.* at 964.

an account of its own state's traditions that differs in important respects from the *Dobbs* Court's understanding of those of the nation, and which, the Oklahoma court has concluded, supports an abortion right.[116]

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116. After *Dobbs,* the Oklahoma Supreme Court held that the state constitution "protects a limited right to an abortion" under the due process clause of Article II, section 7 and the provision of Article II, section 7 protecting "inherent rights." Oklahoma Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1128 (Okla. 2023).

The court observed that since *Roe* it had "followed the U.S. Supreme Court's interpretation of the federal Due Process Clause when deciding issues related to abortion. It was unnecessary for this Court to determine whether there existed an independent right to terminate a pregnancy under the Oklahoma Constitution. Although we have refrained from finding a right to terminate a pregnancy in the Oklahoma Constitution, we have never ruled such right did not exist." *Id.* In interpreting the state constitution, the Court followed (or appeared to follow) a state-level history-and-tradition approach and concluded a limited right to abortion existed. The court wrote:

> If we adopted the *Dobbs* analysis we would have to find a right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. *Dobbs* relied upon various state statutes that criminalized abortion to help determine whether abortion rights were deeply rooted in this nation. Even during the Oklahoma Territory there were laws outlawing certain terminations of pregnancy. . . . Soon after statehood and the adoption of the Oklahoma Constitution these laws persisted and were recodified several times. For many years these laws have been codified in Sections 861 and 862 of title 21 of the Oklahoma Statutes. Section 862 has since been repealed but § 861 still exists . . . . Section 861 provides:
>
> > Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life* shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years. (emphasis added).
>
> This law has changed very little since the days of the Oklahoma Territory. In 1973, the Court of Criminal Appeals of Oklahoma declared that because of the decision in *Roe* both sections are "unconstitutional as being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." . . . However, enforcement of § 861 was revived by law when *Dobbs* overruled *Roe* and *Casey*.
>
> In its finding that the various state laws did not support a history or tradition of a national right to an abortion, *Dobbs* focused on the criminal element of

There is some value in such state court responses. They involve more than the state court electing to read the state constitution differently from how the Supreme Court reads the federal Constitution. Instead, they are criticisms of the way in which the Supreme

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> such statutes. However, that is only half the story in Oklahoma. As much as § 861 had always outlawed abortion it also always acknowledged a limited exception. The law in Oklahoma has long recognized a woman's right to obtain an abortion in order to preserve her life. . . . Our history and tradition have therefore recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman.

Id. at 1129–30.

Given this history and tradition within Oklahoma, the court concluded that the state constitution "creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life," that is, "if . . . the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy." *Id.* at 1130. State laws impairing the right were, the court noted, subject to strict scrutiny. *See id.* The court also noted that it was "mak[ing] no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein." *Id*.

In a subsequent decision, the next year, the Oklahoma Supreme Court tied its finding of a state constitutional right to a more targeted criticism of *Dobbs.* The court wrote:

> *OCRJ I* was this Court's first opinion concerning abortion rights following the United States Supreme Court's holding that there was no longer a right to terminate a pregnancy under the federal Due Process Clause. . . . *Dobbs* held that, in order for a fundamental right to be recognized as a component of the liberty protected in the Due Process Clause, such right must be deeply rooted in our Nation's history and tradition. The Court determined that was not the case when considering abortion had been outlawed in every single state prior to *Roe v. Wade*.. . . . We determined that if this Court were to adopt the *Dobbs* analysis we would have to find a limited right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. Since the days of the Oklahoma Territory and until *Roe,* Oklahoma outlawed abortion; however, such criminal statutes also provided a limited exception to allow an abortion if it was "necessary to preserve her life." We found that *Dobbs* did not account for such exceptions and our history and tradition had long recognized such right. . . . Therefore, we held that the Oklahoma Constitution protects a limited right to an abortion, i.e., one that creates an inherent right of the mother to terminate a pregnancy when necessary to preserve her life.

Oklahoma Call for Reprod. Just. v. Drummond, 543 P.3d 110, 115, (Okla. 2024) (reh'g denied).

Court itself has made use of state law in federal constitutional interpretation.[117] Given that state courts are authoritative on the meaning of state law, the criticisms represent more than disagreement but a correction to what the Supreme Court has said and done.

At the same time, there are at least four potential limits to the significance of the state court responses. First, as responses, they appear after the Supreme Court has already decided the case. That timing likely reduces their impact. When the Court has already decided an issue—after briefing, oral argument, internal deliberations, and the writing of the opinion—it is surely disinclined to recognize error. Even if error is demonstrated by state court responses, the Court is also not likely, soon after a case is decided, to overturn the case or depart significantly from its holding. It is not, for instance, likely at all that a chorus of criticism from state courts will lead the Court to depart from *Dobbs's* holding that there is no federal right to abortion or from the individual rights reading of the Second Amendment in *Heller* and *Bruen*. Second, if only a few state courts offer a correction, the Court has no obvious reason to think it has erred. Instead, the Court might well understand those state courts to represent a minority view (and consider silence from the other state courts as tacit approval of what the Court has done) or to involve practices of particular states that are not representative of the nation as a whole. Third, in order for state court responses to land a punch, they likely must share some significant commonalities. Even if many states air disagreement with the Court, but they all have a different complaint, the multitude of voices is likely to

117. We should distinguish also what might be described as state courts trolling the Supreme Court. *See, e.g.*, LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, WL 656591, at *3 (Ala. Feb. 16, 2024) (in holding that state Wrongful Death Act applies to destruction of frozen embryos, flagging "serious constitutional questions" that would arise if statutory definition of "child" or "person" excluded "extrauterine children" and thus fails to protect "a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment" because the Equal Protection Clause "prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry" and quoting statement in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

prevent the Court hearing any distinct message that might cause it to rethink its approach or conclusions. Absent some mechanism for coordination among them, there is a significant risk of state courts, if they do talk back, doing so in very different ways. Fourth, there might not be a reliable means to ensure the Court even becomes aware of state court responses. It is not likely that the justices keep tabs on what all fifty state supreme courts decide. State courts might air their criticisms in rulings that (for example, because they are based on independent and adequate state law grounds) the Court does not review or in which review is not sought by a party. State supreme courts have to apply and therefore naturally pay close attention to the decisions of the Supreme Court. Transmitting in the other direction has no comparable built-in mechanism.

CONCLUSION: A PROPOSAL

The symposium for which this essay is prepared aims not just to evaluate the Court's past uses of history and tradition but to look ahead and offer steps for improvement. Consistent with that goal, I end with a proposal. The essay has identified a need for a more fulsome account of the relevance of state law to federal constitutional meaning and it has flagged some of the challenges in drawing upon state law to establish and understand history and tradition. If state law *is* to play a central role in discerning the meaning of the federal Constitution, it is important to get state law right. Mass certification can help.

When a federal court (and in particular the Supreme Court or a court of appeals) confronts an unresolved question of state law, the court is able to certify that question to the highest court of the relevant state.[118] Certification has several benefits. Besides "gaining an

118. *See generally* Vikram David Amar & Jason Mazzone, *The Value of Certification of State Law Questions by the U.S. Supreme Court to the North Carolina Supreme Court in the Pending North Carolina Berger Case: Part One in a Series,* JUSTIA: VERDICT (May 9, 2022), https://verdict.justia.com/2022/05/09/the-value-of-certification-of-state-law-questions-by-the-u-s-supreme-court-to-the-north-carolina-supreme-court-in-the-pending-north-carolina-berger-case [https://perma.cc/X9ZP-2BDR].

authoritative response"[119] on a state law issue, certification may "save time, energy, and resources and [it] helps build a cooperative judicial federalism."[120] Certification is not salvation. Federal courts cannot force a state court to answer a certified question.[121] The availability of certification is a function of state (not federal) law. State law determines when and how state courts receive and respond to certified questions as well as the federal courts from which a state court may even field requests.[122] State courts have discretion as to whether to answer the certified question[123] (sometimes they just refuse to do so and without explanation),[124] and they control the form the answer takes.[125] In addition, state constitutions and other rules might impose justiciability and other constrains that preclude the

119. Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 77 (1997). In some instances, the Supreme Court has deemed it error for a lower federal court not to have certified an issue to the relevant state court. *See, e.g.*, McKesson v. Doe, 592 U.S. 1, 6 (2020) (per curiam) ("[W]e conclude that the Fifth Circuit should not have ventured into so uncertain an area of [state] tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.). *See also* Carney v. Adams, 592 U.S. 53, 67 (2020) (Sotomayor, J., concurring) (recommending certification in case raising issue of severability of two state constitutional provisions concerning party affiliations of state judges because "federal courts are not ideally positioned to address such a sensitive issue of state constitutional law.").

120. Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974).

121. *See* Vikram David Amar, *Certification to State Court,* 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed. 2023).

122. *See, e.g.,* 22 NYCRR § 500.27(a) (authorizing the New York Court of Appeals to accept a certified question from the US Supreme Court, a federal circuit court of appeals, or the highest court of another state); OH S. CT. R. 9.01(A) (authorizing the Ohio Supreme Court to accept certified questions from any federal court).

123. *See, e.g.,* Ill. S. CT. R. 20(a) (providing that "[w]hen it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court," the court "may certify such questions of the laws of this State to this court for instructions concerning such questions of State law" and that "which certificate this court, by written opinion, may answer.").

124. *See, e.g.,* Roberts v. Unimin Corp., 2016 Ark. 226, 1 (2016) ("Motion to certify a question of law is denied.").

125. *See, e.g.,* SWN Prod. Co., LLC v. Kellam, 247 S.E.2d 216, 219 (W. Va. 2022) ("[W]e recognize our authority to reformulate questions certified to this Court.").

state court from responding or may shape the response it does give.[126] Every state except North Carolina provides, as a matter of state statutory law, a mechanism for federal court certification in at least some circumstances[127] (although the Missouri Supreme Court has taken the position that it cannot answer certified questions because doing so is akin to issuing an advisory opinion).[128]

Certification ordinarily involves directing a question about the meaning of a single state's laws to the highest court of that state. But there is no reason that a single question cannot be directed to the highest courts of multiple states or of every state. Such mass certification is a means by which a federal court, and particularly the Supreme Court, can obtain reliable information about the laws of states across the land.

The basic idea, then, is that in cases in which state laws are important to discerning the meaning of the federal Constitution, state courts would be asked to provide an authoritative statement about the laws of their own state. For example, had the Court made use of mass certification in *Bruen*, it might have asked all the state courts: "Is there a historical tradition in your state's laws of requiring individuals who wish to carry a firearm in public to show cause for doing so?" Rather than state courts weighing in after the issue

126. *See, e.g.,* Ball v. Wilshire Ins. Co., 184 P.3d 463, 466 (Okla. 2007) (where federal court had certified a question but there existed an outstanding issue of federal jurisdiction, such that "the certification puts us in the position of answering questions which may not be determinative of any issue in the cause," declining to answer the certified question, and invoking discretionary provision of state certification statute as means to "ensure that answers to certified questions do not result in merely advisory opinions.").

127. Amar & Mazzone, *supra* note 118.

128. *See* Grantham v. Missouri Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc) ("Notwithstanding the statutory provision, this Court's general jurisdiction is both established and limited by the Missouri Constitution. . . . Those constitutional provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts.").

involving state law is decided, state courts would have the opportunity to provide their understandings of state law in advance.

As with any mechanism for identifying the nation's history and tradition, mass certification involves some complexities and challenges. Some state courts will choose not to respond. One reason is that a state court might see little reason to draw heat by weighing in on a contested issue (such as regulation of guns or abortion rights). Another might be that the state court lacks the resources to conduct the necessary research. State courts might answer the certified question but provide no supporting information for their answer. Or they might respond that state law is not clear and there exists evidence that cuts in different directions. State courts might reformulate the question before answering it. Mass certification might also be very slow and produce significant delays in the resolution of a case. The overall set of responses returned might provide no clear picture—leaving the certifying court with the task of making sense of difference and generating coherence.

That said, many of the complexities and challenges of mass certification are likely manageable. One sensible strategy would be for mass certification to be deployable only by the Supreme Court. State courts are likely to be more responsive to the Supreme Court than to lower federal courts. Limited to the Supreme Court, mass certification is likely to occur only occasionally and thus not to involve a significant (or regular) burden for the state courts. Given the control the Supreme Court exercises over its own docket, including its ability to limit review to particular issues, the Court is in a good position to frame a precise question to certify to the state courts. The state courts, in turn, will understand that their responses will be relevant to a ruling with national implications. It remains possible, of course, that some state courts will choose not to respond, and likely that some will respond more fully than others. Compared to the alternative—the Supreme Court itself rooting around in states' laws to find evidence of the nation's history and tradition—even incomplete or otherwise limited input from the state courts is a step forward.