COMMENTARY: SOME THOUGHTS AND QUESTIONS ABOUT FEDERALISM, AND GENERAL FUNDAMENTAL LAW, AS REGARDS HISTORY AND TRADITION IN CONSTITUTIONAL ADJUDICATION

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The contributions to this Symposium by Professors Jud Campbell[1] and Jason Mazzone[2] offer valuable, if sometimes contrasting, insights that point out both the possibilities for and problems concerning the modern Supreme Court's consideration of history and tradition in constitutional adjudication. Professor Campbell's focus is on explaining how history and tradition—particularly ongoing, dynamic traditions—can (notwithstanding some surface tension) be harmonized with conventional approaches to originalism. Professor Mazzone analyzes whether the Court's professed fidelity to history and tradition can be reconciled not with originalism but instead with conventional notions of federalism and respect for state courts. Considered individually and taken together, the two essays advance our analysis of what history and tradition (within the meaning of constitutional doctrine) are (or should be), and how they can (or ought) be helpfully deployed. At the same time, both essays raise (explicitly or implicitly) many important questions that require much more consideration if the Court's use of history and tradition is to be coherent and principled. In the space below, I offer

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1. Jud Campbell, *Tradition, Originalism and General Fundamental Law*, 47 HARV. J.L. & PUB. POL'Y 635 (2024).

2. Jason Mazzone, *History, Tradition and Federalism*, 47 HARV. J.L. & PUB. POL'Y, 659 (2024).

just a few reactions/questions that these thoughtful essays triggered as I read and reread them.

Let us turn first to Professor Mazzone's exploration of the ways in which the "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."[3] And let's begin with Professor Mazzone's (implicit) definition of the relevant history and tradition; for Professor Mazzone, the Court's commitment to history and tradition means, in practice, a commitment to respect the "laws and practices of individual *states*."[4] That is, as Professor Mazzone sees things, the Court must examine carefully what the *public policies* in individual states have been to discern some kind of national trend or consensus in these policies, at particularly relevant points in time, so as to help define and enforce national legal norms.

Professor Mazzone is surely correct that this emphasis on the laws and regulatory policies of states accurately describes what the Court seems to be doing these days. For example, in both *Dobbs*[5] and *Bruen*,[6] the Court spent a great deal of its energy discerning and analyzing precisely what various *state laws* forbade and permitted in previous centuries. And this focus on what has been legally forbidden (and what has not) seems to make intuitive sense when one is trying to determine whether particular conduct has historically been considered to be immune from state regulation or punishment. (Of course, that certain conduct has not been legally forbidden in a particular place at a particular time does not necessarily demonstrate belief in that jurisdiction that such conduct could not be subject to legal prohibition, but a widespread absence of regulatory prohibition might nonetheless be somewhat relevant to assessing whether there existed a consensus that certain conduct should be left to individual choice.)

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3. Mazzone, *supra* note 2, at 569.
4. *Id*. at 660 (emphasis in original).
5. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
6. New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

But the Court, even in recent years, has not always been so careful to limit its focus on what is regulated and what is not, on the one hand, as distinguished from what people actually do, on the other. Take, for example, 2019's *Chiafalo v. Washington*,[7] where the question was whether a state that had appointed presidential electors could punish (or replace) those electors if they tried to cast their electoral college ballots for persons other than the candidates they were expected to support. Writing for the Court (in an opinion joined by, among others, Justices Alito, Gorsuch and Kavanaugh), Justice Kagan

> observed that for almost all of the nation's history, presidential electors themselves have overwhelming followed the wishes of the voters (or legislatures, in the early days before popular presidential elections) of the states. She appeared to infer from this that everyone agreed, as a legal matter, that the electors' job is to do nothing other than ratify and implement the wishes of the people who select them. Maybe electors generally have been quite deferential to the wishes of the selectors (although, as Justice Kagan conceded, there have been hundreds of instances—including in the election of 1796—of elector independence, or "faithlessness," a less flattering term.) But all that necessarily shows is that electors (and others) may have felt there is a moral or prudential duty for electors to defer—not that they could be legally compelled (under pain of penalty or replacement) to defer. Justice Kagan pointed out that many states have been requiring electors to take a pledge to follow the wishes of voters since about 1900, but—at a key but understated moment in her opinion—she observed that state laws seeking to impose punishment upon or replacement of electors who show independence go back only 60 years. That means for the first 170 of the Constitution's 230 years there was no tradition of legal compulsion for electors. Justice Kagan characterized the imposition of punishment as simply an extension of the tradition of requiring pledges (itself something not done for the Constitution's first century), but if the question is whether electors enjoy legal independence or not, then the

7. 140 S. Ct. 2316 (2020).

> relevant tradition ought to focus not on moral-suasion devices but on legal sanctions.[8]

Nor is *Chiafalo* the only prominent case in which the Court's focus on history and tradition has involved individual actions rather than public pronouncements. In one of the Court's earlier explicit invocations of history and tradition as a basis for determining constitutional meaning, the Justices (in both the plurality and concurring opinions) in *Moore v. City of East Cleveland*,[9] observed that "[a]ppropriate limits on substantive due process come not from arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values underlying our society."[10] But in applying this concept to the ordinance in question (which forbade extended-family living arrangements), the plurality did not parse state laws so much as survey American social practices:

> [t]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. . . . [And] [o]urs is by no means a tradition limited to respect for the bonds uniting members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.[11]

Justice Brennan (joined by Justice Marshall), concurring, also focused on social practices, rather than legal prohibitions, and pointed out that there is not one social tradition (in the nation or in its states), but rather different traditions among different ethnic

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8. Vikram David Amar, *A Backward- and Forward-Looking Assessment of the Supreme Court's "Faithless Elector" Cases: Part One*, JUSTIA (July 14, 2020), https://verdict.justia.com/2020/07/14/a-backward-and-forward-looking-assessment-of-the-supreme-courts-faithless-elector-cases) [https://perma.cc/94LQ-LER2].

9. 431 U.S. 494 (1977).

10. *Id*. at 503 (plurality opinion) (internal quotations and citations omitted).

11. *Id*. at 504–05 (plurality opinion).

groups and different socio-economic classes: "In today's America," he wrote, "the 'nuclear family' is a pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. . . . The 'extended' [family] form is especially familiar among black families."[12] Lest he be misunderstood to be making an equal protection invidious-motive argument, Brennan added that the record was devoid of evidence of discriminatory purpose. Instead, he simply wanted to make clear that, when considering the relevant history and tradition, we should not ignore the private decisions that have been "central to a large proportion of our population."[13]

Professor Mazzone is certainly correct that discerning the relevant regulatory histories of each of the states is complicated business for which the U.S. Supreme Court may not be particularly institutionally well-equipped. But the competence question may be even greater than Professor Mazzone suggests; if we extend the relevant inquiry beyond law to social practices, not in each state but within "large proportions of our population," the required inquiry may become less judicially tractable still.

Justice Brennan's reference to "large proportions" of population raises another question: even if traditions and histories (legal or social) are to be discovered and tallied on a state-by-state basis, should all states count equally regardless of population size or instead should larger states count for more in determining whether an adequate national consensus exists? A similar question has arisen in deciding how to determine whether a state's criminal punishment regime is "unusual" within the meaning of the Eighth Amendment.[14] In that setting, in a dissenting opinion in *Atkins v. Virginia*,[15] a case involving the imposition of capital punishment upon developmentally disabled persons, Justice Scalia labels the

12. *Id*. at 508–09 (Brennan, J., joined by Marshall, J., concurring).

13. *Id*. at 510.

14. U.S. CONST. amend. VIII ("cruel and unusual punishments [shall not be] inflicted")

15. 536 U.S. 304 (2002).

population-adjustment notion "quite absurd," and then confidently proclaims that what matters is "a consensus of the sovereign States that form the Union, not a nose count of Americans for and against."[16] It is of course possible that the Eighth-Amendment inquiry might be distinguishable from other constitutional inquiries into history and tradition (as under the substantive due process rubric) because the words "cruel" and "unusual" were borrowed verbatim from the English Bill of Rights of 1689 and early revolutionary state constitutions. Neither of which incorporated a one-locality, one-vote, rule.[17] But given the analytic similarity of the inquiries, in the due process and other settings the question of whether each state stands on equal grounds is one that at least needs to be engaged directly.

Another important issue Professor Mazzone engages is, precisely, how to respectfully discern what the relevant state (regulatory) tradition in each state really is. I am not sure I fully accept Professor Mazzone's suggestion that searching for "federal meaning" by focusing on "state law" is necessarily "in tension with federalist principles supporting variation in and independence of state government design."[18] Notwithstanding the Court's use of the histories and traditions of state regulation in giving meaning to federal rights, states generally speaking do remain free to experiment in different modes of regulation and different structures of state governance, and to confer rights upon their citizens that go beyond a federal constitutional floor. For example, when the Court in *Atkins* looked to state laws and practices concerning capital punishment

16. *Id*. at 346 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Justice Stevens' majority opinion did not purport to attach more weight to the laws of larger states, but it did include in its assessment a federal statute explicitly exempting the mentally retarded from the federal death penalty. And that statute emerged—as do all federal statutes, of course—from a lawmaking process involving greater representation of populous states in both the House and the Presidency (via the electoral college).

17. *See generally* Akhil Reed Amar and Vikram David Amar, *Eight Amendment and Mathematics (Part One)*, FINDLAW (June 28, 2002), https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-one.html [https://perma.cc/TF9Z-3EXU] (hereafter Amar & Amar).

18. Mazzone, *supra* note 2, at 661-62.

for developmentally disabled persons to determine whether a particular state is imposing "unusual" punishment within the meaning of the Eighth Amendment, I do not see any insult to state autonomy or independence, except insofar as once the Supreme Court announces a federal right based on a sufficient state-law consensus, complicated questions do arise about whether states are ever free to reverse course of if, instead, a one-way rights ratchet is created.

But it *would* be insulting to federalism for the federal courts to *mis*interpret state legal traditions and then use those misinterpretations to construct federal law which in turn will, by virtue of supremacy principles, bind all states. And, as Professor Mazzone points out, when insufficient attention is paid to the nuanced regulatory approaches of different states—each of which, of course, is responding to particular social and demographic conditions that may or may not, were they different, lead to different regulatory schemes—the Court runs the risk of "exaggerating similarities among the states and discounting their differences."[19] At the very least, a careful Supreme Court should aggregate state policies only with full recognition of the policy rationales in each state, and sensitive to the fact that policies that are facially similar in many states may represent only some lesser-included degree of similarity once relevant differences in the actual social problems confronting each of the states are taken into account. In other words, State A may permit Practice X at a given point in time, but only because Condition Y or Demographic Z are present at that moment; were Y or Z to be absent (as they may be in other parts of the country) then A's regulatory decision (and thus its contribution to the history and tradition inquiry) would be different. Such a "greatest common factor" approach to aggregation of state laws for determining the relevant national history and tradition is surely quite complicated,[20] and whether the Court is up to the task is an open question.

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19. *Id*. at 661.

20. In some instances, the analysis is less complicated than in others. For example, in *Atkins*, surely abolitionist states (those that prohibit all capital punishment) should count if we are tallying states that prohibit capital punishment against developmentally disabled persons. *See* Amar & Amar, *supra* note 17.

This is especially true given that, as the Supreme Court itself acknowledged in *Michigan v. Long*,[21] it is not particularly good about parsing nuanced meanings of state law with which the Justices are "generally unfamiliar."[22] Professor Mazzone offers the creative suggestion of "mass certification"—that is, certification to the state supreme courts, as a group, to ask them to give information to the Court about what the regulatory histories/traditions have been in each of the states on a given question.[23] Certification to state courts may very well be an important step in the right (that is, federalism-respectful) direction, but it may not solve all the big problems. For starters, the success of the certification device in general depends upon the precision and sophistication of the questions that are certified. As noted above, to get a true (legitimate) sense of what a state's actual, relevant legal/historical tradition has been, one needs to take adequate account of all the state-specific factors that explain its regulatory outcome at a particular moment in time. Anticipating and building into the certified questions all of these possible causative components is no mean feat.

Second, the general experience with certification to state courts has shown that sometimes state courts are reluctant to fully cooperate. To the extent that state law at the current moment may not be entirely clear to the casual outside observer (like the U.S. Supreme Court), that opacity may not be accidental, but rather a purposeful decision by the State Supreme Court. If a State high court has been, for political or prudential reasons, reluctant to take on a particular thorny legal question on its own, a request by a federal court to do so may not change its mind too much.

Of course, the precise question posed by the Mazzone-certification device may be different from, and less politically explosive than, the questions posed in the conventional certification setting, because Professor Mazzone wants state courts to weigh in on not necessarily on what state law is today with respect to a given

21. 463 U.S. 1032 (1983).

22. *Id*. at 1039. ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . .")

23. Mazzone, *supra* note 2, at 664.

question but instead what state law *was* (and why) at some prior point in time. The question is, at some level, less about declaring the law as it is about recounting the history. In some instances there may not be much of a difference (if the law hasn't evolved in a state from the point in time the U.S. Supreme Court finds paramount), in which case state supreme courts may be less willing to answer, but to the extent that the state courts can insulate themselves from political backlash by saying they are merely acting as historians of state legal traditions, perhaps they will play ball.

But that raises another big problem. Just as the U.S. Supreme Court Justices are not legal historians, neither are state Supreme Court Justices, even as to the histories in their states. As Professor Mazzone discusses,[24] the Court in *Bruen* acknowledged the institutional limitations of a professionalized federal judiciary, and indicated that the parties would need to fill the expertise void by providing reliable, nuanced accounts of history.[25] This problem plagues the state courts as well, and would seem to do so all the more in the mass-certification setting, where each of the state courts doesn't even have a state litigation (with state-law lawyers) in front of it. In the normal certification case, the parties in the federal proceeding make submissions to the State Supreme Court to which the state-law question(s) have been certified,[26] but can one imagine a party making credible submissions to the state courts of all the 50 states?

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24. Mazzone, *supra* note 2, at 661 n.11.

25. *See* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That 'legal inquiry is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties. . . . For example, '[i]n our adversarial system of adjudication, we follow the principle of party presentation.' . . . Courts are thus entitled to decide a case based on the historical record compiled by the parties.") (internal citations omitted).

26. *See, e.g.*, Perry v. Brown, 52 Cal. 4th 1116 (2011) (California Supreme Court accepting request to answer certified questions relating to legal standing of initiative proponents to defend enacted measure, and establishing an expedited briefing schedule for the parties to weigh in)

The *Bruen* Court's reliance on party submissions is problematic for another reason as well. Just as the U.S. Supreme Court has become a group of very able generalists, so too the Supreme Court bar has become more and more chock full of lawyers who are appellate specialists but not deeply knowledgeable in any particular fields of federal law or deeply grounded in state traditions and histories.[27] This vacuum in expertise, both among the bench and the bar, might usefully be filled by principled academic amicus curiae, but the academy needs to do some soul-searching of its own if it is to provide this salutary function.[28]

Putting aside how one discovers the authentic state legal histories/traditions, there is the (large) question of what use this information can legitimately be put to. In this regard I might read the Court's recent pronouncements about the importance of history and tradition a bit more narrowly than does Professor Mazzone. He suggests that the Court's modern approach might be understood to embrace the notion that "the federal Constitution protects only rights *already* protected in the states and that it therefore serves, at most, as a clean-up charter to deal with occasional outliers."[29] I think that *some* rights the federal constitution undeniably protects (and that the modern Court fully embraces) do not involve matters in which only a few outlier states are dissenting. For example, at the time of the Nineteenth Amendment,[30] fewer than 20 (of the 48) states permitted female suffrage on the broad terms called for in the Amendment.[31] Similarly, in the early 1970s, after Congress lowered the voting age for Congressional elections to 18,

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27. *See generally* Vikram David Amar, *The Edward L. Barrett Jr. Lecture: The Constitution as Client*, U.C. DAVIS. L. REV. 643 (2024). Given that the Supreme Court decides so few cases today (relative to a generation or two ago), much of the judicial processing of history that will need to occur will likely have to be handled by lower courts, who may, given their challenging caseloads, limited resources, and reduced amici input, be even less able to discharge the function adequately.

28. *Id*.

29. Mazzone, *supra* note 2, at 662.

30. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.")

31. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: A CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 186, 206, 214 (2000).

about 17 states refused to lower the voting age for state elections, notwithstanding the logistical difficulties states would encounter in maintaining separate voter-eligibility rolls for state and congressional elections.[32] And this was the backdrop against which the 26th Amendment,[33] forbidding age discrimination in all voting for persons 18 or over, was adopted in 1971.

So history and tradition isn't the only path by which a right can be recognized. But what makes these examples different from *Dobbs*, of course, is the explicit enactment of constitutional text that speaks to the legal question at issue. When the Court has actual words of the Constitution to interpret, the historical understanding of *those terms* is of course key to an originalist (and this is how I believe the Court invoked history in *Bruen*, to discern the understanding of what the "right to keep and bear arms" necessarily involves, rather than whether some *non-textual* right to keep and bear arms exists), but the role that history and tradition play in the identification of a constitutional right is different where specific text is involved than in, say, the substantive due process or Ninth Amendment (or perhaps the privileges and immunities) contexts. Where subject-matter-specific enacted constitutional text is involved, states that may not be "outliers" (after all, 12 out of 50 states can reject a constitutional amendment that becomes part of the Constitution, and it is hard to say 24% of states—or half of a majority—are truly outlier in the way, say, that Connecticut seemed to be in *Griswold v. Connecticut*) may nevertheless be constrained from doing what they want. Thus, as important as broad history-and-tradition analysis may be in constitutional adjudication, no one could credibly argue it is the only means by which rights are discerned.

This last observation, about the appropriate but limited role that history and tradition (even when properly and reliably discerned) can legitimately play in constitution interpretation, brings me to some of the thought-provoking suggestions in Professor

32. THOMAS H. NEALE, *Lowering the Voting Age Was Not a New Idea*, *in* AMENDMENT XXVI: LOWERING THE VOTING AGE 35, 35 (Sylvia Engdahl ed., 2010).

33. U.S. CONST. amend. XXVI (prohibiting denial or abridgement of right to vote on account of age).

Campbell's essay. Professor Campbell (unlike Professor Mazzone) *decouples* history from tradition insofar as he considers the latter to be an ongoing, dynamic concept not fixed into meaning at any particular time (the way contemporaneous public understandings of enacted text might be fixed at the time of enactment). The (or at least a) fundamental question he engages is how, if tradition is ongoing and thus can post-date any particular enactment, can tradition be consistent with originalist precepts?[34] His biggest answer—if the enactors of particular text understood and expected that "general fundamental law" is not fixed in time and must be respected as it continues to evolve in its substantive contours[35]—is, to me, quite convincing. If the normative appeal of originalism is grounded on the understandings of the people who publicly adopted text and made it law, then open-ended provisions whose content was understood and expected to change over time poses no fundamental tension with originalism's starting points. Take, again, the Eighth Amendment—even the most committed originalists would, I think, concede that the use of the word "unusual" in the text of the document meant to condemn not only practices that were unusual in 1791 but also practices that become unusual as legal traditions evolve. So to the extent that Professor Campell invokes "general fundamental law" to protect liberties not specifically mentioned elsewhere in the text of the document, and liberties that can expand over time, his approach fits comfortably, I think, with suggestions of earlier scholars, such as my brother Akhil Reed Amar,[36] who argue that privileges and immunities of national citizenship (or rights protected under the Ninth Amendment) can be understood to include emerging consensuses.[37]

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34. Campbell, *supra* note 1, at 635.

35. *Id*. at 638.

36. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

37. To the extent Professor Campbell argues that, even in the absence of any text (such as the Ninth Amendment) reflecting the founders' expectations as to general fundamental law, such general fundamental law would still need to be respected, I think the matter is more complicated, and would need a much longer back-and-forth with him to engage that question.

But Professor Campbell's provocative exploration of general fundamental law here (and elsewhere) does raise important questions about exactly where the general-fundamental-law concept could lead.

One is whether such evolving traditions about rights can cut both ways, or whether they operate as a one-way ratchet. For example, if states began to reconsider whether contraception ought to be protected, such that a consensus emerged (but was not adopted into constitutional text) would the result in *Griswold*[38] be in jeopardy? (Similar questions sometimes arise in the Eighth Amendment setting—if a once-unusual punishment becomes more fashionable, can an Eighth Amendment right against its use subside?)[39] To be sure, the Court's recognition of the right in *Griswold* may discourage states from experimenting in this arena (insofar as state enactments prohibiting contraception would not be enforceable as long as *Griswold* remains good law), but notice that plenty of states adopted laws that ran afoul of *Roe*[40] and *Casey*[41] long before those precedents seemed precarious at the Court.

A related question concerns incorporation of the Bill of Rights (or various of its provisions). If federal constitutional rights understood to exist in 1868 no longer satisfy the definition of general fundamental law because of evolving traditions, do they cease to be worthy of protection? Or instead does the enactment of the Fourteenth Amendment, and the expectations of the enactors that certain practices did, at that time, by virtue of their inclusion in the Bill of Rights, constitute privileges and immunities of national citizenship, insulate these liberties from backslide.

Finally (and this question attempts to bring together Professor Campbell's essay with that of Professor Mazzone), what, if anything, does general fundamental law say about the notion that state

38. Griswold v. Connecticut, 381 U.S. 479 (1965).

39. *See* Akhil Reed Amar and Vikram David Amar, *Eighth Amendment Mathematics (Part Two),* FINDLAW (July 12, 2002), https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-two.html [https://perma.cc/R2N4-WVMH].

40. Roe v. Wade, 410 U.S. 113 (1973).

41. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

courts are the master interpreters of state law, a principle that Professor Mazzone suggests is bedrock to American federalism? If a tradition evolves to ripen into becoming part of the general fundamental law, can state courts nonetheless reject that tradition in the context of interpreting their own state's enactments? In this regard, I was struck by a passage in the brief of Donald Trump in the *Trump v. Anderson*[42] litigation, in which Trump's lawyers argued:

> There is nothing wrong with a ruling from this [the U.S. Supreme] Court that rejects the Colorado Supreme Court's interpretation of state election law on state-law grounds. There is no federal statute or constitutional provision that bans this Court from reviewing state-law questions . . . or that prohibits this Court from rejecting a state supreme court's construction of state law. This Court has been understandably deferential to state-court interpretations of state law, but that deference has never been absolute, especially when a state-law issue is intertwined with a federal constitutional question. . . . The law of Colorado is what its statutes say, and opinions from the judiciary that interpret those statutes need not be followed if they flout the enacted language and disrupt federal interests of enormous importance.[43]

Is state-court interpretation of state positive enactments beyond the reach of general fundamental law, or does the concept of general fundamental law call for revisiting seminal cases such as *Erie*[44] and *Murdock v. Memphis*?[45]

42. 144 S. Ct. 662 (2024).
43. Brief for Pet'r at 49-50, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719).
44. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
45. 87 U.S. 590 (1874).