Hastings Constitutional Law Quarterly

Volume 49 | Number 2 Article 4

6-2022

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BY SCOTT L. KAFKER*

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The new 6-3 super majority on the Supreme Court will certainly reshape federal constitutional law in its own image. The question addressed in this article is how that reshaping of federal constitutional law will impact state constitutional law. It is the thesis of this article that federal constitutional upheaval can be expected to result in a significant state constitutional reaction.[1] Retrenchment (that is the reversal or reduction in federal constitutional protection) and uncertainty will promote more independent

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1. *See* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1314 (2019); Robert F. Williams, *Robert F. Williams State Constitutional Law Lecture: The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 975–76 (2020).

state constitutional analysis by many state courts in order to provide a double protection of constitutional rights.

This article argues that state reaction to the new Court's reshaping of federal constitutional law will be reminiscent of, but should be different from, the first surge in state constitutional interpretation stimulated by Justice Brennan at the onset of the Burger Court, which resulted in a result-oriented "grab-bag" of state constitutional decision-making.[2] There will be many of the same pressures to separate state from federal constitutional law; however, state courts are now equipped with a much better conceptual foundation to support such independent state constitutional analysis. State courts can be expected to develop an independent approach to state constitutional analysis without requiring the identification of distinctive state traditions or subtle differences in textual language, which commentators who interpreted the first wave of state constitutional interpretation have recognized as problematic and unnecessary. As these commentators have also explained, there is nothing in the design of the federal Constitution, or its original understanding, requiring states to adopt the Supreme Court's interpretation of analogous provisions in the federal Constitution as the default or lockstep setting for interpreting parallel provisions in state constitutions. State courts are fully empowered and expected to interpret independently analogous provisions in their state constitutions and thereby provide greater protections of individual rights, if they so conclude, and likely to do so if presented with revisions or retrenchments with which they do not agree.

This time around, the state courts are also more likely to follow the Supreme Court's admonition in *Michigan v. Long* to make clear when their interpretation is independent and when it is not.[3] They have every incentive to do so if they want to insulate their decisions from review by a Court with a different constitutional vision, or even one that they suspect will not share their constitutional vision.

This article strongly supports such independent state constitutional interpretation, as it is built into the design of our federal constitutional structure. Federalism is designed for dual sovereignty, including a double protection of individual rights and a division of authority between the states and the federal government to further protect our liberty. This constitutional design allows a country that has always contained great divisions, and which

2. I am referring here to Justice Brennan's 1977 article urging state supreme courts to interpret their state constitutions to provide more expansive protections of individual rights. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). *See also* Ronald K. L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981) (describing state constitutional reaction as a result-oriented" grab-bag"); *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

3. *Michigan v. Long*, 463 U.S. 1032 (1983).

is now highly polarized, to continue to manage its fundamental differences, including its different conceptions of constitutional rights.

This article is meant to be not only predictive and descriptive, but also prescriptive. It attempts to explain how state supreme courts and other state constitutional actors are likely to respond to the U.S. Supreme Court's new direction, how they can and should do so based on a more solid conceptual foundation, and in what areas of state constitutional law they can do so without violating the federal Constitution as interpreted by the new Supreme Court majority. The article also seeks to explain why this independent approach is not only consistent with the design of federalism, but also ensures a government that is based on well-considered and continually tested and retested American constitutional principles and enriches the country's conception of these constitutional principles through comparative analysis. Indeed, if state courts do not perform this non-deferential, independent review of state constitutional law, they are not fulfilling their duties as shared guardians of American constitutional rights.

I. What We Can Expect From a U.S. Supreme Court With a New 6-3 Majority

The U.S. Supreme Court selection process in the modern era is highly politicized and carefully undertaken with the goal of selecting justices who share the constitutional vision or values of the presidents that appointed them. President Trump's three recent selections, influenced heavily by the Federalist Society, reflect the latest extension and accentuation of this practice.[4] They join a court with a well-established conservative jurisprudential wing occupied by Associate Justices Alito and Thomas who have already served for sixteen and thirty years, respectively. Chief Justice Roberts, albeit more unpredictable, has historically staked out conservative jurisprudential positions as well, although with a more incremental and institutional perspective.[5] With this new 6-3 majority firmly in control, federal constitutional change can be expected, and its future direction

4. Andrew Restuccia & Michael C. Bender, *Trump's Supreme Court Nomination Strategy Steered by White House Counsel, Others*, WALL ST. J. (Sept. 19, 2020), https://www.wsj.com/articles/white-house-counsel-others-steer-trumps-supreme-court-nomination-strategy-11600553569 ("[f]ew names end up on the [Supreme Court] shortlist without feedback from Leonard Leo, the co-chairman of the Federalist Society, a powerful organization of conservative lawyers. Mr. Leo, who advises the president in his personal capacity, has played a central role in the push to decide the president's first two nominees. . ."); Mark Sherman, Kevin Freking, & Matthew Daly, *Trump's Court Appointments Will Leave Decades-Long Imprint*, AP NEWS (Dec. 26, 2020), https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd (explaining role of conservative judicial organizations in selection of judicial nominees under President Trump).

5. *E.g.*, Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html (discussing incremental radical divide so far).

somewhat predicted, at least in certain areas. In particular, change can be expected where the new majority has already begun to reshape the law, or where previous decisions of the court included 5-4 splits with vigorous dissents from the members of the new 6-3 majority, and a change in the Court's composition (for example, Justice Ginsburg's replacement by Justice Barrett) signals change is afoot. Although predicting what the Supreme Court will do is difficult and inevitably speculative, this article attempts to identify the most obvious areas of the law likely to be redirected or revisited and possibly subjected to radical change. Interestingly, there will be different possible state constitutional reactions depending on the area of the law, the radical or incremental nature of the change in federal constitutional law, and whether the state supreme courts are concerned that the U.S. Supreme Court went too far (or not far enough) in contracting or expanding federal constitutional rights.

Although a single full year of cases is a particularly short time to evaluate the emerging character of the new 6-3 majority, a review of a number of the 6-3 and other split decisions is informative. According to Professor Kimberly Wehle, the emerging character can be discerned in four 6-3 splits in criminal law in the new majority's first term, all of which were decided against criminal defendants, and three of which generated passionate dissents contending that the Court was radically overturning precedent.[6] The four cases were *Jones v. Mississippi*, *Edwards v. Vannoy*, *Shinn v. Kayer*, and *Dunn v. Reeves*.[7] In *Jones v. Mississippi*, a majority of the Supreme Court concluded that a sentence of life without parole for a juvenile was constitutionally permissible as long as the sentencing procedure was a discretionary one in which the sentencer could consider the juvenile's age and other characteristics.[8] The petitioner in *Jones* argued that a separate finding of permanent incorrigibility was required to satisfy the Court's previous decision in *Miller*.[9] In *Jones*, the majority rejected the incorrigibility argument.[10] In Justice Sotomayor's dissent, joined by Justice Kagan and Justice Breyer, she contended that the majority in *Jones* was "gut[ting]" *Miller*.[11]

In *Edwards v. Vannoy*, the new majority ruled that its decision in *Ramos v. Louisiana*, in which the Court held that non-unanimous jury verdicts in

6. Kimberly Wehle, *The One Area Where the Supreme Court's Six Conservative Judges Could Agree*, POLITICO (Aug. 3, 2021), https://www.politico.com/news/magazine/2021/08/03/the-one-way-the-supreme-courts-new-conservative-majority-lived-up-to-its-billing-502164.

7. Jones v. Mississippi, 141 S. Ct. 1307 (2021); Edwards v. Vannoy, 141 S. Ct. 1547 (2021); Shinn v. Kayer, 141 S. Ct. 517 (2020); Dunn v. Reeves, 141 S. Ct. 2405 (2021).

8. *Jones*, 141 S. Ct. at 1322.

9. *Id.* at 1313.

10. *Id.* at 1319.

11. *Id.* at 1328 (Sotomayor, J., dissenting) (citing Miller v. Alabama, 567 U.S. 460, (2012) and Montgomery v. Louisiana, 577 U.S. 190 (2016)).

criminal cases were unconstitutional, did not apply retroactively.[12] The issue was whether the new rule established in *Ramos* constituted a watershed change in the law that fits within the exception to the rule that new rules are not to be applied retroactively. The Court concluded that the exception was very narrow and did not apply. In another scathing dissent, Justice Kagan described the majority decision as flouting precedent and ignoring the great significance of *Ramos*. As she explained, relying "on centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital,' 'essential,' 'indispensable,' and 'fundamental'" to the American legal system, and "vindicated core principles of racial justice."[13]

The Court rejected ineffective assistance of counsel claims in *Dunn* and *Shinn*, two death penalty appeals.[14] In *Dunn*, the Court rejected the argument that counsel was ineffective for failing to hire an expert to develop sentencing-phase mitigation evidence of intellectual disability.[15] *Shinn* involved a claim of failure to develop and submit evidence at sentencing of addiction and mental health problems.[16] In her dissent in *Dunn*, Justice Sotomayor, joined by Justice Kagan, contended that the Court's decision "continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution."[17] As the dissent further explained, "This Court has shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated."[18]

As will be explained in the following sections, revision and retrenchment in federal constitutional protection of criminal defendants' rights has been the focal point of state constitutional reaction in the past. Unlike other areas of the law where state constitutional reactions may be more limited by other federal constitutional rights or federal statutes, in criminal law and procedure, state supreme courts have significant, if not unlimited freedom of action to provide greater protection under state constitutions. If the new U.S. Supreme Court majority undertakes a dramatic revision and retrenchment of federal constitutional protections in criminal procedure, state courts can be expected to react. This is particularly likely in cases where the U.S. Supreme Court has expressly relied on federalism and the dual constitutional structure to justify its decision.

Jones was just such a case. Indeed, writing for the majority, Justice Kavanaugh explained that:

12. *Edwards*, 141 S. Ct. at 1551 (citing Ramos v. Louisiana, 140 S.Ct. 1390 (2020)).
13. *Edwards*, 141 S. Ct. at 1573 (Kagan, J., dissenting).
14. *Dunn*, 141 S. Ct. at 2412; *Shinn*, 141 S. Ct. at 525.
15. *Dunn*, 141 S. Ct. at 2412.
16. *Shinn*, 141 S. Ct. at 525.
17. *Dunn*, 141 S. Ct. at 2420 (Sotomayor, J., dissenting).
18. *Id.* at 2420–21.

[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States.[19]

This is not to say that state supreme courts who disagree with these decisions will need such an invitation to respond to revision or retrenchment in federal constitutional protection of criminal defendants' rights by the new majority. A good example is the court I sit on, the Massachusetts Supreme Judicial Court. In a line of cases beginning with *Diatchenko v. Dist. Att'y for Suffolk Dist.*, the Massachusetts Supreme Judicial Court has already provided greater protection under Article 26 of its state's constitution for juvenile offenders.[20] The Supreme Judicial Court has likewise adopted a more defendant-protective retroactivity analysis.[21] In the Burger era, during the first state constitutional reaction, the Court also declared a Massachusetts death penalty statute unconstitutional under its state constitution once it became clear that the U.S. Supreme Court was not prepared to declare the death penalty unconstitutional under the Eighth Amendment.[22] Other state courts have reached the same conclusion.[23]

A number of the U.S. Supreme Court's last term's civil cases also indicate potential shifts in federal constitutional law and potential state constitutional reactions. An interesting example is the Court's 6-3 decision in *Cedar Point Nursery*, where it held that a California regulation granting labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization constituted a per se physical taking under the Fifth and Fourteenth Amendments.[24] In Justice Breyer's dissent, joined by Justices Sotomayor and Kagan, he suggested the

19. *Jones*, 141 S. Ct. at 1323.

20. Diatchenko, 466 Mass. 655 (2013); *see also* In re Monschke, 482 P.3d 276 (Wash. 2021) (mandatory life without parole for individuals under 21 violates Washington state constitution).

21. Commonwealth v. Sylvain, 466 Mass. 422 (2013).

22. Dist. Att'y for Suffolk Dist. v. Watson, 381 Mass. 648, 665 (1980). This decision prompted a legislative constitutional amendment declaring that the death penalty itself was not unconstitutional under the Massachusetts constitution, although the legislature did not pass another death penalty statute and has not done so since then. *See* Commonwealth v. Colon-Cruz, 393 Mass. 150 (1984); Steve LeBlanc, *In Massachusetts, a Long and Tortured Death Penalty History*, WASH. TIMES (Apr. 11, 2015), https://www.washingtontimes.com/news/2015/apr/11/in-massachusetts-a-long-and-tortured-death-penalty/.

23. For a recent example, *see* State v. Santiago, 318 Conn. 1, 86 (Conn. 2015).

24. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

Court had converted what had historically been considered a regulatory taking into a physical taking, thereby expanding property rights. The Court's decision, he wrote, was inconsistent with the Court's prior holding in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).[25] In that case, the Court upheld, against a Fifth and Fourteenth Amendment challenges, a California Supreme Court decision that the California Constitution protected the right to engage in leafleting at a privately owned shopping center. *PruneYard* has been considered among the most important state constitutional law decisions, as it eliminated the state action requirement in certain contexts.[26]

In the past, when the Supreme Court appeared to cut back on property rights, states have turned to state constitutions or legislation to provide greater protections. A good example was the highly controversial decision in *Kelo v. City of New London*, in which the Court allowed the Connecticut city to exercise eminent domain for the public purpose of furthering an economic development plan where the property would not be open to the public.[27] In response, "at least forty-four states have either amended their constitutions or enacted legislation to address the 'public use' concerns expressed by Justice O'Connor's dissent[.]"[28] State courts also interpreted their own constitutions to provide greater protections than the Supreme Court.[29]

Where, as in *Cedar Point Nursery*, the U.S. Supreme Court appears to be enhancing rather than contracting federal constitutional protection of property rights, the state constitutional reaction will likely be different and more difficult to predict. Potentially conflicting state constitutional protections, such as those provided for worker's organizing rights or for signature-gathering for elected office or initiative and referendum petitions, will be rendered more vulnerable.[30] Enhanced federal constitutional protections for property rights might also stimulate some state courts to further increase state constitutional protections of such rights.

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25. *Cedar Point Nursery*, 141 S. Ct. at 2084 (Breyer, J., dissenting) (citing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)).

26. *E.g.*, Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21 (1997). For examples of cases applying and extending PruneYard, *see* New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp., 650 A.2d 757 (N.J. 1984), and Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991).

27. Kelo v. City of New London, 545 U.S. 469 (2005).

28. Shelley Ross Saxer, *The Aftermath of Takings*, 70 AM. U. L. REV. 589, 594 (2020).

29. *E.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1136, 1141 (Ohio 2006) (disagreeing with U.S. Supreme Court and holding that "an economic or financial benefit alone is insufficient to satisfy the public-use requirement of Section 19, Article I [of the Ohio Constitution]").

30. PruneYard Shopping Ctr., 447 U.S. at 76–77; Glovsky v. Roche Bros Supermarkets, 469 Mass. 752 (2014) (upholding state constitutional right of candidate to gather signatures at supermarket); Batchelder v. Allied Stores Int'l, 388 Mass. 83, 84 (1983) (enforcing same right at shopping mall). *E.g.*, N.Y. CONST. Art. I, section 17 (defining constitutional right to hours and wages in public work and right to organize and bargain collectively).

Last term's decisions also reveal another area of law of great interest to the new majority, and one in which it can be reasonably expected to make significant changes: the relationship of church and state. In its COVID-19 rulings, such as *South Bay United Pentecostal Church v. Newsom*, and even in the unanimous decision in *Fulton v. Philadelphia*, the new majority has made clear that that the existing standards regarding neutrality under the Free Exercise and Anti-Establishment Clause are subject to change, at least in their application.[31]

In both the COVID cases and *Fulton*, the Court found regulations unconstitutional that in the past might have been considered neutral, as defined by the Court's seminal 1990 decision *Employment Division v. Smith*.[32] In *Smith*, the Court had stated: "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[33] Rather, the Court had emphasized that its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[34] Nonetheless, as Justice Kagan wrote in dissent in *South Bay United Pentecostal Church v. Newsom*,[35]

The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic.

Although *Fulton* was a 9-0 vote as to the judgment, it generated four opinions, with at least three of the justices in the new majority calling for the outright reversal of *Smith*.[36] Writing for the Court, however, Justice Roberts took a different approach, relying on what has been described as an expansive interpretation of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, an unusual case that struck down a city ordinance that targeted the Santeria

31. South Bay United Pentecostal Church v. Newsom, 141 S. Ct 716 (2021); Fulton v. Philadelphia, 141 S. Ct. 1868 (2021); Linda Greenhouse, *What the Supreme Court Did for Religion*, N.Y. TIMES, (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html.

32. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 882 (1990).

33. *Id.*

34. *Id.* at 879. *See* South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

35. South Bay United Pentecostal Church, 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting).

36. Although joining Chief Justice Roberts's majority decision in *Fulton*, Justice Barrett clearly kept her options open about reversing *Smith*.

religion's animal sacrifice practices.[37] According to long-time Supreme Court commentator Linda Greenhouse, Justice Roberts' transformation "of the *Lukumi* [interpretation of exemptions] into what amounts to a 'most-favored nation' clause for religion —requiring that religious activity must be treated at least as well as any secular activity deemed comparable — makes *Smith*'s barrier against religious exemptions so easily evaded as to be irrelevant."[38]

Likewise, there is reason to believe that the Court will be less receptive to anti-establishment clause arguments such as the one accepted in *Locke v. Davey* and rejected in *Trinity Lutheran*.[39] Before Justice Kavanaugh and Justice Barrett's appointments to the Court, Justice Thomas, joined by Justice Gorsuch, wrote:

[T]he Court in *Locke* permitted a State to disfavor religion by imposing what it deemed a relatively minor burden on religious exercise to advance the State's antiestablishment interest in not funding the religious training of clergy. The Court justified this law based on its view that there is play in the joints between the Free Exercise Clause and the Establishment Clause — that is, that there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.[40]

This "disfavor," he concluded, was improper: "This Court's endorsement in *Locke* of even a mild kind of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion."[41]

The Court's 5-4 decision in *Espinoza v. Montana Dep't. Of Revenue*, decided before the replacement of Justice Ginsburg with Justice Barrett, represented a further narrowing of *Locke*.[42] In *Espinoza*, the Court held that the Free Exercise Clause precluded the Montana Supreme Court from interpreting the state constitution's no-aid provision to bar religious schools from the state's general private school scholarship program.[43] In so doing, the Court interpreted *Locke* only to "zero in . . . on essentially religious instruction" and to target the historic prohibition of funding the clergy.[44] This term, the Court has also taken *Carson v. Makin*, a case raising the issue whether a state violates the Free Exercise or Equal Protection clauses by prohibiting students participating in an otherwise generally available

37. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
38. Greenhouse, *supra* note 31.
39. Locke v. Davey, 540 U.S. 712, 718 (2004); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017).
40. Trinity Lutheran Church, 137 S. Ct. at 2025 (Thomas, J., concurring).
41. *Id.*
42. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).
43. *Id.* at 2262.
44. *Espinoza*, 140 S. Ct. at 2249.

student-aid program from using public tuition dollars to pay for schools that provide religious instruction.[45]

The Court thus appears poised to interpret the Free Exercise Clause more broadly and to interpret the anti-establishment prohibition even more narrowly, thereby shielding religious entities from government regulation that was previously allowed while also allowing them to receive state benefits they could previously have been denied. However, the potential reaction of state supreme courts to this major development in federal constitutional law is very different from the reaction under criminal procedure and criminal law. Here, unlike in criminal law and procedure, state constitutional reaction is quite limited, as demonstrated by *Espinoza*. Instead, the double enhancement of religious rights under the federal Constitution has an important narrowing effect on state constitutional law.

As I explained in a concurrence in *Caplan v. Acton*, a case involving whether state funds could be used to pay for the repair of stained glass windows in a church: "[o]ur analysis of the anti-aid amendment of the Massachusetts Constitution is tightly constrained by the United States Supreme Court's interpretation of the religion clauses of the First Amendment to the United States Constitution."[46] Even before the appointment of the new justices, the play in the joints and the limited state constitutional action or reaction that the Supreme Court allowed was very narrow. If the new majority on the Court does, as I expect, change the meaning or application of neutrality, and thereby increase the scope of the Free Exercise Clause protection and shrink its conception of what is permissibly prohibited under anti-establishment principles, state constitutional reaction under anti-aid amendments will be further confined.

Although involving federal statutory rather than federal constitutional rights, another 6-3 decision from last term, *Brnovich, Attorney General of Arizona, et al v. Democratic National Committee*, reveals a different area of the law where we can expect substantial state constitutional action and reaction.[47] In this case, the Supreme Court rejected challenges under §2 of the Voting Rights Act of 1965 (VRA) to aspects of the state's regulations governing precinct-based election-day voting and early mail-in voting.[48] In so doing, the Court narrowed the permissible basis of statutory challenges under the federal Voting Rights Act, over the vigorous objection of the three

45. Carson v. Makin, No. 20-1088 (U.S. argued on Dec. 8, 2021). *See* Petition for Writ of Certiorari, Carson v. Makin, No. 20-1088 (U.S. argued on Dec. 8, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1088/168134/20210204140045165_Petition%20for%20Writ%20of%20Certiorari.pdf.

46. Caplan v. Town of Acton, 479 Mass. 69, 96–97 (2018) (Kafker, J., concurring) (citing Locke v. Davey, 540 U.S. 712, 718 (2004), and Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019, 198 L.Ed.2d 551 (2017)).

47. Brnovich, Attorney General of Arizona v. Democratic National Committee, 141 S. Ct. 2321 (2021).

48. *Brnovich*, 141 S. Ct. at 2321.

dissenters. According to election law expert Professor Richard Hasen, the decision "severely weakened Section 2 of the Voting Rights Act as a tool to fight against laws that make it harder to register and vote."[49] Moreover, as Professor Hasen further explained:

When you couple this opinion with the 2008 ruling in the *Crawford* case, upholding Indiana's voter ID law against a Fourteenth Amendment equal protection challenge, [and] the 2013 ruling in *Shelby County* killing off the preclearance provision of the Voting Rights Act for states with a history of discrimination, . . . the conservative Supreme Court has taken away all the major available tools for going after voting restrictions.[50]

A tool that still exists, however, is a state constitutional law challenge to voting rights restrictions. Shrinking the projected scope of the federal Voting Rights Act does not limit state constitutional challenges to such restrictions. The same is true for the narrowing of federal constitutional protections. States can provide more protections under their own state constitutions to the right to vote.[51] Given the number of state statutes passed after the 2020 election restricting voting rights, this is likely to be a hotly contested area of state constitutional law.[52]

49. Rick Hasen, *Breaking and Analysis: Supreme Court on 6-3 Vote Rejects Voting Rights Act Section 2 Case in Brnovich Case—A Significant Weakening of Section 2*, ELECTION L. BLOG (July 1, 2021) https://electionlawblog.org/?p=123065.

50. *Id.*; *see* Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); *see also* Derek Miller, *Brnovich, Election-Law Tradeoffs, and the Limited Role of the Courts*, SCOTUSBLOG (July 6, 2021), https://www.scotusblog.com/2021/07/brnovich-election-law-tradeoffs-and-the-limited-role-of-the-courts/ (predicting *Brnovich* will drive voting rights litigants to "some venue other than federal court").

51. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91–92 (2019) (rejecting lock-stepping state constitutional protections for voting and stating that "[a] renewed focus on the power of state constitutions provides the answer for how best to protect the fundamental right to vote"); *see also* Weinschenk v. State, 203 S.W.3d 201, 211–12 (Mo. 2006) (rejecting voter ID law by providing greater protection under the Missouri Constitution); Chelsea Collaborative v. Sec'y of the Commonwealth, 480 Mass. 27, 47 (2018) (Gants, J., concurring) ("However, because our Declaration of Rights is more protective of the right to vote than the Federal Constitution, I would adopt a version of that approach that is more protective than the Federal jurisprudence, applying strict scrutiny where a law imposes a substantial burden on the right to vote, and reviewing laws that impose lesser burdens under a sliding scale").

52. Relatedly, state supreme courts and state constitutions have played pivotal roles in disputes over redistricting. *See* Nick Corasaniti & Reed J. Epstein, *As Both Parties Gerrymander Furiously State Courts Block the Way*, N.Y. TIMES (Apr. 2, 2022), https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html. For example, the Ohio Supreme Court rejected electoral maps proposed by the Ohio Redistricting Commission three times in the two months leading up to the state's primary elections, finding that the maps violate the Ohio Constitution's prohibition on gerrymandering. *See* Ohio Const., Article XI, Section 6(A); Michael Wines, *In Ohio, a Standoff Over Political Maps Threatens the Next Elections*, N.Y. TIMES (Mar. 17, 2022), https://www.nytimes.com/2022/03/17/us/politics/ohio-court-congress-maps.html. The North Carolina Supreme Court, invoking its state's constitution, also recently rejected electoral maps

We may also discern the new direction of the 6-3 majority from cert petitions allowed in areas of the law with existing 5-4 splits. One such area in which dramatic change is possible and expected is abortion rights. The Supreme Court has granted review and heard argument in a case—*Dobbs v. Jackson Women's Health Organization*—involving a ban on abortion at 15 weeks.[53] The case provides a vehicle through which the framework, established by *Roe v. Wade* and *Planned Parenthood v. Casey*, which has often depended on 5-4 votes, could be reconsidered.[54] As Linda Greenhouse recently wrote about that case: "Permitting a state to ban abortion at 15 weeks—or at six, as in Texas, or at just about any old time, as in a new Arkansas law that purports to ban nearly all abortions and that was temporarily blocked last week by a federal district judge—this is inconsistent with nearly 50 years of Supreme Court jurisprudence."[55] Nonetheless, as the commentators have all recognized, the replacement of Justice Ginsburg with Justice Barrett "has flipped the Court on abortion, at least to some extent."[56] The leaked draft decision of the court in *Dobbs* by Justice Samuel Alito certainly provides strong support for, if not confirmation of, the prediction that *Roe* will be overturned.[57]

How the Court ultimately decides such a case will define the scope of potential state constitutional reaction. The Court may reverse *Roe* and its progeny but still leave the states free to provide such protections, including under their state constitutions. The leaked draft decision by Justice Alito expressly states that the decision regarding abortion should be left to elected

drawn by its state legislature. *See North Carolina's Supreme Court strikes down redistricting maps that gave GOP an edge*, NPR (Feb. 5, 2022), https://www.npr.org/2022/02/05/1078481564/north-carolina-redistricting. Voting *Laws Round-Up: July 2021*, BRENNAN CENTER FOR JUSTICE (July 22, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021 (describing 30 new more restrictive voting laws passed by 18 states).

53. Dobbs v. Jackson Women's Health Org., (No. 19-1392) (U.S. argued on Dec. 1, 2021).

54. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

55. Linda Greenhouse, *Mississippi Explains All on Abortion*, N.Y. TIMES (July 29, 2021) https:/www.nytimes.com/2021/07/29/opinion/Mississippi-abortion-supreme-court.html.

56. *Id.*; *see also* Amy Howe, Court to Weigh in on Mississippi Abortion Ban Intend to Challenge Roe v. Wade, SCOTUSBLOG (May 17, 2021), https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/; Amy Davidson Sorkin, *The Unique Dangers of the Supreme Court's Decision to Hear a Mississippi Abortion Case*, THE NEW YORKER (May 30, 2021), https://www.newyorker.com/magazine/2021/06/07/the-unique-dangers-of-the-supreme-courts-decision-to-hear-a-mississippi-abortion-case ("It's a good bet that Barrett, Neil Gorsuch, and Brett Kavanaugh—the Trump trio—along with Samuel Alito and Clarence Thomas, will try to severely limit reproductive rights"). The Supreme Court's decision not to enjoin the Texas abortion law S.B.8, which bans abortions if the physician detects a fetal heartbeat and allows private citizen enforcement, lends further support to those who predict a change in *Roe*. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

57. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, draft op. at 5–6 (Feb. 2022 draft); Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 2, 2022).

representatives and the people themselves.[58] Many states already have such double constitutional protections in place or would consider state constitutional protection if federal constitutional protection is removed.[59] Alternatively, the new Supreme Court could issue a decision redefining when life begins and when abortion is precluded under the federal Constitution, thereby dramatically limiting freedom of protection of a woman's right to an abortion under state constitutions. The leaked decision does not appear to go this far.[60]

The Court has also granted certiorari and heard argument in a Second Amendment case which may reveal the direction of the new majority in this contested area of constitutional law. In *New York Rifle & Pistol Ass'n v. Bruen*, the Court will consider whether the "denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."[61] The state constitutional reaction here will also be interesting to watch, particularly if the Court provides greater protection of Second Amendment rights. There are indications that is a real possibility, notably Justice Barrett's dissenting opinion on the Seventh Circuit in *Kanter v. Barr*, which restricted the type of felonies that can justify a limitation on the right to bear arms.[62] State courts that have historically been more receptive to gun regulations cannot turn to state constitutions to protect such regulation. State constitutions can only provide greater protections of gun owners' rights, not less. If, however, the Supreme Court rejects expanded protections or proceeds incrementally, state courts interested in expanding gun-owners' rights are free to interpret analogous provisions in their state

58. *Dobbs*, draft. op. at 6, 34–35.

59. *E.g.*, Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice, 948 P.2d 963, 969 (Alaska 1997); Comm. To Defend Reprod. Rts. v. Myers, 29 Cal. 3d 252, 262 (1981) (citing People v. Belous, 71 Cal.2d 954, 80 (1969) as first recognition of constitutional right of procreative choice); Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1041 (Fla. 2001); Moe v. Sec'y of Admin. & Fin., 382 Mass. 629 (1981); Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 27 (Minn. 1995); Armstrong v. State, 1999 MT 261, ¶ 39, (Mont. 1999) *Right to Choose v. Byrne*, 91 N.J. 287, 305 (N.J. 1982). *See also* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469 (2009); Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1160 (1993); Kimberley A. Chaput, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593 (1991).

60. *See Dobbs*, draft. op. at 29 ("our decision is not based on any view about when a State should regard pre-natal life as having rights or legally cognizable interests"); *but compare id*. at 32 ("What sharply distinguishes the abortion right from [other rights we have recognized based on privacy or autonomy] is . . . [a]bortion destroys . . . 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being'").

61. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 (U.S. argued on Nov. 3, 2021).

62. *Kanter*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

constitutions to provide greater protections.[63] This will be a fascinating area of law to watch as there appears to be a divide on the U.S. Supreme Court within the six-justice majority between the incrementalists and those calling for more radical change.[64]

Finally, there are areas of law where the new majority has signaled it intends to make significant changes in federal constitutional law but where there is no incorporation of these rights or concepts, and thus no impact on state constitutional interpretation. A good example is separation of powers and *Auer* and *Chevron* deference.[65] As Justice Oliver Wendell Holmes explained, "[w]e shall assume that when, as here, as state constitution sees

63. One area of divergence could be the ability of convicted felons to possess firearms. If the Supreme Court does not adopt the position espoused in Justice Barrett's dissent in *Kanter*, state courts could do so under their own constitutions. *See Kanter*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). *Compare* Britt v. State, 681 S.E.2d 320, 323 (N.C. 2009) (holding that a law prohibiting felons from possessing firearms violates the North Carolina Constitution as applied to plaintiff) *with* D.C. v. Heller, 554 U.S. 570, 626 (2008) (stating that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of fire-arms by felons"). Another area could be the ability of individuals to possess certain types of firearms, such as assault rifles or automatic weapons. *Compare* Heller v. Dist. of Columbia ("Heller II"), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (D.C. ban on semi-automatic rifles is unconstitutional) and Miller v. Bonta, 2021 WL 2284132 (S.D. Cal. June 4, 2021) (California's assault weapons ban violates the Second Amendment.) *with* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (en banc) (ban on assault weapons and large capacity magazines does not violate Second Amendment); New York State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 247 (2d Cir. 2015) (NY bans on semiautomatic assault weapons and large-capacity magazines do not violate Second Amendment); Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015) (affirming decision rejecting Second Amendment challenge to ban on assault weapons and large capacity magazines). *See also* Fyock v. Sunnyvale, 779 F.3d 991 (9th Cir. 2015) (affirming decision that plaintiffs were not likely to succeed on merits of claim that ban on large capacity magazines violated Second Amendment). For a case expressly applying the new judicial federalism to gun rights, see Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993). *See also* Eugene Volokh, *State Constitutional Rights of Self-defense and Defense of Property*, 11 TEX. REV. L. & POL. 3999 (2007); STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (Praeger 1989); Stephen R. McCallister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 KAN. L. REV. 867 (2011).

64. *See* Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html. *But see* Linda Greenhouse, *Mississippi Explains All on Abortion*, N.Y. TIMES (July 29, 2021), https://www.nytimes.com/2021/07/29/opinion/mississippi-abortion-supreme-court.html (describing scholarly commentary suggesting Chief Justice Roberts is attracted to "stealth overruling," that is "decisions that undermine a precedent to the point of collapse without actually pushing it over the edge"). *See also* Greenhouse, *supra* note 31 (discussing *Fulton* as essentially overruling *Smith*); David Rivkin and Andrew Grossman, *A Cautiously Conservative Supreme Court*, WALL ST. J. (July 1, 2021), https://www.wsj.com/articles/a-cautiously-conservative-supreme-court-11625164373.

65. Auer v. Robbins, 519 U.S. 452, 462 (1997); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *See also* Baldwin v. United States, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari)*;* Gundy v. United States, 139 S. Ct. 2116 (2019); Kisor v. Wilkie, 139 S. Ct. 2400, 2425, 2448 (2019) (Gorsuch & Kavanaugh, JJ., concurring).

fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned."[66]

A number of the justices in the new majority have concerns that delegation or deference to administrative agencies' interpretation of their own regulations or statutes violates the federal constitution's separation of powers.[67] *Auer* deference, that is deference to agency interpretation of its own regulations, narrowly survived a challenge in *Kisor*, over the vigorous objections of Justices Gorsuch and Kavanaugh.[68] In upholding *Auer* deference, the Chief Justice distinguished *Chevron* deference, that is deference to agency interpretation of federal statutes, suggesting that such deference may be more vulnerable to decision by the new majority.[69] State courts interpreting state constitutional and administrative law, however, are free to define their own state separation of powers and deference to administrative agencies.[70]

II. The Past is Prologue: The Burger Court and the Brennan Article

In evaluating the likely reaction of state supreme courts to revisions and particularly retrenchments in federal constitutional law by the new U.S. Supreme Court majority, there is a useful analogy. In another politically polarized era, President Nixon appointed four justices to the Supreme Court who he believed would reverse or revise decisions of the Warren Court with

66. Prentis v. Atl. Coast Line Co., 211 U.S. 210, 255 (1908). *See also* Robert Shapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 90–92 (1998) ("Unlike federal individual rights precedent, federal separation of powers doctrine does not apply to the states"); ROBERT WILLIAMS, THE LAW OF AMERICAN CONSTITUTIONS 240 (2009).

67. Cass Sunstein, *What's at Stake in a New Supreme Court*, BOSTON GLOBE (Sept. 19, 2020), https://www.bostonglobe.com/2020/09/19/opinion/whats-stake-new-supreme-court/ (contending that "[t]he modern regulatory state would be in serious jeopardy [with a third conservative appointment by President Trump]. A more conservative court might revive the 'nondelegation doctrine,' which forbids Congress from granting a lot of discretion to regulators, such as the EPA and the Department of Transportation.").

68. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

69. *Id.* at 2424–25 (Roberts, C.J., concurring). *Chevron*'s vulnerability was on display at oral argument for American Hospital Ass'n v. Becerra, No. 20-1114 (U.S. argued on Nov. 30, 2021). During argument Justices Thomas and Alito asked outright if *Chevron* should be overturned, and Justices Gorsuch and Barrett each suggested that the statutory ambiguity at issue could be resolved by applying traditional tools of interpretation, without *Chevron* deference. *See* Richard A. Epstein & Mario Loyola, *The Supreme Court's Chance to Rein in the Regulatory State*, WALL ST. J. (Dec. 7, 2021), https://www.wsj.com/articles/the-supreme-court-chance-to-rein-in-federal-agency-power-chevron-deference-gorsuch-barrett-11638888240.

70. *See* DeCosmo v. Blue Tarp Redevelopment, LLC, 487 Mass. 690, 698–700 & n.22 (2021) (explaining similarities and differences between United States Supreme Court and Massachusetts Supreme Judicial Court's deference analyses).

which he disagreed.[71] The Burger Court was indeed more conservative (or at least less expansive in its interpretation of federal constitutional rights) than its predecessor, although not as conservative as the President appointing them might have expected.[72] The Burger Court's decisions produced a state constitutional reaction, first and foremost from their dissenting colleague, William Brennan. Brennan wrote a famous law review article in 1977 emphasizing that "our federal system provides a double source of protections for the rights of our citizens" and that therefore the decisions of the Supreme Court "are not and should not be dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[73] He then went even further, contending that the "manifest purpose of state courts" interpreting state constitutions "is to expand constitutional protections," and he called upon them to do so, particularly in the face of what he described as "door-closing decisions" that expressly rely on federalism as a justification to limit federal constitutional protections.[74] This call to action, described as the magna carta of state constitutional law by Stanley Pollack, an influential New Jersey State Supreme Court justice, set off a reaction by state supreme courts.[75] A decade later, Justice Brennan would describe the "rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions [as] probably the most important development in constitutional jurisprudence of our times."[76]

Other commentators were more measured. They criticized Justice Brennan's constitutional analysis as overly politicized.[77] They also

71. Williams, *supra* note 1, at 954 (citing John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 915 (1995)).

72. Williams, *supra* note 1. This is certainly a possibility for the new Roberts court, although the selection and appointment process for the federal judiciary has clearly been transformed to be more predictive of judicial philosophy. Mark Sherman, Kevin Freking, & Matthew Daly, *Trump's Court Appointments Will Leave Decades-Long Imprint*, AP NEWS (Dec. 26, 2020), https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd; Andrea Restuccia & Michael C. Bender, *Trump's Supreme Court Nomination Strategy Steered by White House Counsel, Others*, WALL ST. J. (Sept. 19, 2020).

73. Brennan, *supra* note 2, at 502.

74. *Id.* at 503. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 396 (1984) (discussing "federalism concerns," the reluctance of Supreme Court judges to apply a uniform national mandate to a diverse group of state governments).

75. *See also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995) (Chief Justice of New York Court of Appeals explains "I still remember the excitement those stirring words generated. Many of us had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.").

76. Justice William J. Brennan, Jr., *Color-Blind - Creed-Blind - Status-Blind - Sex-Blind*, 14 HUM. RTS. 30, 37 (Winter 1987).

77. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981); *see* Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981) (criticizing state courts' treatment

recognized that many busy state courts chose to interpret their constitutions in lock-step with the Supreme Court, and even those that did not do so would, for reasons that were not always well-considered, pick and choose when to depart and when to follow the Court, thus avoiding the development of a coherent approach to state constitutional interpretation of analogous provisions.[78] Indeed, it was often difficult to tell whether a state supreme court was relying on the federal or state constitution when deciding difficult constitutional questions, particularly when addressing the rights of criminal defendants. This lack of clarity, and the result-oriented, "grab bag" aspect of state constitutional interpretation by state supreme courts was described by critics like Professor James Gardner as a failed discourse,[79] or by those less harsh, as "a rather modest" contribution to American Constitutional law.[80] State supreme courts, or at least individual justices, periodically attempted to define, and even fully conceptualize, the basis of their approach to state constitutional interpretation.[81] But, as the commentators explained, state courts continued to defer or default to federal constitutional interpretation when interpreting their own state constitutions.[82]

The U.S. Supreme Court's response to the lack of clarity was *Michigan v. Long*, a case exploring the adequate and independent state ground of

of state constitutions as "little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions"); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434 (1988).

78. *See* James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 374, 389 (2016). *See also* Williams, *supra* note 1, at 974 ("Gardner points out that still the majority of state-court rights decisions do not diverge from federal standards.").

79. Gardner, *supra* note 2.

80. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998).

81. *See generally* Justice Hans Linde's opinions and articles, including Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984); *see also* State v. Kennedy, 295 Or. 260 (1983); Honorable Chief Justice Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997); Roderick Ireland, *How We Do it in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405 (2003–2004).

82. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 n.80 (2011) ("To this day, most state courts adopt federal constitutional law as their own"). *See* JAMES GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 14 (2005). ("Notwithstanding a considerable and still-growing literature criticizing the way state courts interpret state constitutions, most state court today continue to employ the same basic approach; they routinely begin and end their analysis by adopting rules of decision developed by the U.S. Supreme Court for use under the U.S. Constitution; engage in no meaningful independent analysis of the state constitution; and offer little in the way of explanation for their actions. From time to time, the bolder of the state courts may reach a result that differs from one reached under the federal Constitution, but in a way that suggests the result was dictated by the state court's disagreement with the federal outcome.").

decision doctrine.[83] As the Court explained, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."[84] In applying this doctrine in *Long*, however, the Court added a controversial presumption. In a case in which "the [state] court below referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law"[85] the Supreme Court held:

> Accordingly, when as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[86]

The Court also recommended a solution to avoid such review by the Supreme Court: "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance."[87] Despite this warning and direction, extensive surveys of state constitutional law decisions taken in 1988 and 2003, and more recent commentary by experts in the field, concluded that "few states have adopted a consistent way of communicating the bases for their constitutional decisions."[88]

Since Justice Brennan's article and the state constitutional reaction it generated, a significant amount of scholarship evaluated this new judicial federalism. The legitimacy of the default or lock-step approach and the various bases for independent state constitutional interpretation, particularly the need to identify distinctive state traditions, were put under a microscope by thoughtful commentators, including Oregon Supreme Court Justice Hans

83. Michigan v. Long, 463 U.S. 1032 (1983).
84. *Id.* at 1040.
85. *Long*, 463 U.S. at 1040.
86. *Long*, 463 U.S. at 1032–33.
87. *Id.* at 1041.
88. Felicia A. Rosenfield, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988). *See* Matthew G. Simon, *Revisiting Michigan v. Long After Twenty Years*, 66 ALBANY L. REV. 969, 970 (2003); FRIEDMAN & WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 274 (5th ed. 2015). *See also* Williams, *supra* note 1, at 959 ("What we have seen over the years, however, is that many state courts still do not utilize this clear advice.").

Linde,[89] Professors Gardner,[90] Paul Kahn,[91] Robert Schapiro,[92] and others.[93] This scholarship provided state supreme courts uncomfortable with a Supreme Court decision or mode of constitutional analysis with a rich body of state constitutional law jurisprudence to draw upon to justify independent interpretation, which will be discussed in more detail below. Very busy state supreme courts, not prone to unnecessary theorizing, therefore, need not develop their own theoretical or normative bases for a departure from Supreme Court precedent from scratch or on the fly. This thoughtful commentary also carefully explained why there is no need to identify and then rely on distinctive state traditions or subtle differences in language to justify not defaulting to the U.S. Supreme Court's interpretation of analogous provisions in the federal Constitution. Horizontal federalism, allowing one state court to look to the decisions of the others for guidance, has also become much easier than it was in the 1970s and 80s, given that many state supreme courts have since that time developed their own interpretations of different rights, especially in criminal procedure.[94] Most if not all the reasons for the lock-step or default setting in state constitutional law have thus disappeared. Finally, with *Michigan v. Long* and its progeny long-established, a state supreme court that wants to insulate its decision from U.S. Supreme Court review knows that a clearly independent mode of analysis is the best way of doing so. Courts uncomfortable with, or even unsure of, the Supreme Court's new direction also have no reason not to include the plain statement of independence recommended by *Michigan v. Long*, and good reason to do so.[95]

89. Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984) ("courts, of course, are accustomed to seeing differences in state laws without attributing these to different values or beliefs of the states' inhabitants.").

90. Gardner, *supra* note 2, at 818 ("the notion of state constitutions as defining distinctive and coherent ways of life does not accurately describe actual state constitutions, thus cannot furnish a useful way of talking about them"); *see also* GARDNER *supra* note 82, at 53–79.

91. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1159 (1993).

92. Robert Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 419–428 (1998).

93. *See also* Liu, *supra* note 1; Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000). For a particularized critique of the distinctive state tradition approach see Professor Gardner's analysis of Ravin v. State, 537 P.2d 494 (Alaska 1975) in JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 55, 67 (2005). For a confusing, albeit amusing, example of the use of state traditions, in this case camping in Colorado, *see* People v. Schafer, 946 P.2d. 938 (Colo. 1997). In contrast, a sophisticated defense of the distinctive state tradition approach appears in JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

94. Williams, *supra* note 1, at 961–962.

95. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX.

We thus have a combination of conditions likely to cause another flood tide of state constitutional decision-making.[96] The country is again politically polarized and the Court is at the center of this storm, as a controversial president has appointed three new justices chosen based on an expectation that they will change the course of federal constitutional law. This new majority can also be expected to control the direction of the Court for decades to come, as Justices Gorsuch and Kavanaugh are 54 and 57 and Justice Barrett is 50. Unlike in the 1970s, now there is a much more well-developed body of state constitutional case law and commentary to ease and guide state supreme court reaction, including a better blueprint for independent interpretation of analogous provisions in state constitutions.[97] Courts with a very different understanding of American constitutional principles will also be especially troubled by the effect of any radical retrenchment of existing federal constitutional rights on their own ability to protect constitutional rights. If confronted with significant revision or retrenchment, and a chasm develops between their understanding of constitutional law and the Supreme Court's, these state supreme courts are likely to, or at least wise to, reject lock-step default positions. Conversely, state supreme courts expecting and welcoming a significant change in constitutional direction from the new Supreme Court majority may be troubled if the Court proceeds in a more incrementalistic direction, which is also a possibility. These courts too are less likely to default to lock-stepping their state constitutional interpretations than in the past, given their own expectations and enhanced understanding of the importance of state constitutional law.[98] Finally, if the Supreme Court itself is regularly rejecting and revising its own precedents and issuing fractured decisions of its own, the reasons for uniting state and federal constitutional interpretation will be further diminished.[99] In sum, expect a declaration of state constitutional independence.

L. REV. 1025, 1047–1050 (1985) (discussing the dangers of not carefully separating out state from federal constitutional analysis).

96. *See* Liu, *supra* note 1, at 1365 ("Justice Brennan's 1977 paean to judicial federalism had particular resonance in light of the changing composition and increasingly conservative tilt of the U.S. Supreme Court. We may be at a similar moment today."); Williams, *supra* note 1, at 975 ("President Trump's campaign pledge to nominate only federal judges who were recommended by the Federalist Society all these years later will likely result in another 1970s-like rush to the state courts and state constitutions.").

97. Williams, *supra* note 1, at 975 ("This time, however, we have available to us all of the experiences gained from the several generations of the NJF [new judicial federalism].").

98. SUTTON, *supra* note 93, at 176 ("There is nothing about the state constitutions that necessarily points toward liberal or conservative rights.").

99. *See, e.g.*, Leidig v. State of Md., No. 19, SEPT. TERM, 2020, 2021 WL 3413163, at *32 (Md. Aug. 5, 2021) (finding the court's Sixth Amendment jurisprudence as it relates to forensic reports so confusing that the court instead decides to adopt a more protective standard (from a Kagan dissent) under the analogous provision of its state constitution).

III. The Design of Federalism

Is this independent approach to state constitutional interpretation just a product of political differences, justifiable under our federalism, or even part of the overall design of our dual constitutional structure? In my view, an independent approach to state constitutional interpretation, and a firm rejection of a lock-step default position in state and federal constitutional interpretation, is included in the design of federalism. Federalism is based on dual sovereignty,[100] including a limited national government,[101] a double protection of individual rights,[102] the allowance and even encouragement of differences between the states,[103] and a division of authority between the states and the federal government that enables push back and prevents overreaching by the other.[104] These double protections, divisions of authority, and duties to review and, if necessary, reject each other's actions and reactions protect personal liberty and promote the public's welfare.[105] Indeed, federalism's design cannot be achieved if states just defer or default to the federal government in those areas in which states are expected or required to act, including the enforcement of state constitutional rights. Importantly, the express duplication of the constitutional provisions themselves in both constitutions sets the stage for this double protection and requires its performance by state courts.

State courts interpreting state constitutional provisions thus play a crucial role in federalism's liberty protecting process.[106] Their non-deferential review of state constitutional rights is required to provide the double protection of liberty the system is designed to achieve.

100. THE FEDERALIST NO. 51 (James Madison); Liu, *supra* note 1, at 1308.

101. *See* THE FEDERALIST NO. 45 (James Madison); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533 (2012) ("In our federal system, the national government possesses only limited powers, the states (and the people) retain the remainder.").

102. Brennan, *supra* note 2, at 503.

103. *See* Louis D. Bilionis, Essay, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1809–10 n.23 (1992) (citing the Brandeis dissent in *New State Ice Co.*, 285 U.S. 262 (1932)); Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 55 (1988); SUTTON, *supra* note 93, at 17.

104. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) ("The independent power of the state serves as a check on the power of the Federal government."). *See also* THE FEDERALIST NO. 51 (James Madison) ("Hence a double security arises to the rights of the people. The different governments will control each other."). In INTERPRETING STATE CONSTITUTIONS, *supra* note 82, at 18, Professor Gardner places great emphasis on the "duty not only to monitor the behavior of the other, but actively to resist it when it takes action that threaten public welfare," particularly the liberty and rights of all Americans. Indeed, he considers this duty as central to the task of state constitutional interpretation and critical to understanding how it works in practice.

105. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 82, at 18.

106. *See generally* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 82.

The Supreme Court also recognizes that "maintenance of the principles of federalism is a foremost consideration" in its own decision-making.[107] The Court identifies a national baseline of protection of individual rights that permits individual states to build upon this baseline.[108] States can thus provide more protection for those individual rights or create different rights, without requiring the rest of the country to agree.[109] Finally, if state courts follow the guidance of *Michigan v. Long*, the Supreme Court will consider the decision based on an adequate and independent state ground and respect the state court's judgment.

All of this allows a diverse country with a historically contested constitutional culture to question, accommodate, and resolve constitutional differences while seeking to preserve and protect liberty.[110] As we are in a particularly polarized time, with a Supreme Court poised to weigh in on many of these controversial questions of constitutional law, independent state constitutional interpretation serves all of these important purposes of federalism, providing a double protection of our historic rights and a means of holding us together despite the forces pulling us apart.

IV. Constitutional Interpretation of Analogous Provisions with Common Wording and History

Perhaps the most difficult question is whether analogous provisions with common origins and similar formulations in state and federal constitutions should also be interpreted independently. This has been a subject of much discussion in the commentary, which need not be repeated

107. *See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("a fundamental feature of our constitutional structure [is that the Supreme] Court is not the only guardian of individual rights in America.").

108. Williams, *supra* note 1, at 954; *see* Serrano v. Priest, 487 P.2d 1241(Cal. 1971); San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Cruzan v. Missouri Dept. of Health, 497 U.S. 261 (1990) (O'Connor, J. concurring); Liu, *supra* note 1, at 1338 (citing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 36–37 (2018) ("Judge Sutton argues that any victory the Rodriguez plaintiffs might have won would have been 'diluted by the U.S. Supreme Court's institutional constraints,' resulting in 'a federalism discount to [the Court's] articulation of the constitutional right and remedy.'").

109. *See* Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990) (O'Connor J., concurring) ("As is evident from the Court's survey of state court decisions, . . . no national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States, …in the first instance.") (citing New State Ice Co. v. Liebmann, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting)).

110. Liu, *supra* note 93, at 1335 (describing Framers' understanding that "a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy"). GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 82, at 18 ("The apparatus of federalism exists for a purpose: to protect the liberty of all Americans.").

in full here. Suffice it to say that independent interpretation of analogous provisions with common histories and similar expression is appropriate for a number of reasons. Independent interpretation is particularly justifiable in the face of rapid, radical revision or retrenchment of federal constitutional law and fractured decision-making by the U.S. Supreme Court.

Let's begin with reviewing what is required and permitted by the federal Constitution. There is nothing in the federal Constitution, including the supremacy clause, requiring states to use the U.S. Supreme Court's interpretation of analogous federal provisions as the default setting in state constitutional law. The Supreme Court has expressly recognized this proposition.[111] Although states cannot provide less protection of individual rights under their state constitutions than that provided by analogous provisions under the federal Constitution without violating the federal Constitution, states can provide more protection under their state constitutions.[112] Indeed, the Ninth and Tenth Amendments provide an express reservation of rights for the people and the states, a reservation that encompasses the right to include greater protection of individual rights under analogous provisions of state constitutions with common histories and similar formulations.[113]

Furthermore, as a historical matter, a number of state constitutions were passed prior to the U.S. constitution and used as a basis for the federal Constitution. This raises the question of who should be the model for whom.[114] The authors of these constitutions were also among our most

111. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (citing William J. Brennan, Jr.); *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)); Kansas v. Carr, 136 S. Ct. 633, 641 (2016). *See* Delaware v. Van Arsdall, 475 U.S. 673, 704 (1986) (Stevens, J., dissenting), (quoting State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983)) ("states' constitutional guarantees were meant to be and remain genuine guarantees against misuse of governmental powers, truly independent of the rising and falling tides of federal case law.' ").

112. Commonwealth v. Gonsalves, 429 Mass. 658, 668 (1999) ("The Supreme Court describes a common base from which we can go up.").

113. U.S. CONST. AMEND. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."), amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *See* Mass. v. Upton, 466 U.S. 727, 737–38 (1984) (Stevens J., concurring) (explaining that the Supreme Judicial court ignored the ninth amendment when it "permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art. 14 of the Massachusetts Declaration of Rights").

114. Delaware v. Van Arsdall, 475 U.S. 673 (1986). *See* Letter from John Adams to Mercy Otis Warren, July 28, 1807, https://founders.archives.gov/documents/Adams/99-02-02-5197 ("I made a Constitution for Massachusetts, which finally made the Constitution of the United States"); People v. Brisendine, 119 Cal. Rptr. 315, 329 (1975) ("It is a fiction too long accepted that provision in state constitutions textually identical to the Bill of rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse."); Commonwealth v. Gonsalves, 429 Mass 658, 667 (1999) ("We also point out other relevant considerations. The Declaration of Rights was adopted in 1780, as part of the Massachusetts Constitution, some seven years before the

distinguished political thinkers: John Adams, Benjamin Franklin, Robert Livingston, James Madison and George Mason.[115] As Professor Bernard Schwartz explained, an American inventory of individual rights was included in early state constitutions, added to the federal constitution, and continued to appear in later state constitutions.[116] These rights are our common heritage.[117] The state and federal courts also have a shared responsibility to preserve and protect them. This does not, however, mean there was or is a single common understanding of those rights, or that the U.S. Supreme Court has an exclusive right to define the interpretation of these common provisions. The opposite is true: the rights are subject to conflicting interpretations and both state and federal courts have a duty to interpret them.

The protections provided by the historic "American inventory of individual rights" included in state and federal constitutions are, of course, difficult to interpret and apply, especially 240-plus years after their appearance in the first state constitutions and later adoption in the federal bill of rights. Despite their common historic origins, and similar formulations, they are subject to multiple, conflicting interpretations and applications, especially in response to fundamental changes in American society. This is particularly true for the open-ended provisions in both constitutions, regarding liberty, equality, due process and the reasonableness of searches which inevitably require the balancing of interests.[118] When these rights conflict, the issues of interpretation become even more difficult. All of these historic rights thus provide the U.S. Supreme Court and state supreme courts ample interpretive discretion when applying their respective constitutions, even when interpreting provisions with similar language and history.

In exercising that discretion, state courts often defaulted or deferred to the U.S. Supreme Court for a number of reasons even though they are not required to do so. One is the understandable desire to interpret provisions with a common history and phrasing alike. Multiple interpretations of similar provisions raise questions about the objectivity or subjectivity of

United States Constitution was approved. That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment.").

115. SUTTON, *supra* note 93, at 8.

116. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS (1992).

117. *See*, *e.g.*, Liu, *supra* note 93, at 1322 ("state constitutions are both sources and products of a shared American legal tradition.").

118. *E.g.*, Commonwealth v. Gonsalves, 429 Mass. 658, 668 (1999) ("We, of course, respect the United States Supreme Court's judgment in the matter under the Fourth Amendment. That judgment was reached after balancing the interests of the police against the liberty interests of citizens, with the Court's concluding that the former should prevail over the latter. For the reasons stated, we conclude that, under art. 14, the balancing of interests requires that Massachusetts citizens should not be subjected to unjustified exit orders during routine traffic stops.").

legal decision making, and what is driving the differences.[119] The U.S. Supreme Court's decisions also reflect a great deal of thought and research into the history of these provisions.[120] This too explains why, in the absence of different language, different constitutional history or even different state traditions, state supreme courts often defaulted to or tracked the federal interpretation of analogous provisions.[121] Another reason for doing so was that the state provision could not provide less protection than the analogous federal provision, meaning they were inevitably somewhat dependent on the U.S. Supreme Court's interpretation of the federal counterpart. As they could not be completely separated, why not start or even end with the federal interpretation, if it is satisfactory?[122] Finally, there were judicial efficiency concerns. As Justice Linde and other thoughtful commentators practically and astutely explained, "[t]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis."[123]

In 2022, many of the reasons for such deference have dissipated, if not completely disappeared. A state supreme court may reasonably conclude that respect for the law and its own decision-making is promoted by the consistency and stability of state and federal constitutional interpretation of similarly worded provisions with common histories. But it is another matter to conclude that such respect is enhanced by rapid revision or retrenchment in both state and federal constitutional law following a highly politicized appointment process of three new U.S. Supreme Court justices. Fractured decision-making by the U.S. Supreme Court makes this even more difficult.

119. *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 733 (2016); *see also* Right to Choose v. Byrne, 450 A.2d 925, 932 (N.J. 1982); Liu, *supra* note 93, at 1333.

120. State v. Kennedy, 295 Or. 260, 267 (1983) ("This court like others has high respect for the opinion of the Supreme Court, particularly when they provide insight into the origins of provisions common to the state and federal bills of rights rather than only a contemporary balance of pragmatic considerations about which reasonable people may differ over time and among the several states.").

121. Lawrence Friedman, *Doctrinal Dead Ends and State Constitutional Rights Innovation*, 72 RUTGERS U.L. REV. 1179, 1179 (2020) ("Notwithstanding the potential benefits of independent state constitutional rights interpretation, many state courts opt, either as a policy or on a case-by-case basis, to track federal precedent when addressing the provisions of their own constitutions."); M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RES. L. REV. 927, 941 (2007) (reviewing lock-stepping courts).

122. Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U.L. REV. 887, 889 (1980) ("If the Supreme Court has expressed broad rights under the federal Constitution, it is often superfluous to determine state constitutional principles in the same area.").

123. Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALTIMORE L. REV. 379, 392 (1980); ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 130 (2009). *See also* Liu, *supra* note 93, at 1315 (discussing reasons why state judges rely on federal interpretation including well-developed body of law to draw on, not needing to research from scratch, and even "political cover").

State constitutional case law and commentary have also now changed our baseline assumptions. There is no required default position and no need to identify distinct state traditions or subtle language differences to justify a different interpretation. Instead, there is a developing understanding that defaulting itself, without independent analysis, is problematic from a federalism perspective. As California Supreme Court Justice Goodwin Liu explained, "the [default] approach treats federal precedent with a presumption of correctness that has no sound basis in our federal system."[124] As Justice Jackson famously quipped, the U.S. Supreme Court is not final because it is infallible; it is infallible because it is final.[125] For federal constitutional law that of course remains true. In state constitutional law, however, the U.S. Supreme Court is not final, and thus, not infallible. Instead, state supreme courts have the final say on the interpretation of their own state constitutional provisions. These state justices were also selected or elected based on their knowledge and experience, and even their professed expression of how they will interpret the law, including their state constitutions. To perform this task correctly, and fulfill the purposes of state constitutions in a federal constitutional structure, they cannot simply rely on or default to the U.S. Supreme Court's interpretations of analogous provisions with similar wording and history; rather, they must independently study the text, history and purpose of their constitutional provisions, and apply the fundamental principles derived from that examination to the facts of the case at hand, and perform the necessary balancing of interests, if so required.[126] If that examination and application produces a different constitutional interpretation from the U.S. Supreme Court or other state supreme courts, that is perfectly appropriate, as it is the right and

124. *See* Liu, *supra* note 93, at 1314; Robert Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 171 (1987) ("United States Supreme Court decisions rejecting asserted federal constitutional rights should persuade state courts confronting similarly claims under their state constitutions only by their reasoning discounted for federalism or strategic concerns.").

125. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

126. Of course, once one state constitutional precedent is in place for a particular provision this task is greatly simplified. Instead of applying federal constitutional precedent, the state court can apply its own state constitutional precedents. *See, e.g.*, the Massachusetts Supreme Judicial Court's recent Article XIV jurisprudence: Commonwealth v. Almonor, 482 Mass. 35, 36–37 (2019) (holding that the collection of real time cell site location information constitutes a search under art. XIV of Massachusetts constitution); Commonwealth v. Mora, 485 Mass. 360, 368, 370 (2020) (citing to *Almonor* and holding that "continuous, long-term pole camera surveillance targeted at [] residences" constitutes a search under art. XIV). *See also* David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) ("when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to- day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.").

responsibility of state courts to make that determination.[127] "State courts and federal courts, using the same modalities of constitutional argument, can and do have principled disagreements on the meaning of those rights and liberties."[128]

This article goes one step further and emphasizes that if state courts do not perform that independent, non-deferential review of state constitutional provisions, including those that share a common origin and wording with federal constitutional provisions, state courts are not fulfilling their function in the federalist system, which is to provide the double protection of American rights and liberty the system is designed to achieve.[129] Both the state and federal courts are responsible for guarding these American rights and preserving our liberty. If either drops its guard, and relies on the other, our rights and liberty become less protected.[130]

There are other important constitutional values served by independent interpretation of analogous state constitutional provisions. As a number of commentators have emphasized, state constitutional interpretation enriches the American constitutional dialogue by providing different perspectives and insights on the American inventory of rights.[131] Importantly, our federal constitutional structure ensures that five or six or even nine people do not have exclusive control of all American constitutional interpretation and the liberty of all Americans.[132] Instead "fifty different courts will talk with each other, as well as the federal courts, about the meaning" of America's constitutional rights, thereby testing and refining each other's thinking about

127. Massachusetts v. Upton, 466 U.S. 727, 738 (1984) (Stevens, J., concurring), (quoting Hans Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)) ("The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.").

128. Liu, *supra* note 93, at 1312.

129. *See generally* Brennan, *supra* note 2; GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 82.

130. For those courts that have historically defaulted to lock-step positions this transition will obviously be more difficult, as such departures will need to be justified. The scholarship discussed above that criticizes such defaulting will obviously support a court's decision to no longer do so. Concerns about stare decisis will also be diminished when the change comes about in response to a U.S. Supreme court decision that revises or retrenches a federal constitutional right. Finally, and perhaps most importantly, defaulting or lock-stepping may have made sense to a state court in the past but not now, based on the substance of the Supreme Court's decision.

131. *See* Kahn, *supra* note 91, at 1155 ("Where there is only a single view . . . [t]he meaning of the constitutional order is impoverished."); Liu, *supra* note 1, at 1330 ("Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition."); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000).

132. Liu, *supra* note 1, at 1339 ("interpretive redundancy can help ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America by situating accountability for individual-rights protection in multiple forums.").

these rights.[133] Comparative analysis thereby improves constitutional analysis.[134] As demonstrated many times in the past, this type of testing and retesting of constitutional principles by state courts has advanced our understanding of those principles, often resulting in rethinking by the U.S. Supreme Court as well.[135]

V. Other Constitutional Actors

It is important to recognize that state supreme courts do not have the same control over state constitutional law that the U.S. Supreme Court has over federal constitutional law, and they alone will not dictate the state constitutional reaction to the new direction of the U.S. Supreme Court. The U.S. Supreme Court is essentially the only constitutional actor under the federal constitution, given the difficulty of the federal amendment process.[136] Thus, it almost always has the last word under the federal constitution. That is not true under the state constitutions, which are regularly amended through ballot or legislative initiatives.[137] On amendments, as one commentator wrote, "[s]tate constitutions are much more conducive to the practice of popular sovereignty in the processes of constitutional change."[138] Indeed, as he contends, "[o]ne of the great contributions of state constitutions to our [federal system] is the place they provide for these voices."[139] Such constitutional amendments are commonplace especially in politically

133. Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984) ("The state constitutions offer those who will argue and decide constitutional cases the chance to question familiar formulas.").

134. *Id.* at 197 ("the experience of the states subjects theory to the test of comparison. The states demystify constitutional law.").

135. *See, e.g.*, Powell v. State, 510 S.E.2d 18 (Ga. 1998) (departing from reasoning in Bowers v. Hardwick, 478 U.S. 186 (1986)); Lawrence v. Tex., 539 U.S. 558 (2003) (citing Powell as well as four other state court decisions that declined to follow Bowers). *See also* Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003) (establishing state constitutional right to gay marriage) prior to Obergefell v. Hodges, 576 U.S. 644 (2015). *See also* Batson v. Ky., 476 U.S. 79 (1986) (barring exercise of peremptory challenges on basis of race); Commonwealth v. Soares, 377 Mass. 461 (1979) (reaching same holding as *Batson* seven years prior). See SUTTON, *supra* note 93 (emphasizing the importance of this interaction).

136. Williams, *supra* note 1, at 968 ("One of the key distinctions between federal constitutional decisions recognizing federal constitutional rights and state supreme court decisions recognizing state constitutional rights is that the latter are subject to the realistic possibility of being 'overturned' prospectively by amendments to the state constitution.").

137. Scott L. Kafker & David A. Russcol, *The Eye of A Constitutional Storm: Preelection Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1282 (2012); JOHN DINAN, STATE CONSTITUTIONAL POLITICS, GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018); John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN. ST. L. REV. 1007, 1010 (2011); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1636, 1652 (2010).

138. Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 474 (1993).

139. *Id.* at 475.

polarized times, as we are in now. There will surely be a response from other state constitutional actors to a Supreme Court engaging in radical or even incremental federal constitutional change in a direction opposed by those political actors. That reaction will be further affected by the state supreme courts' interpretation of analogous provisions in state constitutions.[140] The U.S. Supreme Court will thus stimulate a compound reaction in state constitutional law from multiple state actors.

Perhaps the most contentious state constitutional battle ground will be a woman's right to reproductive autonomy. If the Supreme Court reverses *Roe* and *Casey* but leaves open the possibility of protecting that right under state constitutions, as the leaked draft decision in *Dobbs* suggests, political activists will push for state constitutional amendments. Those opposing the right will try to preclude it through state constitutional amendment; those supporting it will try to provide for its protection, particularly if state supreme courts have not already interpreted their state constitutions to provide for such a right. Radical retrenchment by the Supreme Court in this and other contested areas of constitutional law will surely generate a raft of initiatives in response, including those that may clearly violate the federal constitution.[141]

VI. Conclusion

A Declaration of Independence of state constitutional interpretation does not signify a revolution or a rebellion, or even a rejection of the U.S. Supreme Court. Rather it is a part of the design of the system, and a natural result of its growth and maturity. Almost a half-century after Justice Brennan invited state courts to declare their independence in state constitutional interpretation, state courts should be prepared with ample experience and reflection to consider federal constitutional interpretation of

140. The Burger court era again provides a useful comparison. When the Florida Supreme Court responded to changes in federal constitutional Fourth Amendment jurisprudence by providing greater protections under state constitutions, initiative amendments were passed stating that analogous rights in the state shall be construed in conformity with the Fourth Amendment to the U.S. Constitution as interpreted by the United States Supreme Court. *See generally* Florida v. Casal, 462 U.S. 637–39 (1983) (Burger, J., concurring). State constitutional decisions issued in reaction to the Supreme Court upholding the constitutionality of the death penalty under the federal Constitution also triggered reactions from non-judicial state constitutional actors. *See, e.g.*, Dist. Att'y v. Watson, 381 Mass. 648 (Mass. 1980); Commonwealth v. Colon Cruz, 393 Mass. 150 (Mass. 1984).

141. State supreme courts and other state actors, including the state attorney generals, will be thrust into these battles, having to decide their legality. *See* Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Preelection Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1317–18 (2012) (discussing how court may have to respond to state constitutional amendments that clearly violate the federal Constitution). *See also* John Dinan, *The Unconstitutional Constitutional Amendment Doctrine in the American States: State Court Review of State Constitutional Amendments*, 72 RUT. L. REV. 983 (2020).

analogous provisions only for its persuasive value. They should not consider it as a default position that may substitute for the state courts own careful independent analysis of the text, history, and purpose of their own constitutional provisions. Our dual constitutional structure and double protection of constitutional rights calls for nothing less if we are to provide the necessary protection of liberty as conceived in the American system of government. For our federalist system to function as it was designed, for our American constitutional rights to be fully protected, for those rights to continue to thrive and survive the tests of changing times, state courts must step up and out of the shadow of the U.S. Supreme Court when interpreting their own constitutions.[142] They must declare and define their independence.

142. State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring) ("If we place too much reliance on federal precedent we will render the State rules a mere row of shadows"). *See also* Robert Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1048–49 (1997) (discussing the need for independent interpretation and the "preoccupation with the shadow cast by the United States Supreme Court").