

DIVERGENCE: THE DEMOCRATIC LEGITIMACY OF STATE CONSTITUTION-MAKING

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I. Introduction

For advocates working to abolish racial, class, and gender hierarchies, recent rulings from the federal judiciary have shattered the mythos of federal impact litigation, and lawyers who once drew inspiration from federal court advocates like Ruth Bader Ginsburg and Constance Baker Motley now fight to keep their cases *out* of the Supreme Court. In the past few years alone, the Supreme Court has diluted or altogether abolished abortion rights, voting rights, workers' rights, access to health care, affirmative action, and other protections. Still, a promising alternative forum remains. As the final interpreters of state constitutions—a potent source of affirmative rights¹—state supreme courts can confer protections that the federal judiciary declines to impart. Today, state constitutions are fertile ground for protective rights expansion, and state supreme courts are key legal battlegrounds.

This paper asserts that fundamental differences between state and federal constitutions and judiciaries render state constitution-making more democratically legitimate than federal constitution-making. Accordingly, this should both encourage advocates to bring rights-broadening state constitutional claims, which are more likely to find success in state supreme courts than in federal ones, and also compel state supreme court justices to independently interpret their state constitutions. Using abortion as a case study, this paper observes that advocates have successfully secured and expanded affirmative rights through state constitutional litigation, even in conservative states. Indeed, the saga of state constitutional abortion litigation pre- and post-

¹ See Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1859 (2023) (“While the federal Constitution is proverbially a charter of negative liberties, all state constitutions include both positive and negative rights; they impose affirmative duties on government and cast it as a necessary guarantor of liberty as well as a potential threat.”).

*Dobbs v. Jackson*²—which retracted the abortion rights recognized in *Roe v. Wade*³ and *Planned Parenthood v. Casey*⁴—situates state supreme courts as a critical counterforce to a federal judiciary that is severely out-of-step with the public’s preferences.

Historically, those who care about expanding affirmative rights for marginalized groups have had good reason to be skeptical of states and state courts. In the decades leading up to the Civil War, pro-slavery states embraced the banner of “states’ rights” to reject federal laws and, ultimately, secede from the union.⁵ After the Civil War, the adage of “states’ rights” animated racist state and local Jim Crow laws throughout the South, which were enforced by both state and federal judges.⁶ Today, the phrase continues to be a dog whistle, and is often cited by state leaders to justify violating federal laws—usually related to equal protection—with which they disagree.⁷ Still, not all is wicked in the realm of state powers. As recently recognized state constitutional abortion rights illuminate, state constitutions offer an oft-overlooked fount of protections, and state judges interpreting state constitutions are empowered to recognize protections that today’s federal judiciary refuses to locate in the United States Constitution. “With the federal locus of our double protections weakened”⁸ by today’s substantive rights-hostile judiciary, Justice Brennan’s 1977 words again resonate:

² 597 U.S. 215 (2022).

³ 410 U.S. 113 (1973).

⁴ 505 U.S. 833 (1992).

⁵ See John C. Calhoun, *Address to the People of the United States, Prepared for the Convention of the People of South Carolina, November, 1832*, THE WORKS OF JOHN C. CALHOUN: REPORTS AND PUBLIC LETTERS (D. Appleton and Company, Vol. VI 1855).

⁶ See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a Louisiana state law requiring “separate, but equal” train cars as not violating the Fourteenth Amendment of the U.S. Constitution. The United States Supreme Court heard and affirmed the case on appeal from the Louisiana Supreme Court, which had similarly denied *Plessy*’s assertion that the state law violated the Fourteenth Amendment).

⁷ See, e.g., Border Statement, Governor Greg Abbott (January 24, 2024), https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf (“The failure of the Biden Administration to fulfill the duties imposed by Article IV, § 4 has triggered Article I, § 10, Clause 3, which reserves to this State the right of self-defense.”).

⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) [hereinafter Brennan, *State Constitutions*].

The Supreme Court has . . . limit[ed] the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. . . . Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation . . . With federal scrutiny diminished, state courts must respond by increasing their own.⁹

This paper makes a case to two audiences. First, it asserts that advocates should bring protective rights-broadening claims under state constitutions. It then turns to state judiciaries, making the case that state supreme courts have an institutional responsibility to independently interpret their state constitutions rather than yoke state constitutional precedent to federal Constitutional precedent, as is current practice in most state courts. These approaches should be welcomed by both progressive advocates and conservative institutionalists. For progressives, state constitutional law offers an opportunity to establish and expand rights to which the Supreme Court is hostile by applying interpretive methods that federal courts no longer employ. For conservatives, independent state constitutional interpretation honors originalist principles and promotes federalism.

This paper begins by positing that because most state supreme court justices are popularly elected in statewide elections, state supreme court holdings tend to mirror majoritarian preferences. Accordingly, advocates can expect state judiciaries to better protect at least those rights that enjoy broad public support than federal courts (or even state legislatures). Next, it

⁹ *Id.*

argues that state judiciaries are structurally well-situated to recognize and enforce new substantive rights. Finally, it asserts that state constitutional litigation should be especially attractive to advocates hoping to avoid federal judicial review by the Supreme Court given that state supreme court decisions grounded in state constitutional law are generally not subject to federal judicial review.

In Part III, the paper shifts its focus to state judges, making the case for independent state constitutional interpretation. It considers state judiciaries' legal authority to interpret their state constitutions independently (i.e., without regard for the federal precedent on analogous provisions) and explores some of the reasons why many choose not to. It also discusses the various approaches that state judiciaries take to dual claim disputes, and considers why state supreme courts often try to resolve matters on federal grounds in order to avoid construing their state constitutions whatsoever. The paper argues that several features of state constitutionalism should compel state supreme court justices to engage in independent state constitutional interpretation. First, by virtue of being easier to amend than the federal constitution, state constitutions are uniquely dynamic democratic documents that state judiciaries have an institutional responsibility to interpret independent of federal precedent. Second, elected state judiciaries are ideally-situated to establish new affirmative rights because they do not confront the same judicial usurpation and unaccountability concerns as the federal judiciary. Third, democratically legitimate judiciaries should be at the forefront of developing constitutional methods of interpretation. Fourth, independent state constitutional analysis fits within our federal Constitutional design: when state supreme courts independently interpret their constitutions, states fulfill their role as laboratories of democracy by helping to facilitate the development of federal Constitutional law from the bottom up and contributing to national policy conversations.

And fifth, state constitutional amendments introduced in reaction to abortion rights-*hostile* state supreme court decisions shed further light upon the democratic legitimacy of state constitution-making. Finally, the paper offers a conservative case for divergence, arguing that independent state constitutional analysis should appeal to even the most hardcore originalists.

Part IV turns to abortion, which offers a useful case study on how independent state constitutional analysis works, and why it is so valuable. Since *Dobbs*, several state judiciaries—primarily in conservative states—have for the first time independently considered whether their state constitutions protect abortion rights, and found that they do. It compares a 2023 Oklahoma Supreme Court holding that the Oklahoma Constitution protects an abortion right with a pre-*Dobbs* Kansas Supreme Court holding that the Kansas Constitution protects abortion. This paper emphasizes how, by taking an independent approach to its state constitutional analysis, Kansas developed robust state-level precedent that was not impacted by *Dobbs*. Consequently, Kansas was able to serve thousands of out-of-state abortion patients—including, ironically, many from Oklahoma—while its neighboring state judiciaries spent months scrambling to determine whether pregnant people had abortion rights under their own state constitutions. Finally, these cases illuminate how state supreme courts may experiment with their own interpretive methods.¹⁰

II. Expanding rights protections by bringing state constitutional claims

A. As popularly-elected entities, state supreme courts better capture majoritarian preferences than state legislatures or federal courts.

Because most state judiciaries are popularly-elected, they can be expected to better reflect majoritarian interests than unelected federal courts or gerrymandered state legislatures.

¹⁰ See Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg>.

Accordingly, litigators should at minimum be bringing state constitutional claims to protect affirmative rights that enjoy popularity statewide. Currently, twenty-one states elect their state supreme court justices from the outset, and thirty-eight states use elections to either select in the first instance or retain their state supreme court justices.¹¹ (In all but four of those states— Illinois, Kentucky, Louisiana, and Mississippi—judicial elections are statewide.¹²) While gerrymandering has “created a disconnect between popular support and electoral victories in state legislatures,”¹³ statewide supreme court elections¹⁴ minimize distortions between the will of the majority of a state’s voters and judicial outcomes. This, in turn, compels state supreme court decisions that reflect majoritarian interests.¹⁵ Professor Miriam Seifter has written, for example, that “it is hard to see elected judges as being systematically countermajoritarian in the same way that many state legislatures are. Selecting judges by popular vote . . . allow[s] people to choose the judges they want. . . . Elected judges might also provide a counterweight to countermajoritarian legislatures, as proponents initially envisioned. Or judicial elections might even directly foster majoritarian rulings, at least at the margins of hard cases.”¹⁶ Similarly, *federal* judges’ ideologies will rarely mirror the majority of voters’ political preferences by virtue of the federal judiciary’s lifetime tenure, nomination by Presidents who are elected not by a national majority but rather the Electoral College, and confirmation by a fundamentally

¹¹ *Judicial Selection: Significant Figures*, THE BRENNAN CENTER (Oct. 11, 2022),

<https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>.

¹² In Illinois, Kentucky, Louisiana, and Mississippi, judges are elected to represent different state circuits or districts. *See id.*

¹³ Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756 (2021) [hereinafter Seifter, *Countermajoritarian Legislatures*].

¹⁴ *Id.* at 1740.

¹⁵ See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (“Judges who safeguard a minority contrary to the wishes of a majority . . . can be defeated in the next election and replaced by judges more attuned to majoritarian will.”).

¹⁶ Seifter, *Countermajoritarian Legislatures*, *supra* note 13, at 1774.

antidemocratic, malapportioned United States Senate that unduly amplifies the voting power of less-populous states.¹⁷

State constitutional abortion litigation outcomes offer support for the argument that state supreme court holdings can be expected to better reflect voter preferences than federal court decisions or state legislative outcomes. In the past two years, pro-abortion litigators have obtained favorable decisions even in conservative states—likely a function of the fact that most voters support abortion.¹⁸ Among state supreme courts whose justices enter office through statewide elections, four have considered whether their state constitution protects a right to abortion.¹⁹ Three²⁰ have said it does.²¹ Take, for example, Montana—a state where sixty percent of voters believe that abortion should be legal in all or many circumstances.²² Gerrymandering²³ has created a supermajority Republican²⁴ state legislature, yet the Montana Supreme Court has repeatedly recognized and reaffirmed that the Montana Constitution’s right to privacy includes a

¹⁷ See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 240 (2020).

¹⁸ See *Public Opinion on Abortion*, PEW RESEARCH CENTER (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [hereinafter PEW].

¹⁹ See *Judicial Selection: An Interactive Map*, THE BRENNAN CENTER (Oct. 11, 2022), <https://www.brennancenter.org/judicial-selection-map>; *State Constitutions and Abortion Rights*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/>.

²⁰ These states are Montana, North Dakota, and Minnesota. See *State Constitutions and Abortion Rights*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/>.

²¹ Idaho is the one directly-elected-in-the-first-instance state supreme court that has found its constitution does not protect abortion rights. *Planned Parenthood Great Northwest v. State*, 522 P.3d 1132 (Idaho 2023). Also of note, the West Virginia Supreme Court in 1993 recognized an abortion right under a no-longer-extant state constitutional neutrality provision requiring it to treat the federal right to abortion neutrally. *Women’s Health Center of West Virginia, Inc. v. Panepinto*, 191 W. Va. 436 (1993).

²² Lauren Spangler & Kate Scimone, *Key Findings from a Statewide Survey of 2024 Likely Voters*, <https://www.middleforkmt.org/feb-23-montana-poll-memo>.

²³ Tom Lutey, *Analyst finds gerrymandering in Montana political maps*, BILLINGS GAZETTE (Dec. 1, 2023), https://billingsgazette.com/news/state-regional/government-politics/montana-psc-map-gerrymandering/article_75e2b842-8feb-11ee-83c3-ff3717d3ec46.html.

²⁴ Montana State Legislature, *Party Control*, <https://leg.mt.gov/civic-education/facts/party-control/>.

robust abortion right.²⁵ Montana indicates that at-large state supreme court elections encourage judicial decisions that reflect voter preferences.

Some critics of independent state constitutional analysis warn of state-level *Lochner*-ism: the prospect that state supreme courts might be eager to undermine rights-*protective* state legislation. At least in conservative states, this is unlikely. Statewide judicial elections make it structurally improbable that a state supreme court would have a more conservative political orientation than a conservative-state legislature. Professor Seifter’s research, for example, indicates that state legislatures are “almost always a state’s least majoritarian branch” by virtue of “districting scheme[s], geographic clustering, and extreme gerrymandering.”²⁶ By contrast, direct elections encourage state supreme court justices to issue rulings that reflect the majority of the entire state’s voters.

B. State supreme courts are better-situated to recognize and enforce new substantive rights than federal courts because state judiciaries do not face a federalism discount.

Advocates can expect better outcomes in state supreme courts than federal ones because, as Chief Judge Sutton has noted, state judiciaries do not face the “federalism discount” that the Supreme Court confronts, by which “the challenge of imposing a constitutional solution on the whole country at once” dissuades it from identifying or expanding affirmative rights.²⁷ Similarly, California Supreme Court Justice Goodwin Liu has noted that:

²⁵ *Armstrong v. State*, 989 P.2d 364, 367 (Mont. 1999) (The Montana Constitution’s privacy clause “broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference.”); *Weems v. State*, 529 P.3d 798 (Mont. 2023) (affirming *Armstrong*).

²⁶ Seifter, *Countermajoritarian Legislatures*, *supra* note 13, at 1735.

²⁷ JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 124 (2022) [hereinafter SUTTON, WHO DECIDES?].

[F]ederal courts may underenforce constitutional norms because of . . .

federalism. The Supreme Court may decline to enforce a constitutional right “to its full conceptual boundaries” because of a concern that its interpretation would not only bind the federal government but also impose uniformity on the states. This concern has no applicability to state courts; they need not worry that their constitutional rulings will constrain the prerogatives of other jurisdictions.²⁸

Oftentimes, the Supreme Court declines to identify a new substantive right not because it believes that the right does not or should not exist, but rather because it is hesitant to impose new precedent on all fifty states. Accordingly, state judiciaries can be pioneers when it comes to identifying and expanding rights.

C. State supreme court decisions grounded in state constitutional law are not subject to judicial review.

Given the federal judiciary’s substantive rights-hostile attitude, it should excite advocates that state court decisions construing state constitutional provisions generally are not subject to federal judicial review. Generally, the Supreme Court does not have jurisdiction to review a state court’s interpretation of its own state constitution: to borrow Chief Judge Sutton’s words, the state court’s constitutional construction is “impervious to challenge.”²⁹ In fact, the “fundamental” principle “that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions” is a long-standing judicial tradition.³⁰ In *Michigan v. Long*, the Supreme Court expressed that out of “[r]espect for the independence of state courts,” it would decline to review a state supreme court decision that is “clearly and expressly” based upon

²⁸ Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1330 (2017) [hereinafter Liu, *Individual Rights*].

²⁹ SUTTON, WHO DECIDES?, *supra* note 27, at 123 (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)).

³⁰ *Minnesota v. National Tea Company*, 309 U.S. 551, 557 (1940).

“bona fide separate, adequate, and independent” state constitutional grounds.³¹ This baseline presumption against federal judicial review of state supreme court constructions of their state constitutions was recently reaffirmed in *Moore v. Harper*.³² Ultimately, the default absence of federal judicial review over state constitutional interpretations is an incredible buffer that makes state courts the ideal venues for substantive rights-related constitutional litigation in 2024. State supreme court constructions of state constitutional abortion rights, for instance, will probably not be subject to federal judicial review as long as the Supreme Court does not hold that the federal Constitution protects fetal personhood.

III. Independent state constitutional analysis

A. Independent state constitutional interpretation.

Thus far, this paper has focused upon why state courts should be an attractive forum for advocates. Yet litigators bringing state constitutional claims to expand rights protections will only be successful if state judiciaries are willing to independently interpret their state constitutions. Today, the opportunity inherent in state constitutional litigation hinges upon divergence: the prospect that a state supreme court will diverge from federal precedent in order to enact rights protections under its state constitution that exceed those guaranteed by the federal Constitution. Accordingly, this paper now shifts its focus from advocates to state supreme court justices. It argues that every state judiciary should engage in independent constitutional interpretation, and give primacy to its state constitution when deciding dual claim disputes.

Since *Dobbs*, state judiciaries across the United States have begun confronting their special responsibility to construe their state constitutions. Finding power in their democratic legitimacy, even conservative-state courts have recognized state constitutional abortion rights.

³¹ *Long*, 463 U.S. at 1040–41.

³² 600 U.S. 1 (2023).

Yet the fact that so many state judiciaries confronted the question of whether their state constitutions protect abortion rights for the first time only after *Dobbs* also illuminates a bizarre practice: many state supreme court justices routinely apply *federal* Constitutional precedent when interpreting their *state* constitutions. Rather than independently interpret their state documents, state judiciaries will look for an identical or similar federal analogue, and say that whatever the Supreme Court has said about the federal clause is what the state provision means, too. In the abortion setting, this federal-state constitutional lockstepping has been disastrous. In states without independent state constitutional doctrine, pregnant people lost abortion rights overnight when the federal precedent to which their state constitutional constructions were yoked was overturned.

1. *State judiciaries can independently interpret their state constitutions.*

As Justice Brennan noted in his pioneering article on the topic, state courts retain the right to “independently consider[] the merits of constitutional arguments and decline[] to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal Constitutions are similarly or identically phrased.”³³ In practice, there are myriad reasons for state courts to independently interpret their state constitutions, even when there exists an identical federal Constitutional analogue. For one, it is legal: *Michigan v. Long* empowers state courts to diverge from federal precedent and independently interpret their state constitutions.³⁴ Even when state and federal Constitutional provisions are the same, state court judges have explicit license to “develop state jurisprudence unimpeded by federal interference.”³⁵ As Chief Judge Sutton has noted, “[s]tate courts have independent authority to construe their constitutions.

³³ Brennan, *State Constitutions*, *supra* note 8, at 500.

³⁴ 463 U.S. 1032, 1041 (1983).

³⁵ *Id.*

Nothing compels the state courts to imitate federal interpretations of the liberty, property, and structural guarantees in the United States Constitution when it comes to the provisions found in their own constitutions, even in guarantees that match the federal ones down to the letter.”³⁶

Ultimately, state judiciaries have broad jurisprudential license to diverge from federal Constitutional precedent.

Justice Liu is one of today’s loudest advocates for independent state constitutional interpretation, and has actually cast it as a critical responsibility for judges. He has written extensively about how “state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*,”³⁷ and uplifted and celebrated the handful of state judiciaries that *do* currently engage in independent constitutional analysis.³⁸ Justice Liu has drawn particular attention, for example, to the Washington Supreme Court’s independent state constitutional analysis procedures,³⁹ under which the court will programmatically examine “[t]he following nonexclusive neutral criteria . . . in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”⁴⁰ Other states should develop similar processes.

2. *Why isn’t independent state constitutional analysis the default?*

³⁶ SUTTON, WHO DECIDES?, *supra* note 27, at 123.

³⁷ Liu, *Individual Rights*, *supra* note 28, at 1315.

³⁸ These states include Arizona, Connecticut, Florida, Hawaii, Idaho, Louisiana, Mississippi, Montana, New Hampshire, North Carolina, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming. *See, e.g.*, Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* 11-3 (4th ed. 2006).

³⁹ Liu, *Individual Rights*, *supra* note 28, at 1314.

⁴⁰ *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

Given state judiciaries' broad license to independently construe their state constitutions, one wonders why so many fail to do so. Justice Liu has offered a pragmatic explanation for why state court judges are so tempted to engage in constitutional "lockstepping," wherein they hew to federal precedent when construing state constitutional provisions with identical or similarly-worded federal analogues:

In practice, it is common for state courts, in deciding a state constitutional issue involving equal protection, due process, or search and seizure, to center the analysis primarily on federal law. One reason is that judges, like all graduates of our nation's law schools, are primarily trained in federal law and find it familiar. Another reason is that federal law in these areas may be abundant and well developed. The instinct of judges, when confronted with an open-textured constitutional provision, is not to innovate but to look for precedent.⁴¹

On the opposite end of the ideological spectrum, Chief Judge Sutton has, similarly, ascribed the lockstepping phenomenon to the fact that state judiciaries and advocates are most comfortable with federal Constitutional law, given that it is routinely taught in law school.⁴²

Other constitutional law scholars have suggested that constitutional lockstepping is a matter of judicial economy. Justice Shirley Abrahamson (the former Chief Justice of the Wisconsin Supreme Court), for example, suggests that "[i]t is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution. . . . How am I as a state judge to decide what the state constitution means? Alas, it would be easier for me just to read the writings of

⁴¹ Liu, *Individual Rights*, *supra* note 28, at 1315.

⁴² SUTTON, WHO DECIDES?, *supra* note 27, at 122.

the United States Supreme Court in the United States Law Week and follow the teachings. Why take the hard road when you can take the easy path?”⁴³ Still, lockstepping is not without costs to others. When states rest their decisions upon federal precedent, their opinions are then subject to federal judicial review—forcing the *federal* judiciary to expend resources. In his *Massachusetts v. Upton* concurrence, for instance, Justice Stevens lambasted the Massachusetts Supreme Judicial Court for “increas[ing] its own burdens as well as ours” by resting a decision upon the federal Constitution, rather than the Massachusetts state constitution.⁴⁴

Yet other scholars theorize that judicial elections encourage constitutional lockstepping.⁴⁵ Professor Pozen, for instance, has asserted that “[e]lected judges are less independent than appointed judges in the sense that the public can vote them out of office if it does not like their decisions.”⁴⁶ Perhaps state judiciaries feel a sense of precariousness that encourages them to hew to federal precedent, which voters might be more comfortable with or sympathetic to. There is at least some empirical evidence that supports this line of reasoning. In 2010, for instance, Iowa voters rejected three Iowa Supreme Court justices (including the then-Chief Justice) after they diverged from federal precedent to rule that the Iowa Constitution’s equal protection clause protected same-sex marriage.⁴⁷ That being said, others have argued that judicial elections might actually empower state court judges to diverge from federal precedent. Chief Judge

⁴³ Shirley Abrahamson, *Reincarnation of State Courts*, 36 S.W. L. J. 951, 965 (1982) [hereinafter Abrahamson, *Reincarnation*].

⁴⁴ *Massachusetts v. Upton*, 466 U.S. 727, 736 (Stevens, J., concurring).

⁴⁵ See SUTTON, WHO DECIDES?, *supra* note 27, at 129.

⁴⁶ David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 271 (2008).

⁴⁷ A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html>; Mallory Simon, *Iowa voters oust justices who made same-sex marriage legal*, CNN POLITICS (Nov. 3, 2010), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html> [hereinafter Sulzberger, *Ouster*].

Sutton has asserted that state court elections should weigh *against* lockstepping, and that popular election procedures for state court judges offer an “underappreciated opportunity to liberate state constitutional law from the persistent tug of federal Constitutional law.”⁴⁸

Voters, Chief Judge Sutton argues, care about local pride and traditions: “No state has residents . . . who generally believe that the people in the national government have superior insights about what to do with their problems, their community, their place.”⁴⁹

While the Iowa anecdote offers a cautionary tale, unusual conditions suggest that it is not representative—and that state judiciaries today should not fear this same sort of one-sided electoral backlash. For one, the Iowa retention election took place mere months after the Supreme Court’s *Citizens United v. Federal Election Commission* ruling, which suddenly opened the floodgates to outside expenditures for the first time.⁵⁰ Republican organizations responded more quickly to *Citizens United* than Democrats did, and poured an estimated \$1.4 million⁵¹ into Iowa’s judicial race while the justices, theretofore unaccustomed to campaigning or major outside spending, failed to raise any campaign money or make public appearances until the final days.⁵² Within a year, Iowa Democrats and justices had learned their lesson. By 2012, progressive groups matched conservative spending, and Iowa voters retained Justice David Wiggins, who had also joined the gay marriage decision.⁵³

⁴⁸ SUTTON, WHO DECIDES?, *supra* note 27, at 129.

⁴⁹ *Id.* at 130.

⁵⁰ 558 U.S. 310 (2010).

⁵¹ Jennifer Jacobs, *\$833,000 spent on Iowa judicial vote*, DES MOINES REGISTER (Oct. 25, 2013), <https://www.desmoinesregister.com/story/news/1/01/01/833000-spent-on-iowa-judicial-vote/3185815/>.

⁵² Sulzberger, *Ouster*, *supra* note 47, at 129.

⁵³ See *The New Politics of Judicial Elections 2011-2012*, THE BRENNAN CENTER (2013), <https://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf>.

3. *Some states avoid construing their state constitutions by opting to resolve dual claim disputes on federal grounds.*

While some state judiciaries import federal precedent when deciding state constitutional questions, others try to *avoid* construing their state constitutions altogether by resolving dual claim disputes—cases that present both state constitutional and federal Constitutional issues—on federal grounds.⁵⁴ The relevant precedent for dual claim dispute resolution comes from *Michigan v. Long*, in which the Supreme Court held that a state court is welcome to resolve a claim on either state or federal grounds, whichever it prefers.⁵⁵ Today, state supreme courts follow one of three approaches to dual claim disputes. First, many states have adopted a lockstep approach by which they will resolve the state and federal questions identically, by applying federal precedent to the state constitutional construction.⁵⁶ A second group of states engages in an interstitial (sometimes called “supplemental”) approach, where they will prioritize the federal claim, and probe first whether the right at issue is federally protected. Under the interstitial model, the court will analyze its state constitution as a possible source of “supplementing or amplifying” the right only if it finds that the federal Constitution does *not* protect the right at issue.⁵⁷ Even under the interstitial approach, state courts generally treat federal

⁵⁴ Abrahamson, *Reincarnation*, *supra* note 43, at 964 (noting that most state court judges “tend not to analyze their own constitutional provision if there is a federal counterpart”).

⁵⁵ See *Michigan v. Long*, 463 U.S. 1032 (1983) (note, though, that if a state court must offer a clear statement that its holding rests on *state* constitutional grounds in order to avoid judicial review).

⁵⁶ Justice Utter, the former Chief Justice of the Washington Supreme Court, and his former clerk, Sanford E. Pitler, argue that “[i]n reality, this is a non-approach to state interpretation because it results in ‘absolute deferential conformity’ with Supreme Court interpretations.” Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 646 (1987) [hereinafter Utter, *State Constitutional Argument*].

⁵⁷ *Id.* at 648.

precedent as persuasive in order to “foster uniformity and avoid conflict with federal precedent.”⁵⁸

A third approach to dual claim disputes—which this paper endorses—is state constitutional primacy. Under a primacy approach, a state court confronted with a dual claim dispute will look first to its state constitution when determining whether the right at issue is protected. A state court applying the primacy approach will at the outset independently interpret its state constitution as the fundamental source of law, and turn to the federal Constitution only if it finds that its state constitution does not protect the right in question.⁵⁹ One particularly vocal advocate of the primacy approach is former Oregon Supreme Court Justice Hans Linde, who insisted that “[c]laims raised under the state constitution should always be dealt with and disposed of before reaching a [federal Constitutional claim].”⁶⁰ The primacy approach offers several benefits. For one, it promotes rights stability—particularly in eras, like abortion, when the Supreme Court is narrowing protections. It is by now clear that federal Constitutional guarantees are hardly stable. The primacy approach ensures that state precedent remains good law when federal precedent shifts.

Moreover, only under the primacy approach can state supreme courts avoid federal judicial review. When states follow the lockstep or interstitial approaches, the Supreme Court can assert jurisdiction to reverse the state judiciary’s interpretation of federal Constitutional

⁵⁸ *Id.* at 648–49; *see also* Abrahamson, *Reincarnation*, *supra* note 43, at 964 (Justice Abrahamson notes that the lockstep and interstitial approaches are attractive to state courts given “an understandable human tendency on the part of state judges to view a United States Supreme Court decision on a particular topic as the absolute, final truth. The Supreme Court said it; it must be right,” not to mention “habit” and “simplicity and ease. . . . It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution.”).

⁵⁹ Utter, *State Constitutional Argument*, *supra* note 56, at 647.

⁶⁰ Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970) [hereinafter Linde, *Without “Due Process”*].

law.⁶¹ But if a state has followed the primacy approach, federal courts will not. In fact, Supreme Court justices have endorsed the primacy approach on federal judicial economy grounds. In *Massachusetts v. Upton*, Justice Stevens went so far as to assert that the Supreme Judicial Court of Massachusetts had made an “error” when it decided a case “on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of Massachusetts law.”⁶² He posited that “[t]he proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. . . . I believe the Supreme Judicial Court of Massachusetts unwisely and unnecessarily invited just such review in this case.”⁶³ All in all, only the primacy approach to dual claim disputes promotes the independent development of state constitutional law.

B. Democratic rationales for independent state constitutional interpretation.

1. *State constitutions should be interpreted independently because they are uniquely dynamic democratic documents.*

State constitutions should be independently interpreted and given primacy over the federal Constitution in dual claim disputes because they are living democratic documents that capture the political preferences of a state’s residents better than the federal Constitution does. Today, it is relatively easy for voters to amend a state constitution as attitudes evolve, or to fix a decision that the voters believe its state supreme court has gotten wrong. While Article V stipulates a supermajority requirement to ratify a federal Constitution amendment (facilitating what has been referred to as an “intergenerational power grab”⁶⁴), in most states a bare majority

⁶¹ Utter, *State Constitutional Argument*, *supra* note 56, at 651.

⁶² *Massachusetts v. Upton*, 466 U.S. 727, 735 (Stevens, J., concurring).

⁶³ *Id.* at 736–37 (Stevens, J., concurring).

⁶⁴ See Louis Michael Seidman, *On Constitutional Disobedience* 41 (2012).

of voters can amend the state constitution via a general election ballot.⁶⁵ Every state except Delaware empowers its voters to ratify proposed—either by state legislature⁶⁶ or citizen-amendment process⁶⁷—constitutional amendments, and most require only a simple majority (50 percent plus one) vote.⁶⁸ Of these—and particularly helpful in states where gerrymandering has generated countermajoritarian legislatures—eighteen have constitutional initiative processes by which citizens may collect petition signatures and place constitutional amendments on the ballot directly for a statewide vote.⁶⁹ In sum, “a mistaken or an ill-conceived constitutional decision is . . . easier to fix at the state level than it is at the federal level.”⁷⁰ In this regard, state constitutions are structurally distinct from the federal Constitution. While the ossified federal Constitution has only been amended in twenty-seven instances, state constitutions have been amended an average of one hundred and fifty times.⁷¹

Because state constitutions are dynamic, democratic documents, they should be the first source of doctrine that state courts turn to when construing rights. In effect, state supreme courts cast aside the will of the voters when they decline to construe state constitutions independently, or avoid the state constitution altogether by resolving a dual claim dispute on federal grounds. As

⁶⁵ See *Amending state constitutions*, BALLOTPEDIA, https://ballotpedia.org/Amending_state_constitutions.

⁶⁶ John Dinan, *Constitutional Amendment Processes in the 50 states*, STATE COURT REPORT (Jul. 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> (Most states permit voters to ratify legislature-crafted amendments by a simple majority vote. But three states set a supermajority threshold — a two-thirds vote in New Hampshire, a three-fifths vote for most amendments in Florida, and a 55-percent threshold for most amendments in Colorado. Four states — Hawaii, Minnesota, Tennessee, and Wyoming require amendments to be approved by a majority of voters in the entire election; in these states, voters who abstain from voting on an amendment essentially count as no votes.).

⁶⁷ *Id.* (Once citizen-initiated amendments qualify for the ballot, they generally have to be ratified in the same fashion as legislature-referred amendments, by a simple majority of voters in most states and by a supermajority of voters in several states. But in Nevada, citizen-initiated amendments face an additional hurdle — they must be approved by a majority of voters in two consecutive elections.).

⁶⁸ *Id.*

⁶⁹ Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 876 (2021) [hereinafter Bulman-Pozen & Seifter, *Democracy Principle*].

⁷⁰ SUTTON, *WHO DECIDES?*, *supra* note 27, at 125.

⁷¹ See *id.* at 332.

inherently democratic documents, state constitutions merit independent consideration and interpretation—not federal lockstepping. Ultimately, the accessibility and attainability of state constitutional amendment procedures should empower state court justices to step beyond federal precedent’s protective buffer.

2. *Popularly-elected, democratically-accountable state judiciaries are structurally well-situated to establish new protective rights.*

Elected state judiciaries should conduct independent state constitutional interpretation because they are democratically accountable bodies. Unlike federal judges—who enjoy lifetime tenure and are nominated and confirmed by branches with baked-in antimajoritarian features—most state supreme court justices are directly elected in at-large statewide elections.

Consequently, state judiciaries enjoy a robust democratic mandate to recognize and explore new protective rights. State judiciaries should be independently interpreting their state constitutions in order to contribute to an ongoing, iterative constitutional conversation with their voters, who in turn can easily amend their state constitutions to overrule state court decisions that they feel were wrongly decided.

Given that state supreme courts are among the most democratically-situated institutions in the United States, the judicial usurpation concerns sometimes raised in the federal context do not exist at the state level. The *Dobbs* majority decried that “wielding nothing but ‘raw judicial power,’ the [*Roe* and *Casey*] Court[s] usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.”⁷² This usurpation concern loses salience when the constitutional decision-makers are regularly and

⁷² 142 S.Ct. 2228, 2265 (2022); *see also* *City of Chicago v. Morales* 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) (The entire practice of using the Due Process Clause [of the federal Constitution] to add judicially favored rights . . . is in my view judicial usurpation.”).

directly elected. In reality, state judiciaries are *exactly* who should be addressing questions of profound moral and social importance—and they should be independently interpreting their state constitutions to do so.

Opponents of elected judiciaries tend to focus upon the corrupting impacts of special interests.⁷³ It is certainly true that well-endowed special interest groups can have an outsized impact on political outcomes—as illustrated by the 2010 Iowa retention elections, where out-of-state money poured in to unseat justices who had issued a novel opinion in favor of gay marriage. Yet statewide elections may actually temper the disruptive influence of big donors. Professor Seifter notes that, historically, proponents of judicial elections have “tended to believe that influences of some sort were inevitable, and that the influence of the whole people [is] preferable to the influence of smaller groups.”⁷⁴ Furthermore, there is no reason to believe that the special interests that wade into statewide judicial elections are not also present in the federal judiciary. In fact, in both selection⁷⁵ and operation,⁷⁶ the federal judiciary has proved perhaps *more* susceptible and responsive to special interests than state judiciaries.

⁷³ See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (noting that, in partisan judicial elections, “campaign contributions from business groups are . . . associated with judicial votes in favor of business interests”).

⁷⁴ Seifter, *Countermajoritarian Legislatures*, *supra* note 13, at 1774 (quoting Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 203 (1993)).

⁷⁵ See, e.g., Heidi Przybyla, *Dark money and special deals: How Leonard Leo and his friends benefited from his judicial activism*, POLITICO (March 1, 2023), <https://www.politico.com/news/2023/03/01/dark-money-leonard-leo-judicial-activism-00084864> (“The Federalist Society co-chairman’s lifestyle took a lavish turn after he became Donald Trump’s adviser on judicial nominations.”); Robert O’Harrow Jr., *A conservative activist’s behind-the-scenes campaign to remake the nation’s courts*, WASH. POST (March 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/> (“Leonard Leo helped conservative nonprofits raise \$250 million from mostly undisclosed donors in recent years to promote conservative judges and causes.”).

⁷⁶ See, e.g., David Smith, *Clarence Thomas faces impeachment calls after reports of undisclosed gifts*, THE GUARDIAN (April 6, 2023), <https://www.theguardian.com/us-news/2023/apr/06/clarence-thomas-supreme-courts-gifts-republican-megadonor> (“Clarence Thomas, the most conservative justice on the US supreme court, is facing renewed calls for impeachment after it was reported that for two decades he has accepted undisclosed luxury gifts from a Republican mega-donor.”).

3. *Democratically legitimate judiciaries should be at the forefront of developing methods of constitutional interpretation.*

Yet another argument in support of independent state constitutional interpretation is that democratically legitimate judiciaries should be at the forefront of developing constitutional method. While originalism is currently in vogue, state judiciaries need not ground state constitutional constructions in local traditions and history.⁷⁷ As living documents, state constitutions merit their own interpretive techniques, and in practice countless states have departed from federal precedent because they “simply disagreed” with the Supreme Court, or “employ[ed] the same analytical approach [to] reach[] different doctrinal conclusions.”⁷⁸ In one case featuring a particularly humorous fact pattern, for example, the New Jersey Supreme Court diverged from the Supreme Court to hold that the New Jersey Constitution protects a reasonable expectation of privacy in garbage left at curbside—but not on state-specific grounds. “[T]here is no unique New Jersey state attitude about garbage,” the Court wrote.⁷⁹ “Our differences with the [Supreme Court] rest on other grounds. . . . [T]he trouble with those [federal] cases is that they are flatly and simply wrong as the matter of the way people think about garbage.”⁸⁰ Indeed, it is hard to fathom that the Supreme Court has an interpretive method for adjudicating trash that is somehow innately superior to New Jersey’s.

Often, state supreme courts will only depart from federal precedent when they can identify a state-specific meaning for the provision at issue, but that is no precondition for

⁷⁷ For more on this, see *Home Building and Loan v. Blaisdell*, 290 U.S. 398, 443 (1934) (“If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — “We must never forget that it is a constitution we are expounding.”).

⁷⁸ Liu, *Individual Rights*, *supra* note 28, at 1317.

⁷⁹ *State v. Hempele*, 576 A.2d 793, 814–25 (N.J. 1990).

⁸⁰ *Id.*

independent analysis.⁸¹ The Vermont Supreme Court, for example, has indicated that when confronting a state constitutional question, “neither this Court or any state court should refrain from following a different path from that taken by the United States Supreme Court unless the court can rely on unique state sources,” and notes that it “will consider all types of argument, including historical, textual, doctrinal, prudential, structural, and ethical arguments.”⁸² Similarly, Justice Liu has stated that while state-specific text and history can be useful starting points, “it is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries.”⁸³ Justice Liu has approvingly observed, for instance, that “state courts did not employ any state-specific reasoning in interpreting their state equal protection guarantees” to protect same-sex marriage: “They simply disagreed with or went beyond federal precedent.”⁸⁴ Ultimately, state judiciaries have a long leash to interpret their state constitutions however they see fit, using whichever theories of interpretation they prefer.⁸⁵

While “first-principle inquiries” into “local language, context, and history,”⁸⁶ can be informative, state constitutional analyses are *not* yoked to state-specific sources alone. Justice Liu notes in his review of Chief Judge Sutton’s book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, that:

⁸¹ Justice Liu has written that “[t]he problem is not that state court decisions departing from federal precedent are unreasoned or results-oriented. It is that the reasons for departing seem illegitimate when they include no state-specific grounds and consist of analysis no different than what a federal court would undertake in addressing the same issue under the Federal Constitution.” Liu, *Individual Rights*, *supra* note 28, at 1316.

⁸² *State v. Morris*, 680 A.2d 90, 101-02 (Vt. 1996).

⁸³ Liu, *Individual Rights*, *supra* note 28, at 1312.

⁸⁴ *Id.* at 1319.

⁸⁵ See JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018) at 20 (“For too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions.”).

⁸⁶ *Id.* at 177.

When state-specific sources do not yield helpful guidance on a constitutional question—and this will often be the case—state courts properly look to other sources, including federal and state decisions interpreting similar language in the Federal Constitution or other state constitutions. The *sine qua non* of independence in state constitutional interpretation is not reliance on state-specific reasoning; it is analytical independence.⁸⁷

While contemporary federal Constitutional precedent is grounded upon the Supreme Court’s reading of the federal Constitution’s original public meaning, state judiciaries can choose to center different (including state-specific) history and traditions by engaging in independent state constitutional analysis—or, they can choose to reject originalism altogether.

4. *Only through independent state constitutional analysis can states live up to their ideal function as laboratories of democracy.*

Next, only by engaging in independent constitutional analysis can states live up to their ideal democratic function. As Justice Brandeis famously wrote, “a single courageous State may, if its citizens choose, serve as a laboratory” in order to “try novel social and economic experiments without risk to the rest of the country.”⁸⁸ Critically, state constitutional experimentation can facilitate the development of federal Constitutional law from the bottom up.

Historically, federal courts have studied state constitutional holdings when deciding whether to federalize a right.⁸⁹ In its opinion holding that the Fourteenth Amendment protects same-sex marriage, for example, the *Obergefell v. Hodges* majority

⁸⁷ Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1338 (2019) (book review) [hereinafter Liu, *State Courts*].

⁸⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸⁹ JEFFREY S. SUTTON ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* 6 (4th ed. 2022).

extensively cited *Goodridge v. Department of Public Health*,⁹⁰ a Massachusetts Supreme Judicial Court case finding that the Massachusetts Constitution protects same-sex marriage—the Court even noted that “the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.”⁹¹ There is no dialogue to be had when states merely import federal precedent into their state constitutional constructions.

Furthermore, states can shape national policy conversations by engaging in independent state constitutional analysis. Chief Judge Sutton has noted that “[i]f a problem seems to defy a national solution or Americans become impatient in identifying one, that leaves considerable room for local innovation and leadership.”⁹² Recently, for example, legal scholars affiliated with the Law and Political Economy (LPE) movement have suggested that states might coordinate amongst themselves to establish and promote national policies before the federal government itself takes action on an issue. These scholars have encouraged densely-populated, economically powerful states to coordinate their own social and industrial policy while they wait for the federal government to catch up:

The structural constitutional question is how much can we do with a coalition of progressive states, working in a much more self-conscious, much more closely-coordinated fashion to leverage the enormous economic power of these states to shape the political economy [of the United States] . . . that’s a massive source of power. . . . We appropriately think of the federal system

⁹⁰ 798 N.E.2d 941 (2003).

⁹¹ 576 U.S. 664, 663 (2015).

⁹² SUTTON, WHO DECIDES?, *supra* note 27, at 6.

because of all the people who will be left outside of reasonably social democratic arrangements, but what about the half of people who might actually go there earlier?⁹³

States retain immense power, and our Constitutional design encourages them to use it. By engaging in independent state constitutional analysis, states can contribute to national policy conversations and breathe life into our structure of federalism.

5. *Responses to recent abortion-hostile rulings illuminate the democratic legitimacy of state-constitution making.*

Recent abortion-*hostile* holdings from the Florida Supreme Court⁹⁴ and the Arizona Supreme Court⁹⁵ illuminate just how constitutionally contested the question of abortion rights has become. Inevitably, liberals will not win every constitutional battle—a fact that reenforces how independent state constitutional interpretation should appeal to conservatives, in addition to progressives. But, in the long run, democracy will win the war. On the one hand, these recent abortion-hostile holdings might be explained (at least in part) by features of the Florida and Arizona Supreme Court judicial selection processes that render these states’ supreme court justices less directly democratically representative than elsewhere. In both states, justices are initially selected by the governor, rather than the electorate.⁹⁶ And judicial appointments are irregular. Arizona’s recently-elected Democratic Governor Katie Hobbs, for instance, has not yet had the opportunity to appoint anyone to the Arizona Supreme Court (rather, it is entirely made

⁹³ Yochai Benkler, Remarks at the Georgetown Law Center’s and the American Constitution Society’s “Reviving Progressive Constitutional Political Economy” Conference, at 10:53 (Nov. 18, 2022), <https://www.c-span.org/video/?524348-8/legal-scholars-future-political-economy>).

⁹⁴ *Planned Parenthood v. Florida*, SC2022-1050 (Fla. 2024).

⁹⁵ *Planned Parenthood v. Mayes*, CV-23-0005-PR (Ariz. 2024).

⁹⁶ See *Judicial Selection: An Interactive Map*, THE BRENNAN CENTER (Oct. 11, 2022), <https://www.brennancenter.org/judicial-selection-map>.

up of Republican appointees).⁹⁷ In time, an organized electorate will have an opportunity to reject and replace the justices that curtailed abortion rights—an opportunity not afforded for the federal judiciary.

What’s more, ongoing state constitutional amendment efforts in fact *reinforce* the democratic legitimacy of state-constitution making. This November, Florida voters will weigh in on a state constitutional amendment that would protect and expand abortion rights—a ballot question that the Florida Supreme Court has itself blessed.⁹⁸ Meanwhile, Arizona voters have already secured enough signatures to place an abortion-protective initiative on its own ballot.⁹⁹ That Floridians and Arizonans who disagreed with their state supreme courts’ decisions were able to immediately activate amendment procedures to overturn them situates state constitution-making as far more democratically legitimate than federal constitution-making. There is no retention election for federal justices, and federal Constitutional amendments are practically impossible. But at the state level, democratic accountability is swift—and may very well prove punishing.¹⁰⁰ As Arizona Justice Lopez wrote in his majority opinion, the Arizona Supreme Court is “constitutionally obligated’ to defer to “the mutable will of [its] citizens.”¹⁰¹ While federal Supreme Court decisions can persist for generations without any meaningful opportunity

⁹⁷ See Meet the Justices, ARIZONA JUDICIAL BRANCH, <https://www.azcourts.gov/meetthejustices/>.

⁹⁸ See Patricia Mazzei, Florida Court Allows 6-Week Abortion Ban, but Voters Will Get to Weigh in, THE NEW YORK TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/us/florida-abortion-law-supreme-court.html>.

⁹⁹ See Stacey Barchenger & Reagan Priest, ‘This changes everything’: Arizona’s 1864 ban ‘supercharges’ abortion ballot initiative, THE ARIZONA REPUBLIC (Apr. 10, 2024), <https://www.azcentral.com/story/news/politics/arizona/2024/04/09/arizona-abortion-ban-high-court-ruling-supercharges-ballot-initiative/73261962007/> (quoting Attorney General Kris Mayes, a Democrat, saying that the Arizona Supreme Court’s abortion-hostile ruling “changes everything. I think it supercharges the ballot initiative and it supercharges the elections of all pro-choice candidates.”).

¹⁰⁰ See generally, Sarah McCammon, *Abortion rights win big in 2023 elections, again*, NPR (Nov. 8, 2023), <https://www.npr.org/2023/11/08/1211429268/abortion-rights-2023-election-ohio-virginia-kentucky>.

¹⁰¹ *Planned Parenthood v. Mayes*, CV-23-0005-PR, ¶ 63 (Ariz. 2024).

for correction, Arizona’s voters will have an opportunity to rebuke the state supreme court’s anti-abortion holding within months.

C. The conservative case for divergence.

This paper adopts a progressive lens, advocating for independent state constitutional analysis as a mechanism to erode racial, class, and gender hierarchies. Yet there also exists a strong *conservative* case for independent state constitutional analysis. In fact, in recent years divergence’s strongest advocate has been Chief Judge Sutton, a self-described proud “textualist and originalist.”¹⁰² Remarkably, independent state constitutional analysis is a theory of interpretation that lawyers across the ideological spectrum can agree upon.

1. *Independent state constitutional analysis honors originalist principles.*

Importing federal Constitutional precedent when construing a state constitutional provision violates an originalist judge’s responsibility to probe a text for its specific meaning at the time of enactment. Even when a state constitutional provision has an identical federal analogue, originalists maintain a duty to probe their state’s contemporaneous local histories and traditions in order to accurately construe the meaning of constitutional text at the time it was ratified.¹⁰³ Chief Judge Sutton, for example,¹⁰⁴ has argued that only independent state constitutional analysis “respects and

¹⁰² *Two Federal Judges on How They Interpret the Constitution*, THE NATIONAL CONSTITUTION CENTER (Oct. 10, 2019), <https://constitutioncenter.org/news-debate/podcasts/two-federal-judges-on-how-they-interpret-the-constitution> (“I am an originalist and I you know, I don't think it's a sin. I am proud of it.”) [hereinafter *Two Federal Judges*].

¹⁰³ Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 181–82 (1984) (“Some state courts make too much of identity or slight differences between the texts of similar constitutional clauses. The first step is to overcome the sense that divergence from Supreme Court doctrines is more legitimate when the state’s text differs from its federal counterpart than when they are the same. In truth the state court is equally responsible for reaching its own conclusion in either case. A textual difference only makes this easier to see.”); *See also* Neal Katyal at *Moore v. Harper* oral argument: “the state court [analyzes] under its own processes depending on that text and the history in that state, which differs from state to state for reasons Judge Sutton says.” Transcript of Oral Argument at 97, *Moore v. Harper* (No. 21-1271).

¹⁰⁴ *Two Federal Judges*, *supra* note 102 (“I am an originalist and I you know, I don't think it's a sin. I am proud of it.”).

honors . . . nationwide differences in culture, history, and geography by allowing state courts to account for local conditions in interpreting their own charters.”¹⁰⁵ State constitutions tend to be heavily-amended documents, and each is imbued with its own unique history and local traditions. Justice Liu, for his part, has observed that:

Some state constitutional provisions with similar wording as their federal counterparts have demonstrably state-specific meanings. Consider, for example, whether the constitutional right to a jury trial applies to persons charged with petty crimes. The U.S. Supreme Court has said that “[s]o-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.” The Maine Supreme Court reached a different conclusion under the state constitution’s similarly worded guarantee. The Maine high court cited historical sources and early precedents showing that in Massachusetts (of which the District of Maine was a part), “the principle that a defendant charged with a criminal violation is entitled to a trial by jury encompassed not only the ‘serious’ but also the ‘petty’ violations of the criminal law.”¹⁰⁶

Furthermore, unlike the federal Constitution, many state constitutions currently look much different than their first iterations. As Professors Bulman-Pozen and Seifter note, “state constitutions have been drafted, replaced, and amended in response to national historical developments. . . . the frequent rewriting and amendment of state constitutions

¹⁰⁵ SUTTON, WHO DECIDES?, *supra* note 27, at 125.

¹⁰⁶ Liu, *State Courts*, *supra* note 87, at 1328.

means that most reflect numerous historical periods, not a single one.”¹⁰⁷ Originalist federal judges interpret the meaning of the static federal Constitution at the time that it became law—usually the original public meaning as of 1787 or, for the Reconstruction Amendments, around 1870. To put it simply: for state judiciaries to import precedent built upon what the federal Constitutional text purportedly meant in the 18th or 19th centuries when interpreting a state constitutional provision that was most likely ratified or updated far more recently is unsound originalism. Independent constitutional analysis is necessary to identify “the meaning that [the relevant constitutional text] had *at the time people ratified it*.”¹⁰⁸ All originalists should agree that for a state court to decline to probe state-specific meanings of the text, or to set aside local history and traditions and instead hew to federal Constitutional textual analysis, is unsound constitutional interpretation. Ultimately, to merely import federal Constitutional precedent into state constitutional analysis violates key principles of originalism.

2. Independent state constitutional analysis is not freewheeling judicial policy-making.

Critics of independent state constitutional interpretation warn that it empowers state supreme courts to engage in “results-oriented jurisprudence—a tactic for evading federal precedents that state courts don’t like.”¹⁰⁹ Yet many states have developed robust guidelines for how to independently interpret their state constitutions. As noted, the Washington Supreme Court maintains a six-criteria rubric—which it established in 1986 in response to “the recent retrenchment of the United States Supreme Court in [the] area of [protecting civil liberties]”—to

¹⁰⁷ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 69, at 866.

¹⁰⁸ Testimony of Amy Coney Barrett at the Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 2), at 9:10 (Oct. 13, 2020), <https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1>.

¹⁰⁹ Liu, *Individual Rights*, *supra* note 28, at 1311.

guide its state constitutional analysis.¹¹⁰ Similarly, the Illinois Supreme Court has developed standards to determine when it will diverge from federal Constitutional precedent.¹¹¹ Far from being random or results-oriented, state judiciaries can and do engage in methodical, regulated independent analyses, grounded in principled theories of constitutional interpretation.

3. Independent state constitutional analysis honors federalism principles.

Finally, state courts can and should diverge from federal Constitutional precedent because mechanical adoption violates core principles of federalism. As Justice Brennan wrote, “[e]very believer in our concept of federalism, and I am a devout believer, must salute” state court judges and practitioners who “scrutinize constitutional decisions by federal courts” and instead rest their arguments and judicial decisions on independent state constitutional grounds.¹¹² Indeed, those who care about federalism should recognize that there is no meaningful reason for a state to line up behind the Supreme Court’s federal Constitutional precedent when state judiciaries possess the power to interpret their state constitutions independently.

Independent state constitutional analysis empowers state judiciaries with an opportunity to address unfavorable federal precedent, not to mention “cross-pollinat[e]” constitutional concepts among states.¹¹³ Sometimes, the Supreme Court’s reasoning is just plain incorrect, or the passage of time bears out doctrinal deficiencies that state court judges can then avoid or correct. Justice Liu has observed that “[t]he Framers understood that a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy. . . . State constitutionalism is properly

¹¹⁰ *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

¹¹¹ *See People v. Tisler*, 469 N.E.2d 147, 157 (Ill. 1984).

¹¹² Brennan, *State Constitutions*, *supra* note 8, at 502.

¹¹³ Liu, *Individual Rights*, *supra* note 28, at 1322.

understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy.”¹¹⁴ Only by engaging in independent constitutional analysis can state judiciaries fulfill federalist commitments.

IV. Expanding abortion rights through state constitutional litigation

This paper now turns to a setting in which many states judiciaries (including in conservative states) have only recently begun to independently construe their state constitutions: abortion rights.¹¹⁵ Over the past eighteen months, many state judiciaries have for the first time confronted the question of whether their state constitutions protect the right to an abortion. Pro-abortion advocates have found remarkable success in arguing that state constitutions protect abortion rights—likely because state judiciaries tend to reflect the majoritarian preferences of their states’ voters, and most voters support abortion rights.¹¹⁶ Still, the story of state constitutional abortion rights should also serve as a warning. As Justice Abrahamson has noted, “[w]hen state courts indiscriminately blanket United States Supreme Court decisions into the state’s jurisprudence by basing their holdings on federal law, the law of the state changes each time the United States Supreme Court changes its decisions.”¹¹⁷ Indeed, in the states that engage in precedential lockstepping, countless pregnant people were in the weeks and months immediately after *Dobbs* deprived of abortions while they waited for their state supreme courts to determine the state constitutionality of the procedure for the first time.¹¹⁸ While several state

¹¹⁴ *Id.* at 1335–36.

¹¹⁵ Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html>.

¹¹⁶ See PEW, *supra* note 18.

¹¹⁷ Abrahamson, *Reincarnation*, *supra* note 43, at 966.

¹¹⁸ Charles A. Smith, *What It's Like to Have an Abortion Denied by Dobbs*, IN THESE TIMES (May 22, 2023), <https://inthesetimes.com/article/what-its-like-to-have-an-abortion-denied> (“In the confusing aftermath of the verdict and the new bans, Lationna also feared if she left the state to get an abortion, she’d be arrested upon her return. (Mississippi’s ban charges anyone who performs an abortion in the state with a felony, although officials have said they won’t prosecute people who seek abortions themselves.)”).

judiciaries have since construed their state constitutions to protect abortion rights, access was lost in the interim. Researchers estimate that in the six months after *Dobbs*, at least 66,510 people sought and were unable to obtain a legal abortion in their home state.¹¹⁹ Had state judiciaries maintained a practice of independently interpreting their state constitutions from the outset, the right to abortion would already have been codified in many states on the day that *Dobbs* went into effect.

By requiring state judiciaries to develop robust state constitutional precedent, independent state constitutional analysis ensures that individuals retain critical protections when Supreme Court precedent shifts. Clearly, the post-*Dobbs* scramble to determine in which states abortion remained protected would have been ameliorated had more state courts independently articulated a right to abortion in their state constitutions prior to *Dobbs*. Ultimately, *Dobbs* offers a powerful rejoinder to the contention proffered by some bold critics that “the classical federalism model of distinct bodies of law, providing double protection, has become unnecessary due to the extensive incorporation of the federal Bill of Rights.”¹²⁰ Another major critique of independent state constitutional analysis and the primacy approach concerns inefficiency: the prospect that “a duplication of [constitutional interpretation] effort necessarily increases the costs generated by the legal system.”¹²¹ Yet *Dobbs* makes clear that the benefits of potentially superfluous state constitutional precedent far outweigh the costs. As Justice Brennan asserted, “state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. . . . The legal revolution which has brought federal law to the fore must not be

¹¹⁹ Maggie Koerth & Amelia Thomson-DeVeaux, *Over 66,000 People Couldn't Get An Abortion In Their Home State After Dobbs*, FIVETHIRTYEIGHT (Apr. 11, 2023), <https://fivethirtyeight.com/features/post-dobbs-abortion-access-66000/> [hereinafter Koerth, *Over 66,000 People Couldn't Get An Abortion*].

¹²⁰ Utter, *State Constitutional Argument*, *supra* note 56, at 648.

¹²¹ Earl Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 985, 1005 (1985).

allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”¹²² As has become clear in the abortion context, one major benefit of independent state constitutional analysis is that it ensures that a state’s residents retain protections when Supreme Court precedent shifts.

A. Oklahoma identified a state constitutional abortion right post-*Dobbs*.

In early 2023, the Oklahoma Supreme Court confronted the issue of whether the Oklahoma Constitution protects the right to terminate a pregnancy for the first time. It found a limited abortion right. At the outset of its holding, the unanimous majority in *Oklahoma Call for Reproductive Justice v. Drummond* explained that the Oklahoma Supreme Court had never before independently considered the state constitutional question because it had previously engaged in federal precedential lockstepping:

Since *Roe*, this Court has followed the U.S. Supreme Court’s interpretation of the federal Due Process Clause when deciding issues related to abortion. It was unnecessary for this Court to determine whether there existed an independent right to terminate a pregnancy under the Oklahoma Constitution.¹²³

Acknowledging the *Dobbs* majority’s finding that “various state laws did not support a history or tradition of a national right to an abortion,” the Oklahoma Supreme Court nonetheless probed its own state-specific history and tradition, and found that while “*Dobbs* focused on the criminal element” of various state abortion proscriptions, “that is only half the story in Oklahoma. . . . The law in Oklahoma has long recognized a woman’s right to obtain an abortion in order to preserve her life.”¹²⁴ Ultimately, the Oklahoma Supreme Court located the “right to an abortion when it

¹²² Brennan, *State Constitutions*, *supra* note 8, at 491.

¹²³ *Oklahoma Call for Reproductive Justice v. Drummond*, 2023 WL 2583364, ¶ 7 (Okla. 2023).

¹²⁴ *Id.* at ¶ 8.

[is] necessary to preserve the life of the pregnant woman” in the Oklahoma Constitution’s due process clause,¹²⁵ which reads, “[n]o person shall be deprived of life, liberty, or property, without due process of law”¹²⁶ and is nearly identical to the federal Constitution’s.¹²⁷ The court noted too that an abortion right “can also be viewed as . . . protected under the inherent rights provided in article II, section 2 of the Oklahoma Constitution,”¹²⁸ which reads, “[a]ll persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry,”¹²⁹ and does not have a federal analogue.¹³⁰

Notably, the Oklahoma Supreme Court made no indication that the abortion protection grounded in the state’s due process clause was informed by or contingent upon the existence of its inherent rights clause. While courts sometimes look to other constitutional provisions when analyzing the meaning of a particular clause¹³¹—in fact, Justice Blackmun in *Roe v. Wade* conducted a holistic review of other Constitutional provisions to conclude that a fetus is not a person within the meaning of the Fourteenth Amendment¹³²—the Oklahoma Supreme Court did not do so here. Rather, the Court read the right to terminate a pregnancy to preserve the mother’s life into the Oklahoma Constitution’s due process clause, *standing alone*. This was a significant doctrinal move in that it destabilizes the reasoning upon which at least one state’s abortion-restrictive state constitutional doctrine is built. In *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State (“PPH III”)*,¹³³ the Iowa Supreme Court overturned an existing state

¹²⁵ *Id.*

¹²⁶ OKLA. CONST. art. 2, § 7.

¹²⁷ U.S. CONST. amend. XIV, § 1.

¹²⁸ *Id.*

¹²⁹ OKLA. CONST. art. 2, § 2.

¹³⁰ The Court also held that any state law limiting the “the right to terminate a pregnancy to preserve the woman’s life” would henceforth be evaluated using strict scrutiny. *Drummond*, 2023 WL 2583364, ¶ 11 (Okla. 2023).

¹³¹ See Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 774 (1999).

¹³² 410 U.S. 113, 157 (1973).

¹³³ 975 N.W.2d 710 (Iowa 2022).

constitutional holding (colloquially referred to as *PPH II*¹³⁴) that the Iowa Constitution’s due process clause protected abortion rights on the grounds that “[d]octrinally, *PPH II* stands virtually alone, both inside and outside Iowa. *PPH II* found a fundamental right to an abortion where others had not: in the due process clause . . . While some other state supreme courts have found a fundamental right to an abortion within their state constitution . . . they have done so based on one or more substantive constitutional guarantees. Conversely, states that find a right to an abortion in a state constitutional due process clause have gone no further than the undue burden test.”¹³⁵ (Ultimately, the *PPH III* court ended up applying the then-extant federal undue burden standard.) Oklahoma’s 2023 holding renders this assertion no longer true. In fact, Oklahoma’s due process clause, which now protects an (albeit limited) abortion right, is *exactly* identical to Iowa’s due process clause. Moving forward, anti-abortion advocates are likely to argue that the abortion right Oklahoma identified in its due process clause necessarily rests upon the presence of its novel inherent rights clause. Advocates and judiciaries should reject this assertion—and the Iowa Supreme Court might consider re-evaluating *PPH III* in light of Oklahoma’s 2023 precedent. (Notably, Iowa is one of the states that does not directly elect its judges in the first instance. Rather, Iowa Supreme Court justices are initially selected by a commission¹³⁶ and then subject to periodic retention elections, which may explain why the Iowa Supreme Court made this abortion-hostile holding despite the fact that more than sixty percent of Iowans support abortion rights in all or many instances.¹³⁷)

¹³⁴ Planned Parenthood of the Heartland v. Reynolds (*PPH II*), 915 N.W.2d 206 (Iowa 2018).

¹³⁵ *PPH III*, 975 N.W.2d at 737.

¹³⁶ Iowa Judicial Branch, Judicial Selection and Retention, <https://www.iowacourts.gov/for-the-public/educational-resources-and-services/judicial-selection-and-retention>.

¹³⁷ Katie Akin, *Iowa Poll: Over 60% support legal abortion as state Supreme Court considers restrictions*, DES MOINES REGISTER (March 27, 2023), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2023/03/27/iowa-poll-most-iowans-back-legal-abortion-as-iowa-supreme-court-mulls-limits-roe-v-wade/69990037007/>.

Ultimately, *Drummond* offers a model for how state judiciaries can invoke state-specific histories and traditions in order to even narrowly expand abortion rights. Simultaneously, however, it merits several critiques. One is the fact that the Oklahoma Supreme Court only confronted for the first time the question of whether the Oklahoma Constitution protects the right to abortion nine months—the length of an entire pregnancy—after *Dobbs*.¹³⁸ Had Oklahoma maintained a practice of independent state constitutional analysis from the outset, it could have “evolve[d] an independent jurisprudence under the state constitution” on this issue for pregnant people to rely upon the moment that *Roe* was overturned.¹³⁹ One must consider how many people might have sought and received an abortion in the state of Oklahoma—where one woman per month dies from pregnancy or childbirth complications—in the time they spent waiting after *Dobbs* for the Oklahoma Supreme Court to decide *Drummond*.¹⁴⁰

B. Kansas identified a state constitutional abortion right pre-*Dobbs*.

In contrast with Oklahoma, Kansas has maintained a state constitutional abortion right since before *Dobbs*. In 2019, a majority of Kansas Supreme Court justices held in *Hodes & Nauser, MDs, P.A. v. Schmidt* that a Kansas constitutional provision guaranteeing “equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness” protects the right to abortion.¹⁴¹ In so doing, the court exemplified how state judiciaries can protect the right to abortion even when there exists adverse state history. The *Hodes* court rejected the state’s argument that Kansas abortion bans dating back to the 19th century evinced the state constitution’s hostility to abortion rights, noting that “(1) the history of enactment [of those bans]

¹³⁸ *Dobbs*, 142 S.Ct. 2228 (2022).

¹³⁹ Linde, *Without “Due Process”*, *supra* note 60, at 146.

¹⁴⁰ Michelle Linn, *Women spread awareness for maternal mortality, morbidity in Oklahoma*, FOX 23 (May 5, 2022), https://www.fox23.com/news/women-spread-awareness-for-maternal-mortality-morbidity-in-oklahoma/article_6a9e159d-5e06-510b-9c58-805df7c06790.html.

¹⁴¹ 309 Kan. 610, 613 (Kans. 2019).

provides no evidence that the legislation reflected the will of the people; (2) these statutes were never tested for constitutionality; and (3) the historical record reflects that those at the [Kansas Constitutional] Convention, while willing to recognize some rights for women, refused to recognize women as having all the rights that men had.”¹⁴² Justices Breyer, Sotomayor, and Kagan would go on to echo these points in their *Dobbs* dissent.¹⁴³

In *Hodes*, the Kansas Supreme Court asserted that abortion-related *legislation* is not the only source of history and tradition that courts should look to. Rather than accept historic abortion proscriptions as indicative of Kansas’s hostility to abortion rights, the Kansas Supreme Court cited an expert historian (whose research has also been relied upon by the United States Supreme Court), who found that “the practice of aborting unwanted pregnancies was, if not common, almost certainly not rare in the United States during the first decades of the nineteenth century. . . . [M]any American women sought abortions, tried the standard techniques of the day, and no doubt succeeded some proportion of the time in terminating unwanted pregnancies. Moreover, this practice was neither morally nor legally wrong in the eyes of the vast majority of Americans, provided it was accomplished before quickening.”¹⁴⁴ This history is too often overlooked by originalist judges who purport to interpret the meaning of the static federal Constitution. In this instance, independent constitutional interpretation provided a valuable mechanism for the Kansas Supreme Court to articulate abortion’s centuries-long prevalence.

Notably, *Hodes* was decided in 2019, three years before *Dobbs*. Thanks to this independently-codified right—which actually significantly exceeded federal abortion protections

¹⁴² *Id.* at 651.

¹⁴³ *Dobbs*, 142 S. Ct. at 2324-25 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“[P]eople’ did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our Nation.”).

¹⁴⁴ James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) at 16.

under the U.S. Constitution even in 2019, when it was decided—the Kansas abortion landscape did not change when *Dobbs* came down. The contrast between Kansas and Oklahoma is, in this regard, stark. While the Oklahoma Supreme Court yoked its state constitutional interpretations to federal Constitutional precedent—and consequently did not identify any even limited state constitutional abortion right until early 2023, nine months after *Dobbs* went into effect—Kansas’s independent constitutional construction protected statewide abortion rights immediately. While Oklahoma scrambled, Kansas continued to provide legal abortions, including to Oklahomans. In fact, one Kansas abortion provider reported that in the first six months after *Dobbs*, three-quarters of its patients came from out of state, mostly from Oklahoma and Texas.¹⁴⁵ And, remarkably, in August of 2022 (about a month after *Dobbs* went into effect) Kansas voters overwhelmingly voted down a constitutional amendment that would have overturned *Hodes*.¹⁴⁶ At the ballot box, three-in-five Kansans voted to maintain the *Hodes* precedent and keep a state constitutional abortion right.¹⁴⁷ In so doing, Kansans not only sent a clear message about the popularity of abortion, but also affirmed the theory that popularly-elected state judiciaries tend to accurately reflect majoritarian preferences.¹⁴⁸ That voters turned out in historic numbers to affirm *Hodes* should empower other state judiciaries to broadly recognize and protect substantive rights.

C. In the abortion context, state supreme courts have centered state-specific histories and traditions that the Supreme Court has ignored.

¹⁴⁵ Koerth, *Over 66,000 People Couldn't Get An Abortion*, *supra* note 111.

¹⁴⁶ Nicole Narea, *Abortion was on the ballot in Kansas. Access won.*, VOX (Aug 3, 2022), <https://www.vox.com/policy-and-politics/2022/8/2/23278845/kansas-abortion-vote-constitutional-amendment>.

¹⁴⁷ *Id.*

¹⁴⁸ Greg Payne, *Kansans will get to vote on allowing abortions if Roe v. Wade is overturned*, KCTV-5 (Jun. 13, 2022), <https://www.kctv5.com/2022/06/13/kansans-will-get-vote-allowing-abortions-if-roe-v-wade-is-overturned/>.

The Kansas Supreme Court offers a powerful example of how state judiciaries are free to develop and apply their own interpretive techniques, including reading history and tradition differently from how the Supreme Court has, to expand abortion and other substantive rights. Citing an “unbroken tradition” of state laws prescribing abortion, the *Dobbs* majority adopted one reading of the role that abortion has played in the history and traditions of the United States.¹⁴⁹ Yet the *Dobbs* majority’s historical analysis is not the only one possible—nor is it even presumptively correct. As the Kansas Supreme Court discussed, there exists a robust historical record indicating that abortion was legally and morally permitted in the United States’s early days. Scholars have noted too that many 19th-century criminal abortion statutes were driven not by concerns for fetal life, but rather out of “the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to ‘shir[k their] maternal duties’”¹⁵⁰—a reading of history that Justice Alito refused to engage with in his *Dobbs* opinion.¹⁵¹ By conducting independent state constitutional interpretation, state judiciaries can break from the “memory games” that the Supreme Court has played in the abortion and other contexts in order to communicate alternate—and more accurate—readings of history.¹⁵²

V. Conclusion

In sum, independent state constitutional analysis is a promising and democratically legitimate path forward for protective rights expansion. By independently analyzing their state constitutions rather than simply importing federal precedent, and employing the primacy

¹⁴⁹ *Dobbs*, 142 S. Ct. at 2253.

¹⁵⁰ Brief for Amici Curiae Am. Hist. Ass’n and Org. of Am. Historians in Support of Respondents at 2, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2255 (2022) (No. 19-1392).

¹⁵¹ *Dobbs*, 142 S. Ct. at 2256.

¹⁵² See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023).

approach to resolve dual claim disputes on state constitutional grounds, state judiciaries can broadly construe and protect rights—no matter what the Supreme Court does. *Dobbs*'s aftermath simultaneously illuminates the protective promise of state constitutional law and indicates why state judiciaries should be in the habit of independently interpreting their state constitutions in the first place.

When state judiciaries yoke their state constitutional decisions to federal Constitutional precedent, they are not acting neutrally, or simply being efficient; rather, they are failing to live up to the democratic responsibility entrusted to them by their voters. Time and time again, the instant Supreme Court has opted to “return . . . issue[s] to the States,”¹⁵³ “to the people and their elected representatives.”¹⁵⁴ It is now past time for state judiciaries to take up the baton handed to them by the Supreme Court and independently interpret their state constitutions in order to develop robust state constitutional precedent and protect the rights that federal judges will not. Structural features of state supreme courts indicate that their holdings will more closely reflect majoritarian preferences than the federal judiciary's. And, in the event that they do not, election and retention processes and state constitutional amendment procedures empower voters with ample opportunities to correct them.

¹⁵³ *Dobbs*, 142 S. Ct. at 2308 (Kavanaugh, J., concurring).

¹⁵⁴ *Id.* at 2279.