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WHAT SHOULD BE NATIONAL AND WHAT SHOULD BE LOCAL IN AMERICAN JUDICIAL REVIEW

There is much to say about *Dobbs* and the various opinions in it. My jurisprudential sympathies, truth be told, run in favor of the decision. But I plan to say little about it. I would prefer to focus on the source of those sympathies rather than on the decision itself. My concern is that we are asking too much of the U.S. Supreme Court. My claim is that we should decentralize more of our debates about American constitutional law.

One question dominates every other in American history: What should be national and what should be local? Over the last 100 years or so, we have tended to favor national answers over local ones when it comes to American constitutional law. Often with good reasons: dealing with the imperatives of the Great Depression; bringing Jim Crow to heel; addressing policy challenges that have emerged from an increasingly national and global economy. Even as we recall the reasons not to forget these chapters in American history and even as we contend with chapters still unfolding, I wonder whether, halfway through our third century, we should pay more attention to the localism side of federalism and be more patient when it comes to the nationalism side

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of federalism. In debates about American constitutional law, there are many ways in which our fifty state constitutions and fifty state courts have critical roles to play, all true before *Dobbs*, all true after it, all with the potential to alleviate pressure on the U.S. Supreme Court as the perceived sole arbiter of American constitutional values.

One can appreciate why Herbert Wechsler in 1954 would say that "Federalism was the means and price of the formation of the Union."[1] Had I been around, I would have had the same thought, if not his way with words. But today is not 1954. And it's worth revisiting his formulation nearly seventy years later: What is today's price of federalism? Does it offer benefits as well as costs? Are there competing costs of nationalizing so many matters of constitutional law? Can we still afford those costs?

The footprint of the federal courts. Let me describe three features of federal constitutional law that in combination strike me as remarkable—and, I worry, unsustainable in combination over our next century. First of all, it is the rare court system that has embraced judicial review—the power of a court to invalidate democratically enacted laws or executive branch orders—in the way we Americans have come to embrace it for our federal courts. For decades, we have leaned heavily on the federal courts to resolve many of our most intense and intractable policy debates.[2]

Second, this tradition of muscular interpretation of the Federal Constitution concerns a charter that is exceedingly difficult to amend.[3] Article V of the U.S. Constitution requires three-quarters of the states to approve any amendment to the document.[4] When the American

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[1] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 543 (1954).

[2] *See, e.g.*, Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation 17 (2021) (describing "the growth of federal judicial power over the last seventy-five years"); Keith E. Whittington, Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present Ch. 7 (2019) (similar); Antonin Scalia, A Matter of Interpretation 3 (1986) (describing "our national obsession with the law"). Some might say that the American obsession with courts—if not federal courts—has lasted for centuries rather than decades. *See, e.g.*, 1 Alexis de Tocqueville, Democracy in America 280 (Phillips Bradley ed., 1945) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

[3] *See* Sutton, *supra* note 2, at 334 ("[N]o state constitution is harder to amend or has been amended less frequently than the U.S. Constitution."); John Dinan, The American State Constitutional Tradition 29 ("Whereas Article V of the U.S. Constitution places substantial barriers in the way of amendment and revision, state procedures are generally more accessible ...."); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, 369 tbl. C-1 (1995).

[4] U.S. Const. art. V.

people disagree with a decision of our high court, they thus have little recourse, as they cannot realistically respond to mistaken decisions by seeking to overrule them by amendment. Has any court in history united muscular court interpretation with the near impossibility of overturning the decisions? I know of none.[5]

Third, while we may be a government of laws, the men and women who have nearly unreviewable authority over the meaning of the U.S. Constitution have life tenure.[6] Article III does not impose term limits or age limits on federal judges.

All in all, this is a remarkable aggregation of features in a court system, one without parallel within or without the country. One branch of the national government has the power to invalidate democratically enacted state and federal laws based on interpretations of a document that, practically speaking, cannot be amended, and it's a branch whose membership cannot be changed in the short term and is left to caprice in the long term. Ours may be a system that features separation-of-powers checks. But is it one that still combines checks *and* balances? Put another way, when does the check provided by judicial review create a problem of its own—imbalance of power—the key problem the Framers set out to curb in the first place?

The 2016 election illustrates the stakes. By too many accounts to deny, the election of a President of the United States turned on a sufficient number of Americans treating their vote for a president as a vote for a Justice, as a proxy to fill a single vacancy on a nine-member Court. One can illustrate the burgeoning intensity of the judicial selection process in plenty of other ways. Say that Justice Scalia was confirmed by a 98-0 vote and Justice Ginsburg by a 96-3 vote, that both would get few crossover votes today, that neither likely would be confirmed today if different political parties controlled the presidency and the Senate. Say that Senate votes for lower court federal judges are increasingly partisan, often nearly 100 percent partisan. Or say that a divided national government, with a President from one party and a Senate controlled by the other, might fill few federal vacancies at all.

A difficult truth is that the intensity of the judicial selection process is deeply rational if the American people think that federal judges control the disposition of issues they care deeply about. How

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[5] *See* Lutz, *supra* note 3, at 367 tbl. A-1, 369 tbl. C-1; Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 Ark. L. Rev. 217, 223–24 (2016); Arend Lijphart, Patterns of Democracy 229 (1999).

[6] U.S. Const. art. III, § 1.

else can they respond? They cannot answer decisions they dislike with an amendment. And if the federal courts plant a constitutional flag in an area the people care deeply about, they cannot take a democratic stand on the issue through their elected representatives. Rational though the people's response to the growth in federal judicial power may be, it runs the long-term risk of politicizing the Court and of tarnishing a justifiably esteemed branch of American government.

In thinking about this predicament, it is useful to contrast the just-described trio of features and practices under the National Constitution with their absence in the state courts. It is the rare state court, I submit the non-existent state court, that has exercised judicial review with the same alacrity as the federal courts over such a lengthy period of time. The people in the states indeed might not let them. All state constitutions are easier to amend than the Federal Constitution. Usually much easier, as forty-six states permit amendments by a 51 percent threshold.[7] New Hampshire has the highest threshold, a two-thirds vote requirement,[8] followed by Florida at 60 percent, and Colorado at 55 percent.[9] Delaware does not permit a popular vote but requires the legislature in two separate sessions to approve the amendment by a two-thirds vote. Predictable consequences flow from this juxtaposition between the federal and state amendment requirements. "[E]very state constitution," John Dinan confirms, "is amended more frequently than the U.S. constitution."[10] On top of that, 90 percent of state court judges must face electoral accountability. Every state but Rhode Island has age or term limits.[11] How, it's fair to wonder, could the same people choose such disparate judicial systems for the same country?

The contrast does not end at our shores. No western democracies have constitutions that require a three-quarters vote or more for amendment, and none of them permits their judges to serve for life.[12]

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[7] 53 Council of State Gov'ts, Book of the States 8 (2021).

[8] *Id.*

[9] *Id.*

[10] John Dinan, State Constitutional Politics: Governing by Amendment in the American States 12 (2018). In particular, as Dinan has noted, no state has anything close to a 75 percent supermajority requirement in any part of its constitutional amendment process. *Id.* at 12–19; *see* Council of State Gov'ts, *supra* note 7, at 8–11 tbl. 1.3 & 1.6.

[11] R.I. Const. art. X, § 4; *see* Sutton, *supra* note 2, at 375–78.

[12] Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J. L. Pub. Pol'y 769, 819 (2006); Jeffrey Fisher, *The Supreme Court*

The federal courts for some time, it's fair to say, have exercised authority in a way that is unique in American and world history.

Two of these three traits of the federal judicial system, one must acknowledge, cannot be changed without constitutional amendments—lowering the threshold for a constitutional amendment or imposing age or term limits—something the people in the states have not had trouble approving but something the people at the federal level would have a hard time changing given the three-quarters requirement. Both possibilities may deserve consideration at some point.[13] For now, any realistic reform in the near term must come from changes to how we think about federal constitutional law and how we think about the role of the U.S. Supreme Court—the number of areas of law it constitutionalizes under the federal charter and the pace with which it does so. My submission is that not every constitutional right needs to be nationalized and that, when the Court decides to nationalize some rights, it may wish to moderate the pace of change and consider input from the states before doing so.

How can the state courts and state constitutions help? Let me start, and for today's purposes largely end, with one of the most tricky, the most power-enhancing, areas of federal constitutional law: substantive due process.

Substantive due process. Our trio of federal constitutional features and practices—frequent judicial review of a document that the people cannot amend by a Court that the people cannot change—creates more difficulties in some areas than it does in others. For specific constitutional guarantees, say the requirement that the President be thirty-five, the absence of room for interpretation leaves little room for material risks. But the more general a constitutional guarantee, the more room to contest its application. That reality generates vexing constitutional debates about the application of generally worded

Reform that Could Actually Win Bipartisan Support, Politico (July 21, 2022), https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-00046883 ("[A]most every state in the union imposes term limits on its state supreme court justices, a mandatory retirement age, or both. … The United States … is the *only* major constitutional democracy in the world to impose neither term nor age limits.").

[13] Less promising is Court expansion. In today's climate of one-upmanship, it's hard to see an end point, whether with 13, 19, 29, or still more justices. *See* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing* (May 3, 2021) (unpublished manuscript), https://ssrn.com/abstract=3835502 (modeling the end game of court packing, which gets to thirty-nine justices in 100 years and presumably continues from there). Shame indeed might not kick in until we get to 100 justices, say two from each State. At some point, the institution will no longer be a court. And to what end: to create a second Senate?

provisions to unforeseen settings: When is a search "unreasonable"?[14] What is "the freedom of speech"?[15] What process is "due"?[16] When is punishment "cruel and unusual"?[17] As to these difficult questions, as I can attest, the federal model of judicial review has generated plenty of challenges for a democratic republic.

For now, however, let me leave those challenges to the side. A more difficult near-term problem faces us: rights pulled out of thin constitutional air. Here the accountability challenges of federal judicial review become excruciating when disputes arise over potential rights premised on "substantive due process" but unanchored in any enumerated right. This area of the law potentially leaves judges at sea with little, nothing really but personal intuition and instinct, to go on.

Let me illustrate the point by comparing this feature of American constitutional law to a feature of American football. At the beginning of every football game, the referee tosses a coin in the air to decide who gets the ball first. We use coin flips to make the decision because they are neutral and because the arbitrariness of them does little damage. If your team loses the coin toss, you merely have lost control over whether you get the ball first or after halftime, whether you face the wind now or later. We tolerate the whim of a coin flip because it is neutral and the price of losing is nearly non-existent.

Imagine a federal judge, however, who opted to simplify his decision-making process by resorting to coin flips to decide constitutional cases. Heads always means the individual wins. Tails goes to the government. This approach would have the virtue of being neutral and, I suppose, efficient. But any judge who did it would face well-earned criticism in no time. No matter the exact price of defeat—for the individual in losing liberty, property, or even life, or for the people in losing democratic control over the matter—the American people would not permit this approach to last long. If there is one commitment our country has consistently and proudly made, it has been to prohibit arbitrary exercises of power when it comes to the parties to any legal dispute.[18]

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[14] *See* U.S. Const. amend. IV.

[15] *See id*. amend. I.

[16] *See id*. amends. V, XIV.

[17] *See id*. amend. VIII.

[18] *See* Zeon Chems., L.P. v. United Food & Comm. Workers, Loc. 72D, 949 F.3d 980, 985–86 (6th Cir. 2020) (Sutton, J.).

Return to our substantive due process decisions. Most of those decisions, happily, were not pulled out of thin air. They used the Fourteenth Amendment to incorporate rights spelled out in the Bill of Rights, such as free speech (the First Amendment), the guarantee against unreasonable searches and seizures (the Fourth Amendment), and bans on cruel and unusual punishment (the Eighth Amendment).[19] It's still a trick to say that the Fourteenth Amendment's Due Process Clause incorporated the first eight Amendments when one of those Amendments, the Fifth Amendment, already has an identically worded Due Process Clause. But at least each segment of the incorporation journey was anchored in guarantees written in the Bill of Rights.

Not so for substantive due process decisions that find/identify/enumerate new rights in an unamendable Constitution. They turn on implications and inferences from silence—silence perhaps amplified by prior Court decisions but decisions that started with silence all the same. If the end of the "telephone game" is hard to predict with an initial sentence, imagine how difficult it would be to predict if it had no beginning.

How do substantive due process decisions that enumerate new rights in the Constitution compare to the coin-flipping judge? Not favorably, I fear. How often in American history have the outcomes of such decisions, all without any written guidance in the Constitution, been consistent with the world views of the judges who issued them? Certainly often, maybe usually. Who can say? But it is fair, maybe even worrisome, to wonder. The more one fears that substantive due process cases have a tendency to constitutionalize the world views of federal judges, the more one should be worried about comparisons to coin flips. Substantive due process decisions that overrule democratic preferences based on nothing more than the policy preferences of a judge are not only unfair. They are less fair than coin flips, as a government by the individual preferences of men and women, not law, is the epitome of arbitrariness. At least coin flips come with a guarantee of neutrality.[20]

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[19] At this point, by the way, nearly all of them have been incorporated, save for the grand jury, quartering of soldiers, and civil jury rights. *See*, *e.g.*, F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 Ala. L. Rev. 163, 168 (2019); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[20] *See Zeon*, 949 F.3d at 985–86.

History, tradition, and state constitutions. What of the possibility that the substantive due process test comes with limits—the need to show that the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"?[21] Whatever work that test supplied at the outset, the Court has not consistently stood by it. Compare a few cases to see.

In 1949, in *Wolf v. Colorado*, the U.S. Supreme Court incorporated the Fourth Amendment and made it applicable to the states through the Due Process Clause of the Fourteenth Amendment.[22] The case arose from a seizure of a doctor's records that were later used in a prosecution against the doctor for violating, of all things, a Colorado law restricting abortion.[23] In extending this protection to the doctor, the Court did not start from scratch. Every state constitution at that time had a search and seizure clause or an equivalent guarantee. What did that signal? Not just that each state thought the guarantee was indispensable to a free society; legislation could have conveyed the same sentiment. The key message was that each state thought it essential to remove this aspect of law enforcement from the legislative process, to take it off the plate when it comes to the election of law enforcement leaders, and to prevent individual police officers from taking it upon themselves to create self-identified dispensations from the search-and-seizure guarantee.

Not one of the Justices in *Wolf* seemed troubled by whether to incorporate the Fourth Amendment given its uniform treatment as a constitutional guarantee throughout the states. To nationalize what every state had embraced on its own seemed unobjectionable, and hardly disrespectful to state governments, as it turned on a deeply and widely rooted tradition reflected in *all of the state charters*.[24] And that was so even though this incorporation decision would generate

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[21] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[22] 338 U.S. 25, 28 (1949).

[23] *See* Wolf v. Colorado, 187 P.2d 926, 926–28 (Colo. 1947).

[24] *See id.* at 25 app'x; 2 Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, & Defenses § 11.02[1] & n.12 ("Every state constitution contains [a search-and-seizure or related] provision."). Although it might seem otherwise on a first glance, the Arizona and Washington constitutions do not count as exceptions. Both of them say: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8; Wash. Const. art. I, § 7. The high courts of both States have interpreted the guarantees to protect against unreasonable searches. *See* Arizona v. Peoples, 378 P.3d 421, 424–25 (Ariz. 2016) (construing the provision to protect against "unlawful searches and seizures"); Washington v. Bowman, 498 P.3d 478, 483–85, 489 n.6

many second-order debates about which searches were "unreasonable" and which were not.[25] What divided the Court was the question whether the Court should nationalize the exclusionary rule, the requirement that evidence unreasonably seized or obtained after an unreasonable search should be suppressed in a subsequent criminal trial—a remedy nowhere mentioned in any of America's search and seizure clauses and a remedy that stands in contrast to the remedy for violation provided by the equally prominent guarantee against compelled testimony in the adjacent Fifth Amendment.[26] Even so, the exclusionary rule at that point applied to federal investigations and many state investigations under those States' constitutional guarantees. In deciding not to take the step of extending the remedy of exclusion to all jurisdictions in the country, Justice Frankfurter pointed to the many States that had not adopted such a rule, thirty-one in total, as well as the many democracies that had not done so.[27] Better, he and most of his colleagues thought, to wait for more input from the state courts and more opportunities to establish widespread evidence of this tradition. Justices Murphy and Rutledge by contrast would have embraced the exclusionary rule then and there.[28]

In 1961, twelve years later, the Court nationalized the exclusionary rule in *Mapp v. Ohio*.[29] In adding this protection to the national guarantee, the *Mapp* Court found it sufficient that *half of the States* by that point had adopted an exclusionary rule by judicial interpretation or legislation.[30] In a dozen years, then, the Court went from nationalizing a right that every State had adopted in some form (a guarantee against unreasonable searches and seizures) to nationalizing a right

(Wash. 2021) (explaining that the state guarantee protects no less than does the Federal Constitution's Fourth Amendment).

[25] The American people, it's fair to acknowledge, could agree that arbitrary searches and seizures should be barred without agreeing about what makes a search and seizure arbitrary. On the facts of *Wolf* itself, it is not obvious that every state court would have agreed with the U.S. Supreme Court about the application of the search-and-seizure guarantee to that fact pattern. But that shows only that nationalization decisions by the U.S. Supreme Court have many collateral interpretive consequences for federal judges—difficult enough when illuminating the meaning of illegal "searches" and "seizures," excruciating when divining the meaning of unenumerated rights.

[26] U.S. Const. art. V.

[27] *Wolf*, 338 U.S. at 28–30.

[28] *Id.* at 46 (Murphy, J., dissenting).

[29] *See* 367 U.S. 643, 655 (1961).

[30] *See id.* at 651.

that half of the States had adopted (a remedy of excluding any evidence found during an illegal search).[31]

This innovation was not cost free. Few people debate the *Wolf* decision today. Many people debate the *Mapp* decision today. Nor was continued debate about the legitimacy of a decision the only risk created by premature nationalization. Later U.S. Supreme Court decisions cut back deeply on *Mapp*'s breadth (take *Leon*'s good-faith exception to the exclusionary rule) and cut back on the underlying scope of the guarantee against unreasonable searches and seizures (take *Terry*'s stop and frisk exception).[32]

Move forward another twelve years to 1973, the year the Court decided *Roe v. Wade*. Consider the body of state constitutional evidence for incorporating an unenumerated right in *Roe*—and for nationalizing that right. By that point, *no state* had mentioned abortion by name in its constitution when it came to protecting reproductive rights. Not one state in other words had decided that reproductive rights were so fundamental to human liberty that they should be removed from its democratic process. The same was true in 1992 at the time of the *Casey* decision. The same indeed remained true when the Court decided *Dobbs* in 2022.[33] While eleven state constitutions

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[31] *Mapp*, for what it is worth, counted aggressively. Just one year before *Mapp*, the Court observed that many states had applied the exclusionary rule only in very narrow circumstances—Maryland, for example, applied it in "the trial of most misdemeanors," and Alabama applied it "in the trial of certain alcohol control cases." Elkins v. United States, 364 U.S. 206, 226–28 (1960). Yet *Mapp* treated these states as having embraced the exclusionary rule in full. 367 U.S. at 651 (citing *Elkins*).

[32] *See* United States v. Leon, 468 U.S. 897, 922–24 (1984); Terry v. Ohio, 392 U.S. 1, 30 (1968); Linkletter v. Walker, 381 U.S. 618, 639 (1965) (refusing to apply *Mapp* retroactively); *see also* Jeffrey S. Sutton, 51 Imperfect Solutions 42–83 (2018) (discussing the exclusionary rule at the state and federal levels). An even more powerful backlash occurred in response to *Furman v. Georgia*, 408 U.S. 238 (1972), when the Court construed the Eighth Amendment to require a halt to all executions in the country. Not only did the Court ultimately alter course in *Gregg v. Georgia*, 408 U.S. 238 (1976), but the number of executions increased dramatically in the years after these decisions. Between 1968 and 1972, no one was executed in the United States. After the *Furman/Gregg* decisions, in a type of parabola, the number of executions increased to nearly one hundred per year (in 1999), before leveling off and returning to about twenty executions per year. Tracy L. Snell, *Capital Punishment, 2020—Statistical Tables*, Bureau of Justice Statistics Statistical Tables (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf. Some take from this experience the lesson that ground-up development of social change in the States can be more lasting and effective. *See, e.g.*, Maurice Chammah, Let the Lord Sort Them: The Rise and Fall of the Death Penalty (2021); Carol S. Steikert & Jordan M. Steikert, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 Cornell L. Rev. 1021 (2022); Anand Giridhardas, *Why the Death Penalty is Dying: A New Book Tells the Surprising Story*, N.Y. Times (Jan. 26, 2021).

[33] *See, e.g.*, Becky Sullivan, *With* Roe *Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions.

by then had included a right to "privacy"[34] and some state courts had construed the guarantee to protect a right to abortion,[35] no state mentioned a constitutional right to an abortion. Since *Dobbs* and in direct response to it, three States—California, Michigan, and Vermont—have proposed and passed constitutional amendments that directly protect reproductive rights.[36] One could imagine other states taking, or at least trying to take, a similar path before long.

In just twenty-four years, the Court revealed three distinct faces of substantive due process. One incorporated a specific guarantee in the Fourth Amendment that the states had already uniformly constitutionalized. Another took a judicial gloss added to the national guarantee and nationalized it based on similar judicial (and roughly five legislative) decisions in half of the states. The third nationalized a right found nowhere in a single state or federal constitution. Whatever one thinks about this development or of *Roe* itself, the progression exemplifies a striking increase in judicial power—not just because there were few objective sources for the decision but also because the people had little recourse to change the decision. In reality, they had just one form of recourse—changes to the composition of the Court—a point not lost on the American people for the next fifty years.

Roe of course was not the first Supreme Court decision to nationalize a right found nowhere in the U.S. Constitution and it may not have been the first to nationalize a right found in none of our state constitutions.[37] It is fair to characterize some other cases that way or at

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[34] *See* Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Cal. Const. art. I, § 1; Fla. Const. art. I, § 23; Haw. Const. art. I, § 6; Ill. Const. art. I, § 6; La. Const. art. I, § 5; Mont. Const. art. II, § 10; N.H. Const. art. 2-b; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7.

[35] *See, e.g.*, *In re* T.W., 551 So.2d 1186, 1192 (Fla. 1989) (concluding that the Florida Constitution's privacy provision "is clearly implicated in a woman's decision whether or not to continue her pregnancy"); *see also* Planned Parenthood v. Reynolds *ex rel.* Iowa, 915 N.W.2d 206, 237 (Iowa 2018) (finding a right to abortion in the due process clause of Iowa's Constitution); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 645 (Kan. 2019) (finding a right to abortion in the Kansas Constitution's guarantee of natural rights and liberty).

[36] *See* Cal. Const. art. I, § 1.1; Mich. Const. art. I, § 28; Vt. Const. art. I, § 22.

[37] Before *Roe*, no state recognized a right or entitlement to abortion. Only four states—Alaska, Hawaii, New York, and Washington—permitted abortion without justification. Approximately fourteen other state legislatures allowed for abortions that protected life or health, and all were construed to protect the life of the mother. *See* Julie Conger, *Abortion: The Five-Year Revolution and Its Impact*, 3 Ecology L.Q. 311, 314–15 (1973).

least that way in part.[38] But this reality only confirms another problem with substantive due process. In the abstract, there might not seem to be anything deeply objectionable about looking the other way when the Court exercises such ungrounded and unreviewable power to extricate us from a seemingly intractable political thicket—so long as it does so with considerable restraint and quite infrequently. Think in other words of unrooted substantive due process decisions as a judicial wand to wave over this or that urgent political problem in the country. But restraint rarely accompanies such power. Who among us would have the self-control to use such power just once a generation or even once every ten years? Such people may well exist. But they tend not to pursue jobs in government, warns Madison.[39] The era from 1949 to 1973 for better and sometimes worse illustrates precisely what can happen if the Court has atextual, unrooted, and unreviewable authority to identify new federal constitutional rights.[40]

One last observation on this score. In the *Ramos* decision in 2020, the Court seemed to return to the original approach reflected in *Wolf*. The Court determined that the Sixth Amendment's unanimity requirement for criminal jury trials applied to the states via incorporation under the Fourteenth Amendment.[41] By the time of the decision, all of the states, save for one outlier, Oregon, had agreed to require unanimity in criminal jury convictions under their state constitutions.[42] From the near consensus in 2020, the Court traced

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[38] *See*, *e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (recognizing a "liberty of parents and guardians to direct the upbringing and education" of their children); Skinner v. Oklahoma, 316 U.S. 535, 541–43 (1942) (recognizing a right of procreation); Griswold v. Connecticut, 281 U.S. 479, 485–86 (1965) (recognizing a right to contraceptives stemming from the confluence of "several fundamental constitutional guarantees"); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (recognizing a right to define the boundaries of the nuclear family).

[39] *See* The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (recognizing that angels do not sit in our government offices).

[40] If the Privileges and Immunities Clause, as originally understood, was designed to permit federal judges to identify some set of unenumerated rights, similar problems could arise and a similar solution—invocation of state laws and constitutions—would apply. *Compare* Kurt T. Lash, The Fourteenth Amendment and the Privileges of American Citizenship (2014) (arguing that, as a matter of original meaning, the Privileges and Immunities Clause protects only *enumerated* constitutional rights), *with* Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit (2021) (arguing otherwise).

[41] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

[42] *See id*.

the unanimity requirement to the first state constitutions, to Blackstone's writings, and ultimately to fourteenth-century England.[43] With such past and present consensus as the standard, many of the most difficult-to-justify features of substantive due process begin to fade.

Much as I remain a skeptic of substantive due process of any kind, *Wolf* and *Ramos* suggest a middle ground, a compromise of sorts. That approach would permit the nationalization of rights, whether in the Bill of Rights or not, so long as a significant majority of the states have recognized them, ideally in state constitutions, sometimes through state legislation as well.

Significant? Where does that come from? How would anyone define it? These questions take me to another feature of *Dobbs*, its stare decisis analysis.

Stare decisis. Anyone worried about the absence of neutral principles underlying some substantive due process decisions should be doubly worried about identifying a principled way to apply stare decisis to them. Here we have two inquiries, not one, grasping for objective limitations on judicial innovation.

Justice Thomas, to his credit, has done his best to identify a neutral principle for resolving which constitutional mistakes to overrule and which ones to leave in place. He takes the position that, if the underlying decision is "demonstrably erroneous" as a matter of original public meaning, it must be overruled, no matter the jolt to the legal system it might cause, no matter the extent to which the people had come to rely on the underlying decision.[44] So far, no other Justice, including Justice Scalia, has adopted this highly principled, yet highly consequential, approach to stare decisis. The price of this approach apparently remains too steep.

Is there any other place to look? Here, again, state constitutions in particular and states in general have something to offer. Recall that stare decisis debates occur only because a majority of the Court thinks a prior decision is wrong. Absent that reality, there is nothing to talk about. Judges do not debate whether to preserve precedents

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[43] *See id*. at 1396.

[44] *E.g*., Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (contending that the Court should overrule a constitutional decision when it is "demonstrably erroneous"). *But see* William Baude, *Precedent and Discretion*, 2019 Sup. Ct. Rev. 313, 319–24 (suggesting that even Justice Thomas's view of stare decisis may leave judges too much discretion to tolerate some erroneous precedents while discarding others).

they think are still right. But once judges determine a precedent is wrong, they need handholds for deciding whether to preserve it based on something other than their own world view about the underlying issue. How intensely an individual judge dislikes an individual decision is not an ideal stare decisis test.

Where to look? Recall what it means to misconstrue the Federal Constitution. It means that the Court has *added* a guarantee to the Constitution that is not there or *subtracted* one that is there.[45] That's problematic because the point of Article V is to set forth a process for adding and subtracting constitutional guarantees.[46] Confirmation of a Justice to the Court does not come, or at least should not come, with a Framer's pencil and eraser. The Framers would not have created an amendment process if they thought the Court could amend it by interpretation or update it by interpretation. A mistaken constitutional ruling thus represents a trespass on Article V—and an un-remediable trespass at that given the difficulty of invoking Article V to check the Court. This dynamic suggests an added reference point for orienting a decision whether to overrule a wayward precedent or leave it on the books.

If amending the Constitution by interpretation circumvents Article V, it's worth asking whether the trespass still deserves correction. The point is not that a mistaken Court decision from, say, 1961 at some point becomes sacrosanct. That is too much to ask, particularly if the 1961 decision disrespected the original 1791 or 1868 meaning of the guarantee. No one credibly thinks we should have fixed meaning of precedents but not fixed meaning of the underlying guarantees. The 1961 decision still counts as an error, and the Court should say as much. The question is whether the error deserves correction. The concept of harmless error is not new. And it's hardly a contrivance. Judges use it all the time to acknowledge mistakes in

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[45] Judicial errors, it is true, come in all sizes and shapes. A federal court might expand or shrink a guarantee without necessarily adding or subtracting one. Perhaps that was what Madison meant when he said this: "There has been a fallacy in this case, as, indeed, in others, in confounding a question whether precedents could expound a Constitution, with a question whether they could alter a Constitution. . . . None will deny that precedents of a certain description, fix the interpretation of a law. Yet who will pretend that they can repeal or alter a law?" Letter from James Madison to N.P. Trist (Dec. 1831), *reprinted in* 4 Letters and Other Writings of James Madison 204, 211 (1865). Given my focus on substantive due process—a rights-addition setting by my lights and, I might suggest, Madison's—I have kept the focus there. Either way, many of my criticisms and suggestions apply to both settings.

[46] U.S. Const. art. V.

the past in a case, including constitutional mistakes, that do not deserve correction today because the case would have come out the same way.[47]

Why not here? If the people have moved on, as evidenced by the laws and constitutional amendments and other related political activity in their states, it's not obvious that correcting the decision is necessary to correct the Article V breach. Why require a supermajority of the states to approve an amendment if they have already signaled their support for, or at least acquiescence in, the ruling?

Say what you will about *Roe* or *Casey*, it's difficult to maintain that the people had moved on by 2022. Over the last fifty years, no set of decisions has been more central to the politicization of the selection process for federal judges, the one realistic avenue for input the U.S. Constitution gives the people. Whatever metric one wants to use, it's hard to say that the public had come to accept *Roe*'s or *Casey*'s approach to the problem. *Casey*, in retrospect, looks like a second effort to generate public acceptance of judicial dominion over the issue. In backing off *Roe*'s rigid approach to the issue, the Court adopted a flexible "undue burden" approach to the matter. But thirty years after *Casey*, a lack of consensus remained, especially if one focuses on the kind of super-majority consensus needed to satisfy Article V. That absence of consensus continued to affect elections for public office. Think back to the 2016 election. Might the election have come out differently without *Roe* and *Casey*? The question is worth pondering even if there is no conclusive way to answer it. The fifty or so years between *Roe* and *Dobbs* in the end came with two edges. The length of time understandably gave adherents of the decision greater reliance interests. But it also gave opponents of the decision a sound footing for maintaining that the issue had not been, and could not be, finally or for that matter speedily settled by the Court.

Consider by contrast the consensus that emerged over the underlying policy issues in three other cases that the Supreme Court

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[47] *See, e.g.*, Chapman v. California, 386 U.S. 18, 22–23 (1967) (applying harmless-error rule to violations of Fifth Amendment right against self-incrimination); Harrington v. California, 395 U.S. 250, 254 (1969) (similar); Delaware v. Van Ardsall, 475 U.S. 673, 674 (1986) (applying harmless-error rule to violations of the Sixth Amendment's Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (right against trials *in absentia*); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (Fourth Amendment); *see also* Rose v. Clark, 478 U.S. 570, 576–77 (1986) (listing these examples and more). At one point, the Supreme Court even said that "most constitutional violations" are subject to harmless error review. United States v. Hasting, 461 U.S. 499, 509 (1983).

removed from the democratic process and that arose in other high-profile substantive due process settings: *Griswold* (contraceptives), *Lawrence* (consensual sexual conduct), and *Obergefell* (same-sex marriage). Even if one thinks these decisions were not healthy for the federal judiciary and even if one thinks they were wrong when decided, that does not show that they remain harmful errors from the perspective of Article V.[48] It's doubtful that overruling any of these decisions would lead to the need for a constitutional amendment (because a state at that point would need to re-ban the conduct) or, even if necessary, that it would take long for a state or federal constitutional amendment to be ratified.

There's another reason this inquiry is worth including in the mix of stare decisis considerations. What is it about overruling constitutional decisions, of not standing by them, that bothers us? A central fear is that the meaning of the Constitution turns on the people construing it, not the ratified charter itself. Invocation of state constitutions, laws, and practices as a way of measuring public acceptance separates the subjective opinions of a judge from the objective truth of what is going on in the country. It helps to show either that the decision should be left alone, even if wrong, because the people have accepted it, or that the people have not accepted it and the offense to Article V remains real and deserves correction.[49]

This inquiry casts a reassuring light on *Dobbs*. Let us say for the sake of argument that a majority of the current Court would have rejected the claims in *Griswold*, *Roe*, *Lawrence*, and *Obergefell* in the first instance. And let us say for the sake of argument that a majority of the current Court thinks those decisions are wrong today. The reality that the *Dobbs* majority showed no interest in taking on these other decisions, and Justice Kavanaugh in concurrence accepted two of them by name and the third by implication, offers a useful piece of proof that the composition of the Court does not dictate the meaning of constitutional law and which precedents stay and which do not. One possibility that differentiates the four assumed errors is that

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[48] What may be a harmless error from "the perspective of Article V," I appreciate, may not be cost free for the individual litigant in the underlying stare decisis case or for that matter the people who enacted the challenged law. But that will usually be true in a constitutional dispute.

[49] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 413 (2012) (describing one of the stare decisis factors as "whether the decision has been generally accepted by society"); Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting) (treating "wide acceptance in the legal culture" as a reason not to overrule a decision).

three are harmless under Article V in America circa 2023 and one is not.

I appreciate that not every one of these inquiries will lend itself to objective benchmarks in state constitutions, state laws, or state court decisions. There's a difference in particular between mistakenly subtracted rights and mistakenly added rights. If a Court decision errs in *subtracting* matters from federal constitutional protection, that leaves more room for the states to fill in the gaps than Court decisions that err in *adding* constitutional protection. The former leaves plenty of room for state activity because it allows the local democratic and judicial process to flourish and to innovate in the area. The latter leaves less room for state input and explicitly bans it in some settings. Even in this second setting, however, the state courts remain free to express disagreement with federal constitutional decisions that mistakenly purport to occupy a field in discussing the meaning of the counterpart guarantees in their own constitutions.[50] Some have done just that.[51] As shown by the distinct post-*Roe* and post-*Griswold* stories, moreover, objective ways remain to determine whether a federal decision that mistakenly adds constitutional protection has gained acceptance and when it has not.

For those still uncomfortable with the judicial discretion that remains in assessing whether an Article V violation has become harmless,[52] I submit that the inquiry nonetheless at least deserves

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[50] *See* Idaho v. Guzman, 842 P.2d 660, 671 (Idaho 1992) (rejecting *Leon*'s good faith exception); DeRolph v. Ohio, 677 N.E.2d 733, 737 (Ohio 1997) (recognizing a right to equal public school funding under the Ohio Constitution despite the Supreme Court's refusal to do so under the U.S. Constitution); Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 63 (Wis. 2018) (rejecting *Chevron* deference under the Wisconsin Constitution); Harper v. Hall, 868 S.E.2d 499, 535 (N.C. 2022) (concluding that political gerrymandering claims are justiciable under the North Carolina Constitution).

[51] *See*, *e.g.*, Tex. Dep't of State Health Servs. v. Crown Distrib. LLC, 647 S.W.3d 648, 676–78 (Tex. 2022) (Young, J., concurring) (suggesting that the U.S. Supreme Court's reading of the Fourteenth Amendment's Due Process Clause to create substantive due process rights might depart from the meaning of an analogous Texas constitutional limitation); State v. Rowan, 416 P.3d 566, 575 (Utah 2017) (Lee, J., concurring) (suggesting similarly for Utah's Fourth Amendment analogue); MKB Mgmt. Corp. v. Burdick, 855 N.W.2d 31, 41–46 (N.D. 2014) (opinion of Vande Walle, C.J.) (rejecting state constitutional right to an abortion); Mahaffey v. Att'y Gen. of Mich., 564 N.W.2d 104, 109–10 (Mich. Ct. App. 1997) (similar).

[52] One could imagine at least two other concerns. First, the Court's efforts to apply "evolving standards" of decency" have generated considerable debate about how to measure a consensus in the States, much less a super-consensus. *See*, *e.g.*, Miller v. Alabama, 567 U.S. 460, 481–87 (2012); Roper v. Simmons, 543 U.S. 551, 564–67 (2005). Second, to the extent "tradition" is permitted to evolve after the date a constitutional guarantee is ratified, say 1868, that makes it difficult to see when (if ever) tradition should stop evolving. *See* Sherif Gergis, *Living Traditionalism*, 98 N.Y.U. L. Rev. (forthcoming 2023).

consideration as part of the mix. The inquiry improves on—it does not make worse—the ineffable inquiries already used to determine which substantive due process decisions stand and which do not under the traditional stare decisis inquiry. And the inquiry has the virtue of orienting us around the serious structural problem created by a mistaken constitutional ruling in the first place.

Trial and error, *pacing*, *and variety*. Time will tell. But history may show that the two most consequential decisions of the Roberts Court were (1) *Dobbs* and (2) its 2019 *Rucho* decision, which determined that efforts to end extreme partisan gerrymandering present a "political question" that is not amenable to judicial resolution under the U.S. Constitution. Both decisions have some things in common: They concern deeply salient and complex policy matters; they do not end the debate; they remain neutral about the people's answers to these challenges; and they give citizens many local avenues for change, whether by seeking state legislation, state court relief, or state constitutional amendments.

In the short time since the decisions, the intensity of state activity in all directions has been striking. The state responses confirm the array of American views and approaches to the underlying issues and, so far, the elusiveness of a winning insight suitable for export to the whole country. Only after the Court left the stage did the auditioning of these approaches occur in full.[53] It's worth remembering what Justice Brandeis said about federalism *before* mentioning the role of States as "laborator[ies]" of policymaking: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation."[54] What might those consequences be? Denial of the right to try all kinds of approaches to the issues. Denial of the right to use the gravitational forces of democracy to generate

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[53] With freedom to experiment comes the chance for productive talk about what it means to be pro-life or pro-choice in full—and where common ground might exist. Consider, for example, two scholars who urge pro-life States to carry their convictions on the sanctity of the unborn child forward to children who have left the womb. *See* Leah A. Plunkett & Michael S. Lewis, *The Wages of Crying Life: What States Must Do to Protect Children After the Fall of* Roe, 2022 Pepp. L. Rev. 14, 47 (arguing pro-life States that do not take child abuse and neglect seriously are not true to their ideals).

[54] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The rest of the quotation is: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *Id.*

compromise. Denial of the right to allow different approaches to flourish in different parts of the country. Not every difficult problem deserves a singular solution.

Because *Dobbs* and *Rucho* have conspicuously unleashed an assortment of trial-and-error approaches to these policy issues, they offer a useful way to think more deeply about how we decide what questions to answer with national solutions, what questions to answer with local solutions, and who should make the choices at either level: legislators, agencies, or judges. Consider the four distinct routes to change at the state level left open by the U.S. Supreme Court in these cases: legislation, direct democratic changes to laws and constitutions, indirect state constitutional amendments, and state courts.

As for legislation, the people's representatives may take matters into their own hands. Consider some of the state activity on abortion policy. Roughly twenty-three states place only modest limits on abortion access.[55] Roughly sixteen additional states permit abortion access up to a certain point in the pregnancy—whether a fetal heartbeat or a time such as fifteen weeks.[56] And roughly eleven remaining states have bans save for the life of the mother, incest, or rape.[57] The legislative activity, one suspects, is just getting started.[58] Legislative efforts to curb gerrymandering have been less apparent, but only by comparison. In total, seven state legislatures have shifted redistricting authority to independent commissions.[59] At least one State—Virginia—made the change post-*Rucho*, and other states may follow over time.

Direct democracy allows the people directly to alter a state statute or constitution. Twenty-four states give the people a way to circumvent an unaccommodating legislature, whether due to political

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[55] *See State Policies Protecting or Restricting Legal Status of Abortion*, Kaiser Fam. Found., https://www.kff.org/womens-health-policy/state-indicator/state-policies-protecting-or-restricting-legal-status-of-abortion (last visited Nov. 21, 2022).

[56] *Id*.; *An Overview of State Abortion Laws*, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws tbl. 1 (Nov. 1, 2022).

[57] Kaiser Fam. Found., *supra* note 55.

[58] John Dinan, The Constitutional Politics of Abortion Policy After *Dobbs*: State Courts, Constitutions, and Law Making 49 (unpublished manuscript) (on file with author). State legislatures, due in part to differences in their powers, politics, and rules, are more active on abortion policy than is the U.S. Congress. *See id*. at 41–49.

[59] *Creation of Redistricting Commissions*, Nat'l Conf. of State Legis. (Dec. 10, 2021), https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx.

headwinds in the legislature or the Governor's office or to gerrymandering itself.[60] In all of these states, the people have the power directly to amend a state statute or constitution. In the 2022 elections, for example, two of the three amendments to the Michigan constitution to protect reproductive rights arose from initiatives proposed by the people directly.[61] Taking a broader lens, five states, starting with Arkansas in 1956, have adopted redistricting reforms by citizen's initiative.[62] All told, eighteen states permit the people directly to amend the state constitution to create new fundamental rights or to curb dysfunctional features of democracy such as extreme partisan gerrymandering. For citizens frustrated that their representatives do not reflect the will of a 51 percent majority in the state, a constitutional initiative or for that matter a statutory referendum offers a way out.[63]

All states permit what I will call indirect constitutional amendments, created through constitutional conventions or through amendments proposed by the legislature and approved by the people, save in Delaware.[64] These paths are particularly relevant for the thirty-two states that do not permit constitutional initiatives proposed directly by the people. The promising news for those in favor of adding fundamental liberty or representation rights to their constitutions is that forty-six states require a mere 51 percent popular vote for approval.[65] Of the thirty-two states that do not offer the option of a direct-democracy initiative, all but New Hampshire permit a constitutional amendment with a 51 percent vote. What a legislature must do to refer an amendment to a popular vote varies widely by the state.[66] The legislatures in ten states, for example, may send an amendment to the

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[60] *See* Dinan, *supra* note 10, at 16–17 (identifying 18 States that allow citizens to initiate constitutional amendments); Sutton, Who Decides, *supra* note 2, at 342 (identifying another six States that allow citizens to directly amend statutes).

[61] *See Michigan 2022 Ballot Measures*, Ballotpedia, https://ballotpedia.org/Michigan_2022_ballot_measures (last visited Nov. 21, 2022); *see also 2020 Ballot Measures*, Ballotpedia, https://ballotpedia.org/2020_ballot_measures (last visited Nov. 21, 2022) (reporting that 40 of the 120 measures on the ballot in 2020 were citizen initiated).

[62] Nat'l Conf. of State Legis., *supra* note 58.

[63] As one would expect, evidence suggests direct democracy leads to a "congruence between policymaking and public opinion." Dinan, *supra* note 57 (manuscript at 54). Perhaps more surprising, the mere existence of a method for direct participation, aside from its use, leads to more majoritarian outcomes in state legislatures. *See id.*

[64] Sutton, Who Decides, *supra* note 2, at 340–43.

[65] *Id.* at 343.

[66] *See* Dinan, *supra* note 10, at 12–16.

ballot with a simple majority vote.[67] The legislatures in nine more states may do so with a 60 percent vote.[68] Twelve other states require that their legislatures approve the amendments in two successive sessions.[69] Four other states employ a hybrid approach, allowing the legislature to place an amendment on the ballot with a majority vote in two sessions or a supermajority vote in one session.[70] While approval by the legislature of a constitutional amendment may be easier in some states than others, it is *always easier* than the federal constitutional amendment process.

That leaves the fifty state courts, which have the final say over the meaning of their constitutions and laws. There are many reasons why state courts might chart their own courses when it comes to interpreting their state constitutions, whether with respect to abortion, gerrymandering, or any other issue. Here are just a few.[71] Sometimes the text of the state constitution differs from its federal counterpart.[72] Different terms tend to generate different meanings. Sometimes the history behind the guarantee differs. A distinct history might lead one state, say Utah, to treat free exercise of religion distinctly from another state. Sometimes the state court uses a different method of constitutional interpretation from the one the U.S. Supreme Court used in the parallel federal precedent. A formal, fixed-meaning approach to a constitutional question is not apt to lead to imitation by a court that uses an informal, fluid-meaning approach to interpretation. Sometimes the federal doctrine has been shown to be bankrupt or sufficiently filled with difficulties of application to raise eyebrows about unthinking imitation at the state level. If a federal court—if, to personalize the point, Judge Sutton—makes a mistake in construing the federal guarantee, why should a state court judge repeat it?

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[67] *Legislatively Referred Constitutional Amendment*, Ballotpedia, https://ballotpedia.org/Legislatively_referred_constitutional_amendment (last visited Dec. 19, 2022).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] For a much fuller discussion of these and other reasons, *see* Sutton, Who Decides, *supra* note 2, at 101–43.

[72] With respect to abortion, for example, recent attempts to amend state constitutions tend to substitute general, judge-empowering phrases, think of "privacy" or "due process," for specific, judge-constraining language, think "reproductive autonomy" or "abortion." *See* Dinan, *supra* note 57, at 29–31. Other amendments remove space for judicial gap-filling by clarifying that "[n]othing in this Constitution secures or protects a right to abortion." *Id.* at 33.

All of these considerations, and plenty more, create the possibility for an innovative market of American constitutional interpretation in which States may experiment by offering *more or less* protection under their own constitutions. The use of these trials and occasional errors becomes a promising platform for determining whether to nationalize one approach or another to a question—the more difficult the more valuable the input—or to allow distinct approaches to take root. Just as we do not nationalize all matters of legislative policy, we should not assume that all matters of constitutional interpretation must end up in the same place. The country has not had any problems with fifty-one distinct methods of raising revenue by taxation or fifty-one distinct approaches to spending it. The same may be so, and correctly so, for certain areas of American constitutional law.

The possibility of state court input is not for lack of cases filed in the state courts. The vast majority of legal actions in this country, in inexorable reality, run through the state courts, not the federal courts, meaning the first place most Americans will interact with our legal system will be in the state courts. In the last year for which we have numbers, there were some 40 to 50 million cases filed in the fifty state court systems and 400,000 cases filed in the ninety-four federal district courts.[73] In nearly every one of those state court cases, whether civil or criminal, the state constitution stands as a potential backstop against wrongful state action.

Some state court decisions after *Rucho* illustrate this last point particularly well. After the 2020 census, and *Rucho* notwithstanding, state courts in Maryland, New York, North Carolina, and Ohio set aside alleged partisan gerrymanders under state law.[74] Most of these decisions attracted heated dissents—dissents that voters, at least in North Carolina and Ohio, arguably endorsed in 2022's judicial

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[73] *See* Nat'l Ctr. for State Cts., State Court Caseload Digest 7 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf (reporting more than 83 million State court cases in 2018); *Federal Judicial Caseload Statistics 2018*, Admin. Off. of the U.S. Cts., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (reporting 358,563 cases filed in federal district court between March 2017 and March 2018); *Federal Judicial Caseload Statistics 2022*, Admin. Off. of the U.S. Cts., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (reporting 380,213 cases filed in federal district court between March 2021 and March 2022).

[74] Szeliga v. Lamone, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022); Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022); Harper v. Hall, 868 S.E.2d 499 (N.C. 2022); Adams v. DeWine, 195 N.E.3d 74 (Ohio 2022).

elections.[75] *Rucho*, in short, has not prevented state courts from acting as backstops when they think partisan gerrymanders have gone too far. And state *voters* have not shrunk from that task either, including when they think their own state *courts* have gone too far. In the full view of all of these options, above all that forty-six states ultimately permit a 51 percent vote to alter a state's constitution, it's fair to say that any federal constitutional ruling criticized for under-enforcing the U.S. Constitution, as some have criticized *Dobbs* and *Rucho*, does not leave the people empty handed. It's also fair to say that the political accountability risks facing the federal courts when it comes to the development of new rights does not apply in the states. The state constitutions are more readily amendable. And 90 percent of their judges face elections and all of their judges, save Rhode Island's, face age or term limits. These features of the state judiciary assuredly make state judges more accountable than their federal counterparts, may make them more humble given the down-to-earth risks that come with facing the voters on a regular basis, and most definitely make them the best positioned judges for experimenting with innovative constitutional individual and structure guarantees. If we are to have constitutional innovations in this country, they should develop from the ground up, not the top down.

In *A Matter of Interpretation*, Justice Scalia diagnosed our American proclivity to embrace far-reaching federal judicial review as arising in part from the common law tradition we inherited from Great Britain—and the "Mr. Fix-it mentality" that comes with it.[76] Law students trained to understand common law reasoning, as he saw it, eventually became judges who use similar reasoning in construing the unamendable U.S. Constitution.[77] Many scholars agree with this assessment, though many of them applaud the approach to constitutional interpretation rather than deride it.[78] Either way, one

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[75] *See* Laura Benshoff, *How GOP State Supreme Court Wins Could Change State Policies and Who Runs Congress*, NPR (Nov. 22, 2022), https://www.npr.org/2022/11/22/1138344117/republican-state-supreme-court-abortion-voting-redistricting-ohio-north-carolina (observing that, in North Carolina and Ohio, voters selected more conservative state Supreme Court candidates in 2022).

[76] Scalia, *supra* note 2, at 13–14.

[77] *See id.* at 37–41.

[78] *See, e.g.*, David A. Strauss, The Living Constitution (2010); Goodwin Liu et al., Keeping Faith with the Constitution (2010).

commendable feature of the common law is that it turns on the reasoning of fifty state court systems, and the lending and borrowing associated with the enterprise, not on the reasoning of one court. Anyone open to common law constitutionalism should be particularly open to enlisting the insights of our fifty high courts before the national high court creates one constitutional rule for the entire country.

Structural headwinds for decreasing the footprint of the federal courts. The increase in the authority of the U.S. Supreme Court has come in fits and starts—and by and large up to now we Americans have seemed to want it. Many of the Court's most important decisions, including some substantive due process decisions, were consistent with the preferences of most Americans and at other times were consistent with large pluralities.

We Americans are a pragmatic lot, however. What seemed like a good idea in the past—delegating power to the Court to identify new substantive due process rights or broad interpretations of text-based rights—may not seem like such a good idea today. But what was relatively easy to increase—federal judicial power—may not be as easy to decrease.

Even as *Dobbs* and *Rucho* amount to two significant decisions to remove federal judicial power over fraught matters of public policy, many structural headwinds face any committed effort to decrease the role of the U.S. Supreme Court in American policy making. Let us suppose today's Court wishes to lessen its role in American government and wishes to obtain more input from state courts before nationalizing rights. That is still easier said than done. Congress and the President may famously have the power of the purse and sword. But they have another power, sometimes a more potent power: The power not to decide, the power not to handle this controversial issue or that one. Not so for the federal courts.[79] If people take their dispute to the courts, the judiciary usually must answer it. That's true whether the matter involves the Federal Constitution or a federal statute. This makes the idea of pacing the development of federal constitutional doctrine difficult and sometimes unrealizable.

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[79] *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.").

How can the Court wait for the state courts if one of our 330 million citizens files a lawsuit today to challenge the validity of this or that state law under the Federal Constitution? *Rucho* illustrates one option—decide that some matters do not implicate judicially ascertainable standards. That of course might also be a good answer to substantive due process claims unanchored in the Bill of Rights and unanchored in any super-majority of state constitutional protections. But absent growth in the political-question doctrine, growth in other gate-keeping doctrines to Article III (e.g., standing or ripeness), or delays in resolving circuit splits through the discretion baked into the certiorari process, the Court faces persistent challenges in deciding not to decide.

This problem by the way also confronts the Court in statutory interpretation cases. In one sense, to be sure, statutory cases lower the political and accountability temperature. If the people disagree with the decision, they can plead to Congress that it should amend the statute. Even so, many statutory cases come to the Court precisely because of congressional inaction. It's not easy for the federal courts to determine the meaning of laws that have not been updated in over a half-century. Some of the most difficult statutory cases in recent years—*West Virginia v. EPA*, *Bostock v. Clayton County*, *Massachusetts v. EPA*, *Arizona v. Biden*, *Sackett v. EPA*—became that way because Congress had not revisited the statutes in over a half century to account for new norms, new technology, new understandings of air or water pollution.[80] Some statutes, quite understandably, are drafted "for the moment but not for the duration."[81] That also explains why agencies have been asked to do so much and perhaps why the Court has pushed back on their assertions of power.

There is one other area of conspicuous inaction that has increased pressure on the federal courts and contributed mightily to the difficulty of recalibrating their role in American government. It's the end of our political tradition of amending the U.S. Constitution when it needed to be changed. The last time we did so in a consequential way was more than fifty years ago, when the people decreased the voting

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[80] *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Clean Air Act); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Title VII); Massachusetts v. EPA, 549 U.S. 497 (2007) (Clean Air Act); *see also* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1 (2014).

[81] Glasser v. Hilton Vacations Co., 948 F.3d 1301, 1308 (11th Cir. 2020).

age to eighteen.[82] For much of our history, that was not our way. Whether it was guaranteeing women the right to vote, permitting Congress to impose an income tax, eliminating the indirect election of senators, or starting and stopping Prohibition, we once took the path of Article V in dealing with new social and political imperatives. This tradition did not, I suspect, grow solely out of a finicky desire to adhere to Article V. It also grew out of what must have been perceived as a political advantage of taking a popular amendment to each State in the country to seek ratification. A good issue could be a good way to increase support for a political party. Perhaps those political incentives have given way to the incentives of nationalizing policy preferences in one Court with unreviewable authority to construe the Constitution—what has become its own form of gerrymandering. But it is not obvious that the political incentives of Article V compliance have disappeared for good. We will see.

Early American experiences with judicial review, uses of history, and sources of humility. Many Americans, I appreciate, wish that today's Court acted more like the Warren Court of the 1960s or the Burger Court of the 1970s. Those courts created many national rights, including *Roe*, and did so using uninhibited theories of constitutional interpretation. Whether those same Americans wish that today's Court—with its composition—would use innovative methods of interpretation to generate new rights may be another matter. Not everyone wants to try that hat on for size.

No matter one's perspective, it can be useful in a democratic republic like ours to allow different approaches to constitutional interpretation to have their time in the sun. Give the current Court a chance to show over a period of years that its approach to deciding cases has virtues of its own—that it can be done neutrally, that it will not lead to policy-laden outcomes, that it might decrease the role of the federal courts in American government. Judges, as I can attest, cannot hide for long from being judged themselves over whether their decisions turn on the rule of law or the rule of individual judicial preferences.

The key challenge for the current Court, for any court, for any judge, will be to show that they can apply their approach to constitutional interpretation in fair and even-handed ways. Here, yet again,

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[82] *See* U.S. Const. amend. XXVI; *see also* Sutton, Who Decides, *supra* note 2, at 335–36.

the state courts have lessons to offer about judicial review. In our federal-centric world, we assume that the federal courts started us down the road of judicial review. That's not what happened. Had John Marshall never been born, had there never been an election of 1800, had neither Madison nor Marbury walked the earth, our country would have had judicial review all the same. That's because the state courts had been doing it ever since their formation soon after 1776.

How the state courts engaged in judicial review at the outset offers lessons for our time. In one direction, they had little doubt about their authority to decline to enforce an unconstitutional law. It was a matter of judicial duty, part of the judicial oath, to honor a superior law when it conflicted with an inferior law.[83] The state and federal constitutions counted as superior laws. In the other direction, they looked for ways to avoid the conflict. They did so by construing statutes narrowly (an early form of constitutional avoidance) or by deciding that the constitution, after using all conventional tools of interpretation at their disposal, did not clearly cover the situation.[84] Under this approach, they did not hesitate to hold local laws unconstitutional, but they did so rarely.[85]

Almost 250 years later, federal judges could learn from these examples, examples that might help to readjust the role of the federal courts in American democracy. Yes, history, text, and fixed meaning all should inform when to set aside a democratically enacted law. And yes, courts should not abdicate their duty to set aside such laws when they truly conflict with the Constitution. But the requirement of a clear meaning of the constitutional provision, as the early state courts required, would go a long way to rightsizing the balance of power between the federal courts and the elected branches, between the federal courts and the states. Only historical inquiries that generate clear readings should count, an approach that might help to alleviate, if not always end, the human proclivity to look for allies and ignore foes in any historical record.

Against this backdrop, perhaps labels like judicial restraint or judicial engagement are the wrong way to think about it. Maybe it's brazen humility that's called for, an attitude, not a doctrinal label. It

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[83] Sutton, Who Decides, *supra* note 2, at 51.

[84] *See id.* at 52–53, 56.

[85] *See id.* at 41–45, 57.

may be hard to be humble and patient in an age of little humility and considerable impatience. And it may be that one person's humility is another person's abdication. But one way to create judicial humility in constitutional cases might be to focus on two things: the risk of error and the reality that the federal courts are rarely the only available solution to a problem. Article III courts might reflect on the reality that their constitutional decisions cannot be overruled, that mistakenly added constitutional guarantees cannot be corrected by any democratic process or state court, that the judges or Justices who decide them cannot be replaced in the near term and will be replaced in the long term only in unpredictable ways, and that state court judges face few of these risks and might help in the ground-up development of new rights. Judges concerned about improper delegations of power in particular and separation of powers in general, moreover, should be concerned about the remarkable delegation of policy making power that comes with substantive due process and other inventive doctrines of judicial review. All of this might go a long way to capturing the need for the federal courts not just to check the political branches from time to time but also to check themselves from creating the very imbalance in power that separation of powers was designed to avoid.

The signal accomplishment of the Marshall Court was to legitimize federal judicial review. The destiny of the Roberts Court may be the thankless task of saving it.