State Court Adherence to Decisions Incorporating Federal Constitutional Law

Elizabeth Bentley[*]

ABSTRACT: By issuing its decision in Dobbs v. Jackson Women's Health, *the U.S. Supreme Court changed the operative meaning of federal constitutional law: On June 23, 2023, the Fourteenth Amendment Due Process Clause protected the right to an abortion; the next day, it did not. But is it possible that* Dobbs *also changed the meaning of state constitutional law? Curiously, the answer in some circumstances may be yes. That is because many state courts have incorporated U.S. Supreme Court interpretations of federal constitutional provisions, like the Due Process Clause, into the meaning of analogous state constitutional provisions, in what is often referred to as the "lockstep" method of state constitutional interpretation.*

State constitutional law scholars have debated for decades whether states should follow the lockstep approach, but little attention has been given to the question of what happens to state law after a state court decides to lockstep and then the relevant federal law changes. This issue has particular importance today as legal scholars and advocates seeking to safeguard rights are increasingly turning to state courts, where they may confront prior lockstep decisions.

This Article offers the first comprehensive review of how state courts interpret the precedential effect of prior lockstep decisions, including whether they view them as having dynamically incorporated federal law (meaning they intended to incorporate future changes to the law as well), or as having only statically incorporated federal law (leaving room to deviate in the event of federal changes). The Article then considers the interplay between adherence to prior lockstep practices and principles of stare decisis and the rule of law.

INTRODUCTION 1015

[*] Judge, Minnesota Court of Appeals. For the thoughtful comments, robust conversations, and overall support as I prepared this Article, I am grateful to Charlotte Garden, Jill Hasday, Kristin Hickman, Carmen Iguina González, Jason Mazzone, the Honorable Karl Procaccini, Daniel Schwartz, Miriam Siefter, Raymond Tolentino, Julie Veroff, Robert Williams, and Robert Yablon, as well as the faculty participants at workshops at the University of Illinois College of Law, the University of Minnesota Law School, the University of Wisconsin Law School, and the Constitutional Law Colloquium. For their excellent research and editing support, I thank Callan Showers and Thaameran Sarvaswaran. And I owe special gratitude to the editors of the *Iowa Law Review*.

I. STATE CONSTITUTIONAL INCORPORATION OF FEDERAL CONSTITUTIONAL LAW 1017
A. *EARLY INDEPENDENT STATE CONSTITUTIONALISM* 1017
B. *ROUTINE STATE INCORPORATION OF FEDERAL CONSTITUTIONAL LAW* 1020
C. *VARIATIONS IN STATE COURT INCORPORATION OF FEDERAL LAW* 1023
1. Static Incorporation 1024
2. Dynamic Incorporation 1025

II. STATE COURT ADHERENCE TO PRECEDENTIAL DECISIONS APPLYING THE LOCKSTEP METHODOLOGY 1027
A. *STRANDED STATE DOCTRINE FOLLOWING CHANGES IN FEDERAL LAW* 1027
B. *VARIATIONS IN HOW STATE COURTS ADHERE TO PRECEDENT INCORPORATING FEDERAL LAW* 1028
1. Decisions Justifying Continued Adherence to Federal Law when Interpreting State Constitutions 1029
i. *Construing Prior Decisions as Dynamically Incorporating Federal Law with Respect to a Specific Legal Issue* 1029
ii. *Construing Prior Decisions as Dynamically Incorporating Federal Law with Respect to All Applications of a Constitutional Provision* 1033
iii. *Extending Incorporation of Federal Law to New Scenarios After Independent Consideration* 1034
2. Decisions Justifying Departures from Lockstep Methodology 1036
i. *Construing Prior Decisions in a Manner that Limits Precedential Weight of Lockstep Methodology* 1036
ii. *Narrowing the Holding to the Substantive Outcome* 1036
iii. *Scrutinizing the Quality and Depth of the Prior Decision's Reasoning* 1038
iv. *Identifying Changed Circumstances* 1041
a. Changes in Legal Circumstances 1041
b. Changes in Factual Circumstances 1042
3. Construing Prior Decisions to Emphasize State Sovereignty 1044

III. STATIC INCORPORATION AND THE RULE OF LAW 1046
A. *STATIC INCORPORATION AND PRINCIPLES OF STARE DECISIS* 1047
1. Predictability 1048
2. Equality 1050
3. Legitimacy 1051
B. *STATIC INCORPORATION AND PRINCIPLES OF SEPARATION OF POWERS* 1053

1. Vertical Separation of Powers (Federalism)............ 1053
2. Horizontal Separation of Powers 1054

CONCLUSION.. 1055

INTRODUCTION

By issuing its decision in *Dobbs v. Jackson Women's Health*,[1] overruling *Roe v. Wade*[2] and *Planned Parenthood v. Casey*,[3] the U.S. Supreme Court changed the operative meaning of federal constitutional law: On June 23, 2023, the Fourteenth Amendment Due Process Clause protected the right to an abortion; the next day, it did not. But is it possible that *Dobbs* also changed the meaning of *state* constitutional law? Curiously, the answer in some circumstances may be yes. The Illinois Supreme Court, for example, currently defines the meaning of its "state due process clause to provide protections, with respect to abortion, *equivalent to those provided by the federal due process clause*."[4] This could mean that Illinois has effectively outsourced this provision of its constitution to the U.S. Supreme Court, with the expectation that the two due process clauses will always mirror each other. Alternatively, the state court may impose limits on its prior incorporation of the U.S. Constitution, and the scope of the two clauses may start to diverge.

This dilemma provides a good illustration of the conundrum state courts face after tethering the meaning of state constitutional provisions to federal constitutional law. And, while *Dobbs* helps illustrate this issue, it is not unique to the abortion context. State courts deciding the meaning and scope of state constitutional provisions frequently incorporate U.S. Supreme Court decisions interpreting analogous U.S. constitutional provisions in what is known as the "lockstep," "federal mimicry," or "incorporation by reference" method of state constitutional interpretation.[5] State constitutional law scholars have debated

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

2. *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 231.

3. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. at 231.

4. Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 760 (Ill. 2013) (emphasis added). The right to abortion is separately protected under Illinois statutory law, rendering the practical effect of the *Dobbs* decision hypothetical for now. 775 ILL. COMP. STAT. ANN. 55/1-15 (LexisNexis Supp. 2024).

5. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) [hereinafter Williams, *Case-by-Case Adoptionism*] ("[S]tate courts decide to follow, rather than diverge from, federal constitutional doctrine . . . [in] the clear majority of cases . . . ." (emphasis omitted)); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338–39 (2002); *see also* Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 974, 977 (2020) [hereinafter Williams, *State Constitutional Law*] (noting that "the majority of state-court rights decisions do not diverge from federal standards" and that "many state courts continue in lockstep with federal law" with respect

the propriety of this approach for decades,[6] but little attention has been given to the question of what happens to the development of state constitutional law *after* state courts engage in lockstep in a particular case.[7] Specifically, are future courts bound to continue following the lockstep approach and to adopt federal law if the previously incorporated federal law changes? Are they bound to continue to apply the lockstep approach to different applications of the previously linked constitutional provision? This Article begins to answer those questions, which have particular importance today as legal scholars and advocates are looking to state courts to safeguard rights[8] and are likely to confront prior lockstep decisions.

This Article proceeds in three parts. Part I offers a brief history of state constitutional incorporation of federal law and outlines the wide variation in

---

to separation of powers concerns); Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 970 (2011) ("The literature repeatedly confirms that state courts significantly rely on federal doctrine . . . ."); MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 89–94 (1999) ("Despite the considerable hoopla afforded a few decisions from a few states, the vast majority of state courts follows federal law when construing the liberty-protective provisions of their own constitutions, and indeed it is still relatively rare for a state court to rely exclusively on state law at all."(footnote omitted)).

6. *See* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017) ("[I]t is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries."); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 838 (2011) (arguing for the primacy perspective that privileges state law). *Compare* Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345, 367 (2007) (describing departures from federal constitutional law on state constitutional law grounds as pretext for "judicial creativity"), *with* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403 (1984) (arguing that U.S. Supreme Court decisions should be given even "*less* weight than decisions of sister state jurisdictions").

7. *But see* Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1097 (1985); Williams, *Case-by-Case Adoptionism*, *supra* note 5, at 1500–01; JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1.06[2] (2006).

8. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1339; David Shapiro, *US Supreme Court vs. States' Highest Courts: We Are Giving Kids the Wrong Message.*, CHI. TRIB. (Sept. 23, 2022, 8:23 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-supreme-court-state-courts-power-elections-20220923-d7crquqe3vhqfp6jiogbonsava-story.html (on file with the *Iowa Law Review*); Jeffrey M. Shaman, *The Rise of State Constitutional Law: Equality and Liberty*, 72 RUTGERS U. L. REV. 1247, 1248 (2020); Mark Denniston & Christoffer Binning, *The Role of State Constitutionalism in Determining Juvenile Life Sentences*, 17 GEO. J.L. & PUB. POL'Y 599, 600 (2019); Liu, *supra* note 6, at 1312–13; Lara Bazelon & James Forman, *Aim Lower: Liberals Have Lost the Supreme Court for a Generation. Their Only Hope Is to Seize State Courts and Launch a Counterrevolution.*, N.Y. MAG. INTELLIGENCER (July 5, 2023), https://nymag.com/intelligencer/2023/07/liberals-should-use-state-courts-to-check-the-supreme-court.html [https://perma.cc/7J5H-8AYV]; Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights (on file with the *Iowa Law Review*); Kyle C. Barry & Maria E. Hawilo, *How States Can Undo One of This Supreme Court Term's Most Egregious Decisions*, SLATE (July 9, 2024, 1:19 PM), https://slate.com/news-and-politics/2024/07/supreme-court-term-egregious-decisions-grants-pass.html [https://perma.cc/W8T9-9LRK].

state lockstep decisions with respect to the manner and extent of incorporation. Offering a unique framework to discuss the variations in how state courts incorporate federal law, I build on Professor Michael Dorf's work distinguishing static and dynamic incorporation by reference.[9] Applying that distinction here, I explain how a state decision that statically incorporates federal law incorporates only the meaning of federal law as understood at that specific time and with respect only to the issue before the court. In contrast, a decision that dynamically incorporates federal law more broadly incorporates future changes in federal law.

The difference between static and dynamic incorporation of federal law informs Part II of the Article, which offers the first comprehensive evaluation of state court decisions interpreting the binding effect of prior lockstep decisions. State decisions adhering to a prior practice of lockstepping typically justify that adherence by construing the earlier decision as having dynamically incorporated federal law or by explaining their agreement with the federal constitutional change. State decisions that deviate from the lockstep practice after a change in federal law, in contrast, typically limit the binding effect of the prior lockstep decision as only a static incorporation. They may narrowly construe the holding of the earlier case, scrutinize the quality and depth of the prior decision's reasoning, or identify changed circumstances. Decisions deviating from federal law also often invoke principles of state sovereignty and the independent role of the state courts in our national constitutional structure.

Part III then considers the interplay between adherence to prior lockstep decisions and the rule of law: Are stare decisis values better served by retaining substantive interpretations or the lockstep approach? Does static or dynamic incorporation better promote the rule of law from a separation-of-powers perspective? Though any court will need to decide those questions for itself in the case before it, there is reason to think that construing decisions as engaging only in static incorporation may better serve stare decisis and separation of powers principles.

In Part IV, I offer some concluding thoughts on the practical implications of these inquiries as advocates and courts grapple with state constitutional rights claims today.

I. STATE CONSTITUTIONAL INCORPORATION OF FEDERAL CONSTITUTIONAL LAW

A. *EARLY INDEPENDENT STATE CONSTITUTIONALISM*

State courts' routine incorporation of federal law into decisions interpreting analogous state constitutional provisions is a relatively recent development in the course of constitutional history. The Founders "perceived [states] as protectors of, rather than threats to, the civil and political rights of individuals."[10]

9. Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 104 (2008).

10. William J. Brennan, Jr., *The Bill of Rights: State Constitutions as Guardians of Individual Rights*, 59 N.Y. ST. BAR J. 10, 11 (1987).

As a result, the Bill of Rights in the U.S. Constitution applied only to the federal government, and state constitutions and laws generally provided the only source of protection from *state* government conduct that intruded on individual rights and liberties.[11] State courts, therefore, routinely considered the scope of state constitutional protections, including now-familiar concepts like liberty and due process,[12] unreasonable searches and seizures,[13] government instruction of religion,[14] and the right to a jury.[15] In doing so, they employed the full range of constitutional interpretive principles to distill the meaning of state constitutional rights provisions, often without any mention of U.S. Supreme Court interpretations of parallel federal constitutional provisions.[16] As the Honorable Jeffrey S. Sutton has explained, "Odd though it may sound to modern ears, most of the constitutional-rights litigation of the first 150 years after 1776 took place in the States."[17]

11. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 14 (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977); Liu, *supra* note 6, at 1322 ("During the Founding Era and throughout the nineteenth century, the Federal Bill of Rights was understood to apply only to the federal government, not to the states."). *But see* Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 989–90, 989 n.59 (2010) (discussing pre-incorporation state court decisions "invok[ing] provisions of the Federal Bill of Rights . . . to invalidate state laws and otherwise constrain state government").

12. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378, 383 (1856) (considering due process); Ieck v. Anderson, 57 Cal. 251, 253 (1881) (considering the rights of liberty and property); Taylor v. Porter & Ford, 4 Hill 140, 146–47 (N.Y. Sup. Ct. 1843) (considering due process); Janes v. Reynolds' Adm'rs, 2 Tex. 250, 251–52 (1847) (considering jury right and meaning of "due course of the law of the land"); City of Portland v. City of Bangor, 65 Me. 120, 121 (1876) (interpreting the meaning of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution).

13. *See, e.g.*, Fisher v. McGirr, 67 Mass. (1 Gray) 1, 28–29 (1854) (covering the right to be free from unreasonable searches and seizures). *But see* People v. Caballes, 851 N.E.2d 26, 33 (Ill. 2006) (noting that even before incorporation of the Fourth Amendment through the Fourteenth Amendment, the Illinois Supreme Court "had followed the Supreme Court decisions interpreting the [F]ourth [A]mendment in our interpretation of section 6 of article II of the Illinois constitution" (quoting People v. Williams, 190 N.E.2d 303, 304 (Ill. 1963))).

14. *See, e.g.*, State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. 8, 44 N.W. 967, 973–76 (Wis. 1890) (discussing the prohibition on sectarian instruction); Moore v. Monroe, 20 N.W. 475, 475 (Iowa 1884) (discussing the prohibition on establishment of religion and compelling persons "to attend any place of worship").

15. *See, e.g.*, Rhines v. Clark, 51 Pa. 96, 100–02 (1866) (discussing the right to a jury).

16. Liu, *supra* note 6, at 1322–23 ("[I]t is notable that state constitutional decisions from this era often employed concepts of natural law, common-law developments, and other modes of reasoning that transcended state-specific texts or understandings."); *see id.* (offering examples); *Wynehamer*, 13 N.Y. at 392–95, 398 (considering the text and original meaning of the state's due process provision, the state constitution's structure, decisions interpreting other states' constitutions, historical commentaries, and the provision's focus on "fundamental rights"); *Ieck*, 57 Cal. at 253 (considering the historical meaning of due process and a relevant decision of another state supreme court); *Taylor*, 4 Hill at 143–48 (considering principles including text, purpose, original meaning, constitutional structure, and liberty in interpreting the meaning of the due process clause of the New York Constitution).

17. SUTTON, *supra* note 11, at 13; Robert J. Smith, Zoë Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 559 (2023) ("For the

But states did not always wield their interpretive power equitably. Indeed, "many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone."[18] The Supreme Court of Appeals of Virginia held in 1806, for example, that enslaved people were exempted from the equality and liberty guarantees in the Virginia Constitution's bill of rights, further insulating the practice of slavery in that state.[19] The New Jersey Legislature passed a gradual emancipation act in 1804,[20] but its supreme court in 1845 rejected the argument that the equality provision in the New Jersey Constitution could "free those slaves who had not yet been emancipated by statute."[21] And it was an 1850 Supreme Judicial Court of Massachusetts decision[22] that "supplied the basis for the 'separate but equal' doctrine" later endorsed by the U.S. Supreme Court in *Plessy v. Ferguson*.[23]

As Judge Sutton remarked, "Who could blame lawyers and their clients for being reluctant to develop a strategy built in part on state constitutional rights?"[24] The Civil War created a demand "for the national protection of individual rights against abuses of state power,"[25] which led to federal supervision over states through the Thirteenth, Fourteenth, and Fifteenth Amendments.[26] Eventually, the U.S. Supreme Court's incorporation of various Bill of Rights provisions through the Fourteenth Amendment Due Process Clause created

first 175 years or so after the adoption of the U.S. Constitution and the subsequent bill of rights amendments, the states, as designed, operated as the preeminent source for individual rights protection, enforcing the rights enshrined in their own constitutions."); *see also* THOMAS M. COOLEY & ANDREW C. MCLAUGHLIN, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 224–67 (Boston, Little, Brown & Co. 3d ed. 1898) (discussing provisions of the Constitution and in some cases how they apply to the states).

18. SUTTON, *supra* note 11, at 14; *cf.* Liu, *supra* note 6, at 1324 ("Although primary responsibility for individual rights protection fell to state courts before the advent of incorporation, it is fair to say that the natural law decisions [in state court decisions] did not amount in scope or depth to what we would today regard as a developed jurisprudence of individual rights.").

19. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1203 (1985); Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 141 (1806).

20. Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law*, 23 RUTGERS L.J. 753, 755 (1992).

21. Williams, *supra* note 19, at 1204 (discussing State v. Post, 20 N.J.L. 368 (1845)). *But see* Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 208 (1836) (concluding that the Massachusetts Constitution's declaration of rights abolished slavery).

22. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1849).

23. Williams, *supra* note 19, at 1204–05; *see* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (discussing and relying on *Roberts*), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. SUTTON, *supra* note 11, at 14.

25. Brennan, *supra* note 10, at 11.

26. *See id.* ("[T]he primary impetus to the adoption of the Fourteenth Amendment was the fear that the former Confederate states would deny newly-freed persons the protection of life, liberty, and property formally provided by the state constitutions."). The Honorable Goodwin Liu and Professor Akhil Amar have pointed out that "our conventional understanding of constitutional rights as protections for individuals and minorities from oppressive majorities has its main origins not in the Founding Era but in the aftermath of the Civil War and ratification of the Fourteenth Amendment." Liu, *supra* note 6, at 1324 (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 28–30, 32–33, 65 (1998)).

redundancy between the role of the U.S. Constitution and state constitutions.[27] State constitutions were no longer the only source of protection of individual rights against state intrusion, and legislators, advocates, and scholars largely turned their attention to the U.S. Constitution and the federal courts.

State courts did not entirely abandon the authority to interpret their constitutions independently from the U.S. Constitution,[28] but as the U.S. Constitution was interpreted to offer more robust protections of rights that overlapped with state constitutional protections,[29] "it was only natural that . . . state courts saw no reason to consider what protections, if any, were secured by state constitutions."[30] The Federal Constitution and U.S. Supreme Court had raised the floor of constitutional protection, allowing state courts to go along for the ride.[31] As a result, as the Pennsylvania Supreme Court recently put it, some state courts developed a "[c]omplacency with the status quo established by the [U.S.] Supreme Court jurisprudence applying the federal Constitution," which in turn "stalled development of [state constitutional] protections."[32]

B. *Routine State Incorporation of Federal Constitutional Law*

Attention returned to state courts and state constitutions in the 1970s, after "Chief Justice Burger replaced Chief Justice Warren in 1968, and the kinds of advantages that once prompted resort to federal law and federal

---

27. Brennan, *supra* note 11, at 492–93.

28. States remained "active in interpreting the structural provisions of their respective state constitutions and in providing independent interpretations of rights guarantees for which there are no analogous federal guarantees." Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 334 (2017). In his book, *51 Imperfect Solutions*, Judge Sutton also details a handful of examples where state courts engaged in dialogue with each other and with the U.S. Supreme Court in developing the bounds of individual rights protections under the federal and state constitutions. SUTTON, *supra* note 11, at 47–83 (discussing the Fourth Amendment exclusionary rule); *id.* at 92–132 (providing examples of protections against forced sterilization); *id.* at 133–72 (discussing free speech, religion, and flag salutes).

29. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (enforcing the Fourth Amendment exclusionary rule against the states); Robinson v. California, 370 U.S. 660, 666–67 (1962) (incorporating Eighth Amendment prohibition on cruel and unusual punishments against the states).

30. Brennan, *supra* note 11, at 495; *see also* Brennan, *supra* note 10, at 17 ("In the 1960's, the 'understandable enthusiasm that championed the application of the Bill of Rights to the states . . . contribute[d] to the disparagement of other rights retained by the people, namely state constitutional rights.'" (quoting Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 4 (Bradley D. McGraw ed., 1985))); Boldt & Friedman, *supra* note 28, at 334 ("The selective incorporation of most of the Bill of Rights, coupled with the rights-expanding jurisprudence of the Warren Court in the 1960s and early 1970s, led advocates and judges to look almost exclusively to the federal constitution as the source of an expanding field of individual rights.").

31. Brennan, *supra* note 10, at 17 ("Busy interpreting the onslaught of federal constitutional rulings in state criminal cases, the state courts fell silent on the subject of their own constitutions.").

32. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 906 (Pa. 2024).

courts [became] more fluid than fixed."[33] In a law review article in 1977, Justice William Brennan called on states "to step into the breach" and interpret their constitutions to protect individual rights even where the U.S. Constitution may not.[34] This began the phenomenon that Professor Robert F. Williams termed the "New Judicial Federalism," where state courts to varying degrees embraced the call "to interpret their state constitutions to provide more rights than recognized by the [U.S.] Supreme Court under the Federal Constitution."[35]

Some state courts around this time were quick to assert their independence.[36] But "following its initial 'thrill of discovery,'" independent state constitutionalism sparked a backlash in some states where political pressure drove adherence to U.S. Supreme Court decisions retrenching on rights.[37] To dispel the perception that state courts were rendering decisions based on the justices' policy preferences,[38] state courts developed various methodologies

33. SUTTON, *supra* note 11, at 15; *see also* Brennan, *supra* note 11, at 495–98 (identifying "a trend in recent opinions of the [U.S.] Supreme Court to pull back from" prior rights-protective decisions); Boldt & Friedman, *supra* note 28, at 334 ("[W]hen the Burger Court threatened a constriction of constitutional rights, a new focus on state constitutions as an alternative source of rights emerged.").

34. Brennan, *supra* note 11, at 503; *see also* Brennan, *supra* note 10, at 17 ("Now, the dimunition [sic] of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role.").

35. Williams, *State Constitutional Law*, *supra* note 5, at 953.

36. *See, e.g.*, People v. Disbrow, 545 P.2d 272, 280–81 (Cal. 1976) ("We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the [U.S.] Supreme Court interpreting the federal Constitution."); State v. Johnson, 346 A.2d 66, 68 n.2 (N.J. 1975) (considering the New Jersey constitutional provision that mirrors the language of the Fourth Amendment and holding that the state supreme court has "the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning," even if it offers greater protection than the Fourth Amendment).

37. Williams, *State Constitutional Law*, *supra* note 5, at 968–69 ("[T]he California Supreme Court's decision declaring the death penalty unconstitutional under the state constitution was nullified very quickly by [a constitutional] amendment."); *see also* Boldt & Friedman, *supra* note 28, at 337 (noting that legitimacy concerns regarding independent state constitutionalism were "driven, at least in part, by the politics surrounding the shift from the Warren Court to the Burger and Rehnquist courts in the last decades of the twentieth century").

38. *See* Liu, *supra* note 6, at 1311 (discussing criticism that "[s]tate constitutionalism . . . boils down to a results-oriented jurisprudence—a tactic for evading federal precedents that state courts don't like"); *id.* at 1311 n.23 ("It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the [U.S.] Supreme Court. Our decisions must be principled, not result-oriented." (quoting State v. Jewett, 500 A.2d 233, 235 (Vt. 1985))); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 422–26 (1974); Keasler, *supra* note 6, at 367 (arguing in support of the lockstep approach and noting that the "'second bite at the apple' approach to state constitutional interpretation is nothing more than a thinly disguised pretext for exercising 'judicial creativity'" and writing the article during his time as a judge on the Texas Court of Criminal Appeals).

to determine and explain whether and when they should depart from U.S. Supreme Court interpretations of analogous rights provisions.[39]

Some courts continue to embrace independence in state constitutional interpretation, in what scholars often refer to as the "primacy" or "independent state constitutionalism" approach.[40] This approach "accord[s] federal law persuasive authority but [courts] need not treat it as more persuasive than the interpretations of sister states with similar provisions."[41] Often, though, state courts defer to some degree to federal interpretations of analogous state constitutional provisions. Some state courts consider a variety of criteria when determining whether to deviate from federal law in any particular case, in what is called the "criteria" or "interstitial" approach to state constitutional interpretation.[42] Other state courts simply incorporate federal interpretations

39. Williams, *State Constitutional Law*, *supra* note 5, at 969 ("State courts, in reaction to the backlash, began to engage in the state constitutional 'methodology wars,' in which they considered whether they should evaluate state constitutional claims before or after analogous federal claims, whether they should interpret state constitutional rights in 'lockstep' with federal rights, and whether 'criteria' should be developed to justify state interpretations beyond the national minimum.").

40. Boldt & Friedman, *supra* note 28, at 313. The primacy approach "has come to be associated most directly with Former Oregon Supreme Court Justice Hans Linde" and calls on state courts to "to address fully all state law issues fairly raised in litigation, including both constitutional and non-constitutional rights claims, before turning to federal constitutional law." *Id.*

41. *Id.* at 335–36; *see also* Liu, *supra* note 6, at 1313–20 (discussing state court legitimacy in interpreting state constitution provisions differently than similar Federal Constitution provisions). Bob Williams has posited that U.S. Supreme Court decisions should be given even "*less* weight than decisions of sister state jurisdictions," in recognition that "the U.S. Supreme Court has expressed an inclination to risk the under-enforcement of some federal constitutional rights guarantees to preserve room for state supreme courts to adopt alternative approaches." Williams, *supra* note 6, at 403; Boldt & Friedman, *supra* note 28, at 336. Others yet maintain "that state courts should interpret state constitutions *without reference to* . . . federal constitutional law." *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982) (emphasis added). Some examples of state decisions embracing primacy include: *State v. Kennedy*, 666 P.2d 1316, 1321 (Or. 1983) ("Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines."), *Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992) ("If we simply apply federal law in all cases, why have a Texas Constitution, and why have a Texas Supreme Court?"), *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002) ("[W]e will not 'march lock-step' with federal courts, where the broader protections of the Montana Constitution may be implicated."), *State v. Rowell*, 188 P.3d 95, 99–100 (N.M. 2008) ("Despite the fact that the search incident to arrest exception is recognized by both the [U.S.] Supreme Court and this Court in enforcing our respective Constitutions, our courts are not in lock-step with each other in those interpretations. We are careful to consider the reasoning underlying federal constitutional interpretations when construing our own New Mexico Constitution, but we have declined to adopt federal constitutional analysis where we found it unpersuasive or flawed."), *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 975 (Or. 1982) (en banc) ("It is our duty to determine what the standard should be under our own constitution . . . ."), and *State v. Novembrino*, 519 A.2d 820, 827–35 (N.J. 1987) (criticizing perceived inconsistences in the U.S. Supreme Court's Fourth Amendment jurisprudence and affirming its independence to avoid uncertainty).

42. *Developments in the Law: The Interpretation of State Constitutional Rights*, *supra* note 41, at 1356 (calling for "a self-consciously *interstitial* view of state constitutional law, a model primarily for filling in the spaces left open by federal constitutional doctrine, and suggest[ing] that state

of U.S. constitutional language into the state constitution through the lockstep approach.

The benefits and drawbacks of each of these state constitutional interpretation approaches have been well explored and debated in scholarly literature and case law,[43] and I do not intend to rehash that debate here. Regardless of whether courts *should have* adopted or incorporated federal law when interpreting their state constitutions, the reality is that they repeatedly have done so.[44] The critical issue for this Article, which examines the impact of those decisions on future cases adjudicating state constitutional rights, is *how* they adopted or incorporated federal law into the state constitution and whether the incorporation withstands future changes in federal law.

C. Variations in State Court Incorporation of Federal Law

To understand how courts construe prior decisions incorporating federal law, it is important to break down in more detail how state courts go about incorporating federal law in the first place. Much of the literature discussing state constitutional decisions entering lockstep with the U.S. Supreme Court lump the decisions together with little analysis of the variations in the extent of incorporation.[45]

Some state decisions incorporating a federal constitutional interpretation are narrow in scope, unambiguously incorporating the U.S. Supreme Court's interpretation of a constitutional provision as applied to a specific application

---

courts consider a variety of factors in deciding how far to depart from federal reasoning and results" (footnotes omitted)); *see also* Boldt & Friedman, *supra* note 28, at 313 ("An intermediate approach is also possible; specifically, a method which presumes state court deference to federal constitutional standards unless one or more criteria are established permitting the state court to interpret its state constitutional provision as being at odds with a U.S. Supreme Court interpretation of a coordinate federal individual rights provision."). Courts following this approach typically consider: (1) the text of the state provisions (including difference in the text between the state and federal constitutions); (2) constitutional history; (3) constitutional structure; (4) matters of state or local concern; (5) state laws; (6) the persuasiveness of federal precedent; and (7) related state precedent. *See* Liu, *supra* note 6, at 1314; State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986); People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984); City Recycling, Inc. v. State, 778 A.2d 77, 87 (Conn. 2001).

43. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 224 (2d ed. 2023) (noting that the New Judicial Federalism "heated debate over state court interpretation of state constitutional rights provisions that are identical or similar to federal constitutional provisions that have already been interpreted in a certain way by the U.S. Supreme Court"); *see, e.g.*, Liu, *supra* note 6, at 1309–13; Landau, *supra* note 6, at 847; James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 359 (2016); Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99–102 (1988); Boldt & Friedman, *supra* note 28, at 310–16; SUTTON, *supra* note 11, at 173–90.

44. *See supra* note 5 and accompanying text.

45. *See* WILLIAMS & FRIEDMAN, *supra* note 43, at 226 ("Much less attention has been devoted . . . to the circumstances where state courts decide to *follow*, rather than *diverge from*, federal constitutional doctrine."). In this Section, I expand upon analysis that Bob Williams began in a 2004 law review article and subsequent book chapter. *See* Williams, *Case-by-Case Adoptionism*, *supra* note 5, at 1509–13; WILLIAMS & FRIEDMAN, *supra* note 43, at 224–63.

of the right at a specific time.[46] This type of incorporation reflects the concept Professor Michael Dorf calls "static" incorporation by reference, where the court "adopts the law as it stands at the moment of incorporation."[47] Other decisions, in contrast, could be read to incorporate not only the meaning of the federal constitutional provision at the time of incorporation, but also future changes in federal law,[48] reflecting what Professor Dorf calls "dynamic incorporation"[49] and Professor Williams calls "prospective lockstepping."[50] Where a state court purports to incorporate federal law dynamically, the state court effectively says "that not only in the instant case, but *in the future*, it will interpret the state and federal clauses the same."[51]

1. Static Incorporation

The 2013 decision of the Illinois Supreme Court, *Hope Clinic for Women, Ltd. v. Flores*, arguably illustrates a static, case-specific incorporation of a federal constitutional rule into the state constitution.[52] In *Flores*, the court considered the constitutionality of a state law requiring in most situations forty-eight-hour parental notice before a physician could perform an abortion on a minor.[53] "As a threshold matter," before reaching the constitutionality of the parental notice provision, the court first considered "the origin and scope of th[e] right" to an abortion under the state constitution.[54] Finding no grounds justifying departure "from the [U.S.] Supreme Court's interpretation that the federal due process clause protects a woman's right to an abortion,"[55] the court held,

---

46. *See, e.g.*, Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 760 (Ill. 2013); *see infra* notes 52–56 and accompanying text.

47. Dorf, *supra* note 9, at 104. Professor Dorf primarily discusses static and dynamic incorporation of statutory law, but he recognizes the practice of state courts engaging in dynamic incorporation of federal constitutional law. *See id.* at 110, 150–52. This Section intends to expand on the work he began in the context of state constitutional interpretation.

48. *See, e.g.*, State v. Laude, 654 P.2d 1223, 1228 (Wyo. 1982); *see infra* notes 51–61 and accompanying text.

49. Dorf, *supra* note 9, at 104–05.

50. WILLIAMS & FRIEDMAN, *supra* note 43, at 232.

51. *Id.*

52. Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 760 (Ill. 2013).

53. *Id.* at 750 (quoting 750 ILL. COMP. STAT. 70/20 (repealed 2022)).

54. *Id.* at 754.

55. *Id.* at 760. To reach this conclusion, the court applied what it calls the "limited lockstep" approach to state constitutional interpretation:

> [W]hen the language of the provisions within our state and federal constitutions is nearly identical [as in the case of the respective due process clauses], departure from the [U.S.] Supreme Court's construction of the provision will generally be warranted only if we find "in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned."

Id. at 757 (quoting People v. Caballes, 851 N.E.2d 26, 36 (Ill. 2006)).

"*at this time*, we interpret our state due process clause to provide protections, *with respect to abortion, equivalent to those provided by the federal due process clause*."[56]

I characterize this decision as case-specific because it focuses its analysis on a specific application of the state due process clause: the state due process right to an abortion, and more specifically, whether that right is infringed by the parental notification statute. The decision does not opine on the meaning of the state constitutional due process clause more broadly nor does it purport to hold that the court must incorporate the federal due process standards in all circumstances.[57] The decision is also static as a temporal matter—limiting its holding to the "time" of the decision and leaving open the possibility that the court could reach a different conclusion down the line.[58]

2. Dynamic Incorporation

In contrast to decisions that expressly limit the extent of incorporation, other state decisions incorporating federal constitutional law announce more broadly that the state constitutional provision has the same meaning as the federal constitutional analog, regardless of the circumstances of the particular case. In failing to limit the incorporation temporally or in scope, these decisions could be read to incorporate dynamically future changes in the linked federal constitutional doctrine.

The Wyoming Supreme Court in *State v. Laude*, for example, stated that "if a statute does not violate the Due Process Clause of the Fourteenth

---

56. *Id.* at 760 (emphasis added). The court then went on to conclude that the parental notification was constitutional because there was similarly no justification to deviate from U.S. Supreme Court decisions upholding analogous statutes under the Federal Constitution. *Id.* at 769 ("Finding no reason to depart from lockstep here, we adopt the reasoning of the [U.S] Supreme Court in holding that the Illinois Parental Notice of Abortion Act of 1995 does not violate our state constitutional guarantees of due process and equal protection."). The court separately held that the parental notification law did not run afoul of the state constitution's privacy and gender equality clauses. *Id.* at 763, 771–72.

57. For another example of case-specific static incorporation, see *State v. Charpentier*, 962 P.2d 1033, 1036–37 (Idaho 1998). There, the Supreme Court of Idaho adopted the U.S. Supreme Court's bright-line rule in *New York v. Belton* that police officers may search the passenger compartment of an automobile as a search incident to arrest. *Id.* (discussing New York v. Belton, 453 U.S. 454, 461 (1981)). In explaining its decision, the court noted that it agreed with the U.S. Supreme Court that a bright-line rule was important in this context. *Id.* at 1037. But it also offered additional justifications why it considered the outcome in *Belton* to be correct. *Id.* And although it noted that consistency between state and federal law was desirable in this context, the court did not purport to adopt all of the U.S. Supreme Court's Fourth Amendment jurisprudence wholesale or to bind a future court to follow a change in U.S. Supreme Court precedent on the question presented. *See id.* The U.S. Supreme Court has since limited the holding of *Belton* to apply only if the arrestee is unsecured and can access the interior of the vehicle, or "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Arizona v. Gant, 556 U.S. 332, 335 (2009). The Supreme Court of Idaho has not yet revisited whether the bright-line rule from *Belton* still controls as a matter of state constitutional law.

58. *Flores*, 991 N.E.2d at 760. It is worth noting here that a concurring opinion in *Flores* interprets the same language as dynamically incorporating federal law. *See infra* note 86 and accompanying text for further elaboration on that judge's analysis.

Amendment, it does not violate Wyoming's Due Process Clause."[59] The *Laude* decision considered, as relevant here, whether a state criminal statute was unconstitutionally vague in violation of the state's due process clause.[60] The rule it announced, however, appears to apply to all applications of the due process clause not just to the case-specific question whether the statute at issue was unconstitutionally vague or to issues relating to unconstitutional vagueness more broadly. Indeed, in a subsequent decision addressing a state constitutional challenge to a statute on the basis that it violated principles of substantive due process and equal protection, the Wyoming Supreme Court cited *Laude* for the premise that "a statute which would be deemed constitutional under the 'reasonableness' standard of the Fourteenth Amendment to the [U.S.] Constitution also complies with the requirements of [the due process clause of the Wyoming Constitution]."[61]

Although some courts engage in in-depth analysis when deciding whether to adopt federal standards as a matter of state constitutional law, other decisions incorporate federal law with minimal (if any) explanation of their reasoning, in what is known as "unreflective adoptionism," "kneejerk lockstepping," or "instant agreement" decision-making.[62] The Washington Supreme Court, for example, has repeatedly closed the door to arguments that the state equal protection provision could offer greater protection than the U.S. Supreme Court's interpretation of the Fourteenth Amendment, stating that the "court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue."[63] To support that conclusion, the court relied on a chain of decisions with similar holdings

59. State v. Laude, 654 P.2d 1223, 1228 (Wyo. 1982); *see also* McGarvey v. Swan, 96 P. 697, 714 (Wyo. 1908) ("[I]f [a] statute does not violate the [F]ederal Constitution as to due process of law, it does not violate the state Constitution in that respect, for 'due process of law' has the *same meaning and effect* in either Constitution." (emphasis added)).

60. *Laude*, 654 P.2d at 1228. Likewise, the Ohio Supreme Court broadly tethered the meaning of its free speech clause to the First Amendment in a case involving a state law that prohibited picketing and pamphletting at a private shopping mall. Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 61 (Ohio 1994) (holding "that the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment *is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution* [the free speech clause]" (emphasis added)). And the Supreme Court of Washington has tied the meaning of its state constitutional provision protecting against self-incrimination to the Fifth Amendment. State v. Earls, 116 Wash. 2d 364, 373–74 (1991) (en banc).

61. White v. State, 784 P.2d 1313, 1318 (Wyo. 1989) (citing *Laude*, 654 P.2d at 1228).

62. Williams, *Case-by-Case Adoptionism*, *supra* note 5, at 1505–06; *see id.* at 1505 (discussing "state court decisions simply applying federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome").

63. *See* State v. Manussier, 921 P.2d 473, 482 (Wash. 1996); *see also* State v. Smith, 814 P.2d 652, 660–61 (Wash. 1991) (noting "several recent decisions holding that the [state] privileges and immunities clause and the [federal] equal protection clause are substantially identical and considered by this court as one issue" and "declin[ing] to interpret [the state clause] independently of the Fourteenth Amendment in this decision as well").

that link back to a decision as early as 1914 tethering the two constitutional provisions without substantial analysis.[64]

II. State Court Adherence to Precedential Decisions Applying the Lockstep Methodology

A. *Stranded State Doctrine Following Changes in Federal Law*

One confounding aspect of state incorporation of federal constitutional law is whether state law changes with subsequent changes in federal law. With respect to decisions that purport to dynamically incorporate federal law, would state law change automatically whenever federal law changes (even without involvement of the state judiciary)? Or does the change in federal law create "stranded" state constitutional doctrine that requires state courts to react and clarify the status of state constitutional law?[65] Another related aspect of this inquiry is whether decisions that purport to incorporate federal law dynamically, in fact, bind future courts to follow that methodology. As discussed in depth in Section II.B, some courts indeed consider the lockstep methodology in these decisions to be binding, but many others, when pressed to determine the precedential effect of a lockstep decision, do not adhere to the lockstep methodology.

This conundrum is likely to arise in a variety of areas of constitutional law. By eliminating federal constitutional protection for abortion, *Dobbs* already has sparked litigation raising these questions in states that had adopted the previous federal approach to constitutional due process.[66] State courts could confront similar questions in any number of constitutional rights cases, including cases involving the right to bear arms or the right to be free from unreasonable searches and seizures.[67] The conundrum also extends beyond the rights context, such as when courts have lockstepped on issues surrounding

64. State v. Pitney, 140 P. 918, 919 (Wash. 1914) ("The provisions of the federal and the state Constitutions relative to the equal protection of the laws, and due process of law, are substantially the same.").

65. FRIESEN, *supra* note 7, § 1.06[2] & n.193 (noting that, "in the intervening period before the state supreme court has an opportunity to react" to a change in federal law, "the last state court opinion to embrace the now extinct federal rule is a piece of 'stranded doctrine'").

66. *See, e.g.*, Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 924–45 (Pa. 2024).

67. Consider, for example, state decisions adopting the U.S. Supreme Court's interpretation of the Second Amendment when interpreting an analogous state constitutional right to bear arms. *See, e.g.*, State v. Wheatley, 94 N.E.3d 578, 583 n.3 (Ohio Ct. App. 2018) (recognizing the right to bear arms under "the Ohio Constitution as being coextensive with the [U.S.] Constitution"). If the U.S. Supreme Court changes its interpretation of the Second Amendment, Ohio will be confronted with whether its analogous constitutional provisions change as well. See also notes 149–53 and accompanying text for a discussion of Iowa's recent decisions breaking lockstep from the U.S. Supreme Court with regard to its state protection against unreasonable searches and seizures. *See* State v. Wright, 961 N.W.2d 396, 408–12 (Iowa 2021).

the proper separation of powers among the branches of government.[68] Yet, despite substantial scholarship on the propriety of the lockstep approach as a method of state constitutional interpretation in the first instance, there has been no comprehensive analysis of whether and how state courts adhere to prior decisions employing the lockstep methodology.

B. Variations in How State Courts Adhere to Precedent Incorporating Federal Law

As a general matter, courts considering the precedential effect of a prior decision undertake an analysis to assess and characterize the holding of the case, or its *ratio decidendi*.[69] But when federal law changes after a state decision incorporated its reasoning into state law, such that the previously incorporated federal rule and the present federal rule diverge, the analysis of the precedential effect of the earlier "lockstep" decision requires that the court determine whether the substance or the methodology of the decision is binding. That is, courts will have to determine whether the decision statically incorporated federal law, such that it binds them to adhere to its *substantive holding* (e.g., in the *Flores* context, that the Illinois Constitution protects the right to an abortion), or whether the decision dynamically incorporated federal law, such that it binds them to adhere to the *methodology* it employed (e.g., that the Illinois courts interpret the state due process clause to be equivalent to the federal due process clause).

In practice, state courts vary widely in how they approach these questions and in whether they construe the incorporation of federal law to be static or dynamic. To help understand these divergent outcomes, I reviewed both state court decisions that adhere to the lockstep methodology of prior decisions, and those that break from the practice of lockstep following a change in federal

68. Consider, for example, state decisions that incorporated the U.S. Supreme Court's reasoning in *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to articulate the deference that the courts should give to state agency interpretations of the law. *See, e.g.*, Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 636–37 (2023) (noting in the context of *Chevron* deference and the nondelegation doctrine that "[s]tate courts have generally taken a very reactive approach to both doctrines," either accepting federal doctrine "wholesale" or "constructing modified cognate doctrines"). Following the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron*, state courts that previously lockstepped with the *Chevron* decision will need to confront whether state law has changed in light of *Loper Bright*. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024). That question may involve a different balance of considerations than those that are in play in the constitutional rights context.

69. Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 161–62 (1930). *See generally* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62 (2018) (discussing methods of approaching precedent and respecting stare decisis).

law.[70] I also analyzed the decisions' reasoning in construing the precedential effect of the prior decision.

My intention here is not to produce an exhaustive account of all justifications for deciding to adhere or not adhere to a prior lockstep approach. Nor do I offer any interpretation as to the motivations behind a court's decision to adhere to methodology or substance. Instead, my aim is to reveal the variation and complexity in how state courts deal with their prior lockstep decisions. My analysis shows that, while some state courts find themselves bound by methodology, others often fall out of (lock)step with federal law if presented with principled reasons to deviate.

1. Decisions Justifying Continued Adherence to Federal Law when Interpreting State Constitutions

i. Construing Prior Decisions as Dynamically Incorporating Federal Law with Respect to a Specific Legal Issue

Some courts that adhere to changes in federal law do so because they construe an earlier lockstep decision as having dynamically incorporated future changes. That is, they interpret the prior decision as not only having adopted the federal standard applicable at that time but also as having tied the meaning of the state constitution to future developments in federal law. In these scenarios, the methodology, not the substantive outcome of the earlier decision, is the binding holding that the court must adhere to down the line.

The Ohio Supreme Court's 1997 decision in *State v. Robinette* illustrates this type of reasoning.[71] The court previously had held under "the federal and Ohio Constitutions," that "citizens stopped for traffic offenses [must] be clearly informed by the detaining officer when they are free to go after a valid detention."[72] The U.S. Supreme Court granted certiorari and held that such a notice actually was not required under the Federal Fourth Amendment.[73]

70. I have sourced the decisions in this Section using a variety of techniques. Two articles by Christopher Green and others were particularly helpful, as they identified state cases that departed from U.S. Supreme Court holdings on state law grounds. *See generally* LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 MISS. L.J. 197 (2020) (canvassing 342 Supreme Court Fourth Amendment cases and the 306 state departures stemming from 125 cases); Christopher Green, Charles A. Langley, Elena Mosby Peters, David Camp Pittman & Suzette Nicole Wafford-Turner, *State-Court Departures from the Supreme Court: A Comprehensive Survey*, 92 MISS. L.J. 329 (2023) (expanding the analysis to 1,013 U.S. Supreme Court cases and 1,868 state-court departures). I also identified many cases by starting with lockstep decisions cited in other sources, and then searching for cases applying those decisions to new cases and scenarios, or alternatively, identifying state court decisions deviating from federal law and looking back to see whether they distinguished earlier lockstep decisions.

71. State v. Robinette, 685 N.E.2d 762, 766–67 (Ohio 1997). For additional discussion of *State v. Robinette* and the Ohio Supreme Court's practice of "prospective lockstepping," see WILLIAMS & FRIEDMAN, *supra* note 43, at 233–34.

72. State v. Robinette, 653 N.E.2d 695, 699 (Ohio 1995), *rev'd*, 519 U.S. 33 (1996). The court did not separately analyze the state and federal constitutions but referenced both provisions as providing the same constitutional protections. *See id.*

73. *Robinette*, 519 U.S. at 39–40.

On remand, the Ohio Supreme Court considered whether its "prior holding should be reaffirmed under the" Ohio Constitution.[74] That is, even though the court already had held the "free to go" language was required as a matter of state constitutional law, it revisited that ruling in light of the change in the operation of federal law. Then, relying on the premise "that the reach of Section 14, Article I, of the Ohio Constitution . . . is coextensive with that of the Fourth Amendment,"[75] the court abandoned its prior state constitutional holding requiring "free to go" language and "harmonize[d]" its interpretation of the state constitution with the U.S. Supreme Court's interpretation of the Federal Constitution.[76] The court did not find it was bound by the substance of the original state constitutional holding (i.e., that the state constitution required that officers tell individuals they are "free to go" before the officer can engage in consensual interrogation). Rather, the court gave effect to the methodology of the original holding (in effect, construing the earlier decision as having dynamically incorporated federal law). As a result, the court found it was obligated to change its conception of state constitutional law when the meaning of federal law changed "unless there were persuasive reasons to find otherwise."[77]

Professor Ronald Collins described another example of this situation when playing out the implications of a 1983 Montana Supreme Court decision, which he characterized as the "Montana Disaster."[78] The court had previously held—under both the federal and state constitutions—that the use at trial of evidence of a person's refusal to take a sobriety test violated the right against self-incrimination.[79] But when the U.S. Supreme Court later ruled that the use of such evidence does not violate the U.S. Constitution[80] and vacated the

74. *Robinette*, 685 N.E.2d at 766.

75. *Id.* at 767 (quoting State v. Geraldo, 429 N.E.2d 141, 146 (Ohio 1981)).

76. *Id.* at 767, 771.

77. *Id.* at 767. The court held:

> Accordingly, we find that Section 14, Article I of the Ohio Constitution affords protections that are coextensive with those provided by the Fourth Amendment and, therefore, the Ohio Constitution does not require a police officer to inform an individual, stopped for a traffic violation, that he or she is free to go before the officer may attempt to engage in a consensual interrogation.

Id. at 771. It went on to conclude that the seizure in that case nevertheless violated the Ohio Constitution because, despite the lack of a "free to go" warning, the officer's subsequent search of a vehicle was not voluntary. *Id.* at 771–72; *see also* People v. Caballes, 851 N.E.2d 26, 44–45 (Ill. 2006) ("[W]e reaffirm our commitment to limited lockstep analysis not only because we feel constrained to do so by the doctrine of *stare decisis*, but because the limited lockstep approach continues to reflect our understanding of the intent of the framers of the Illinois Constitution of 1970.").

78. Collins, *supra* note 7, at 1097.

79. *Id.* at 1099–100.

80. South Dakota v. Neville, 459 U.S. 553, 564 (1983).

Montana decision,[81] the Montana Supreme Court issued a subsequent opinion changing course on the state constitutional question and continuing in lockstep with the U.S. Supreme Court: "The language used in the two constitutions is substantially identical and *affords no basis* for interpreting Montana's prohibition against self-incrimination more broadly than its federal counterpart."[82] Again here, the state court considered the incorporation of federal law to have stronger precedential weight than the substantive holding regarding the scope of the right against self-incrimination in its prior decision.[83]

Considering the logical extension of this type of dynamic-incorporation reasoning, Professor Collins offered the following scenario:

> Consider a situation in which the Montana Supreme Court . . . [aligns] state law with its federal counterpart. For a decade thereafter the federal and state decisional law in this area enjoy a calm coexistence. Then a newly constituted [U.S.] Supreme Court restricts substantially the constitutional protection afforded under fifth amendment precedents. In most jurisdictions, the state constitutional precedent would continue to bind state courts even after the federal law changed. But that would not be the case in a [dynamically lockstepped] jurisdiction. When the protections of federal law ceased, the parallel protections afforded by the Montana Constitution would vanish.[84]

This scenario mirrors at least one Illinois Supreme Court justice's understanding of the implications of the Illinois Supreme Court's *Flores* decision.[85] Justice Robert R. Thomas concurred in the decision, which defined the Illinois constitutional right to an abortion by reference to the U.S. Supreme Court's interpretation of the Fourteenth Amendment Due Process Clause, and stated that "in the event that *Casey* and *Roe* are ever overruled . . . the [*Flores* majority] opinion's approach would simply revert the meaning of our due process clause to the pre-*Roe* interpretation and the matter of abortion regulation (*i.e.*, whether to regulate or prohibit it) would be left for the

81. Montana v. Jackson, 460 U.S. 1030, 1030 (1983). Over the dissent of Justice John Paul Stevens, who would have found that the original decision was sufficient to establish that it "rests on an adequate and independent state ground," *id.* at 1032 (Stevens, J., dissenting), the Court instructed "the Supreme Court of Montana to consider whether its judgment is based upon federal or state constitutional grounds, or both," *id.* at 1030 (majority opinion).

82. Collins, *supra* note 7, at 1109 (quoting State v. Jackson, 672 P.2d 255, 260 (Mont. 1983), *abrogated by* State v. Johnson, 719 P.2d 1248 (Mont. 1986)).

83. For other examples of state courts "abandon[ing] their state constitutional holdings after the U.S. Supreme Court reversed [their] interpretation of a similar or identical federal constitutional provision," see WILLIAMS & FRIEDMAN, *supra* note 43, at 235–37.

84. Collins, *supra* note 7, at 1114 (footnote omitted). The Montana example contrasts with a state court decision engaging in static incorporation, see *supra* notes 46–47, which affirms the viability of the state constitutional holding even if federal law changes. *See also* State v. Caraher, 653 P.2d 942, 946 (Or. 1982) ("When this court gives Oregon law an interpretation corresponding to a federal opinion, our decision remains the Oregon law even when federal doctrine later changes.").

85. *See supra* notes 52–56 and accompanying text (discussing *Flores*).

legislative process."[86] For state court judges adhering to Justice R. Thomas's view, state constitutional rights that previously were linked to the analogous federal constitutional provisions would change as the operative meaning of federal law does.[87]

State courts that construe lockstep decisions as having engaged in dynamic incorporation recognize changes in federal law regardless of whether the change retrenches or expands individual rights. In a Supreme Court of Wisconsin case from 2010, *State v. Dearborn*,[88] adherence to the lockstep methodology had the effect of expanding state constitutional rights after the U.S. Supreme Court expanded Fourth Amendment protections in the context of the search of a vehicle incident to arrest of an occupant.[89]

In *New York v. Belton*, the U.S. Supreme Court created a bright-line rule that officers could search the passenger compartment of a vehicle, including containers, as a search incident to the arrest of one of the vehicle occupants.[90] Following *Belton*, the Supreme Court of Wisconsin adopted the bright-line test as a manner of state constitutional law in a 1986 case, *State v. Fry*.[91] Later, in *Arizona v. Gant*, the U.S. Supreme Court rejected the prevailing broad reading of *Belton* and limited *Belton*'s holding to circumstances "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[92] After *Gant*, the Supreme Court of Wisconsin adhered to its practice of lockstepping in *Dearborn*, noting that "[c]onsistent with our prior practice of keeping Wisconsin and federal constitutional law in this area in step, we hereby adopt the reasoning in *Gant* as the proper reading of Article 1, Section 11 of the Wisconsin Constitution (protecting against unreasonable searches and seizures)."[93] The effect of that decision, the court explained, was to overrule the substantive outcome of the

86. Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 779 (Ill. 2013) (Thomas, J., concurring) (discussing Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215).

87. The Iowa Supreme Court, in breaking from its practice of lockstepping in this manner, lamented the "instances of whipsawing" that lockstepping caused, including "awkward" situations where even a footnote in a U.S. Supreme Court case was enough to reverse a recent position. State v. Ochoa, 792 N.W.2d 260, 266 (Iowa 2010). Despite its history of viewing the two provisions as identical, the court embraced its independence and asserted that Iowa courts should view U.S. Supreme Court Fourth Amendment cases as "no more binding . . . than . . . a case decided by another state supreme court." *Id.* at 267.

88. *See generally* State v. Dearborn, 786 N.W.2d 97 (Wis. 2010).

89. *Id.* at 105–06.

90. New York v. Belton, 453 U.S. 454, 455, 460–61 (1981).

91. State v. Fry, 388 N.W.2d 565, 573 (Wis. 1986) ("This court has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the [U.S.] Supreme Court under the [F]ourth [A]mendment."), *overruled by Dearborn*, 786 N.W.2d 97.

92. Arizona v. Gant, 556 U.S. 332, 343 (2009) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).

93. *Dearborn*, 786 N.W.2d at 105.

Fry decision that had adopted a bright-line test.[94] But in "overruling" the substance of the *Fry* decision, the court relied solely on the lockstep methodology, not on the factors it typically considers when overruling precedent.[95]

ii. Construing Prior Decisions as Dynamically Incorporating Federal Law with Respect to All Applications of a Constitutional Provision

The examples in the previous Section involved situations where federal law changed with respect to the exact issue that was incorporated into state law in a prior state decision. More often, state courts are called to interpret precedent that broadly pronounced that state and federal law are the same with respect to a particular constitutional provision, even though the issue in that earlier decision involved a distinct set of circumstances from the situation the court presently faces. In these examples, courts treat the lockstep methodology as binding and, in effect, construe their earlier decisions as having dynamically incorporated federal law.

The Supreme Court of Nebraska, for example, pronounced in a 2005 decision, *State v. Senters*, that the Nebraska "constitution does not contain a right of privacy broader than that recognized by the federal Constitution."[96] That case involved a substantive due process challenge to a conviction for child sexual abuse material.[97] In a subsequent decision involving a different application of substantive due process (regarding the constitutionality of statutes that permit grandparents certain visitation rights over a parent's objection), the court cited *Senters* for the proposition that "the due process provision of the Nebraska Constitution is congruent with the [F]ederal Constitution and that the Nebraska Constitution does not contain any rights broader than the [F]ederal Constitution."[98] The court therefore "extend[ed] the foregoing principle of congruence to the present context involving a parent's substantive

94. *Id.* The court went on to similarly follow lockstep with the U.S. Supreme Court in applying the good-faith exception to the exclusionary rule. *Id.* at 106–08. As a result, even though the court expanded the rights of individuals subject to searches incident to arrest as a general matter, the defendant in that case did not benefit from the change in constitutional law. *See id.* at 110.

95. *See id.* at 105. The Wisconsin Supreme Court in other circumstances has explained that it considers the following factors in deciding whether to overrule precedent:

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" [sic] or (5) the prior decision is "unworkable in practice."

Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 717 N.W.2d 216, 223–24 (Wis. 2006) (quoting Johnson Controls, Inc. v. Emps. Ins. of Wausau, 665 N.W.2d 257, 287 (Wis. 2003)); *see also Johnson Controls, Inc.*, 665 N.W.2d at 287 (considering "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated").

96. State v. Senters, 699 N.W.2d 810, 814 (Neb. 2005).

97. *Id.* at 813–14.

98. Hamit v. Hamit, 715 N.W.2d 512, 524 (Neb. 2006) (citing *Senters*, 699 N.W.2d 810).

due process rights, and accordingly . . . [did] not distinguish between the two constitutions in [its] analysis."[99]

Wisconsin's Supreme Court endorsed a similar coextensive approach to interpretation of the Sixth Amendment of the U.S. Constitution and Article 1, Section 7 of its state constitution.[100] In *State v. Delebreau*, the court instructed that its "precedent regarding constitutional interpretation" requires construing the Wisconsin Constitution consistent with the Federal Constitution where "the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible."[101] Following this approach, the Sixth Amendment's language was sufficiently identical to Article 1, Section 7, and the court declined to deviate.[102]

iii. Extending Incorporation of Federal Law to New Scenarios After Independent Consideration

Like the adage "if it ain't broke, don't fix it," another common reason state courts articulate for adhering to a prior practice of lockstepping with the U.S. Supreme Court is that they have done so consistently and have identified no principled reason for deviating in the present case. These decisions generally rely on a practice of adopting relevant federal law, but they do not necessarily treat prior decisions as having dynamically incorporated federal law. That is, they do not consider the methodology binding; rather, they consider federal law to be hyper-persuasive, and these courts will generally follow changes in federal law though they technically leave the door open to deviation in future cases.

The Supreme Court of Colorado's 2017 decision in *Nicholls v. People* is illustrative.[103] *Nicholls* involved a reinterpretation of the Colorado confrontation clause in the aftermath of the U.S. Supreme Court's decision in *Crawford v. Washington*, which transformed the Court's interpretation of the Federal Confrontation Clause.[104] In *Crawford*, the Supreme Court overruled the test established in *Ohio v. Roberts*[105] that the confrontation clause "does not bar admission of an unavailable witness's statement against a criminal defendant

99. *Id.*

100. State v. Delebreau, 864 N.W.2d 852, 863 (Wis. 2015).

101. *Id.* at 862, 863 (quoting State v. Agnello, 593 N.W.2d 427, 433 (Wis. 1999)).

102. *Id.* at 863. Courts are not the only decisionmakers to embrace adherence to the lockstep approach. In Florida, the language of the state constitution expressly *requires* that the state search and seizure provision be interpreted in conformity with the U.S. Constitution's Fourth Amendment. *See* FLA. CONST. art. I, § 12 ("This right shall be construed in conformity with the 4th Amendment to the [U.S.] Constitution, as interpreted by the [U.S.] Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the [U.S.] Supreme Court construing the 4th Amendment to the [U.S.] Constitution."). Likewise, the California Constitution ties its equal protection provision to the Federal Constitution's Equal Protection Clause of the Fourteenth Amendment with respect to the issue of school busing. *See* CAL. CONST. art. I, § 7.

103. *See generally* Nicholls v. People, 396 P.3d 675 (Colo. 2017).

104. *Id.* at 680–81; Crawford v. Washington, 541 U.S. 36, 60–68 (2004).

105. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36.

if the statement bears 'adequate "indicia of reliability."'"[106] Instead, the Court held that "[*t*]*estimonial* statements of witnesses absent from trial" may be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[107] Before *Crawford*, the Supreme Court of Colorado had "adopted [the *Roberts*] analysis . . . declaring it equally applicable to admission of hearsay evidence under the Colorado Constitution."[108] In the immediate aftermath of *Crawford*, Colorado courts continued to apply the *Roberts* reliability test to *nontestimonial* hearsay statements (believing that to be consistent with *Crawford*'s holding).[109] But when the U.S. Supreme Court later clarified that the Federal Confrontation Clause only applies to testimonial statements (and, thus, with respect to nontestimonial statements, only regular hearsay exceptions apply without any additional reliability inquiry),[110] the Supreme Court of Colorado considered in *Nicholls* whether to follow suit, or whether to keep a reliability test under the Colorado Constitution with respect to nontestimonial statements.[111]

In deciding to follow in step with the U.S. Supreme Court and hold that the state confrontation clause also does not apply to nontestimonial statements, the Supreme Court of Colorado did not treat its earlier decision incorporating *Roberts* as having dynamically incorporated federal law.[112] Rather, the court recognized that stare decisis typically requires that it "follow the rule of law it established in earlier cases"—meaning stare decisis would ordinarily require that it continue to follow its earlier substantive holding that the state confrontation clause applies to nontestimonial statements.[113] But it also recognized that "the doctrine 'does not exclude room for growth in the law, and the courts are not without power to depart from a prior ruling, or to overrule it, where sound reasons exist.'"[114] The court then explained its decision to overrule its prior decision on the basis of such "sound reasons" present here.[115] It first noted that it had "long interpreted Colorado's Confrontation Clause as commensurate with the [F]ederal Confrontation Clause."[116] The court thus implicitly endorsed the view that U.S. Supreme Court decisions are hyper persuasive, noting that the shift away from its prior holding will maintain a desired "consistency" between the two clauses.[117] But unlike the cases described

106. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66); *id.* at 60–62 (abrogating *Roberts*).

107. *Id.* at 59 (emphasis added).

108. Compan v. People, 121 P.3d 876, 879 n.1 (Colo. 2005) (citing People v. Dement, 661 P.2d 675, 680–81 (Colo. 1983)), *overruled by Nicholls*, 396 P.3d 675.

109. *See id.* at 879–80.

110. *See* Davis v. Washington, 547 U.S. 813, 821 (2006).

111. *Nicholls*, 396 P.3d at 681.

112. *Id.*

113. *Id.*

114. *Id.* (quoting Creacy v. Indus. Comm'n, 366 P.2d 384, 386 (Colo. 1961)).

115. *Id.*

116. *Id.*

117. *Id.*

above that embrace versions of dynamic incorporation, the court did not stop its analysis there. Rather, it engaged in an (albeit brief) independent analysis of the issue and found the Supreme Court's latest analysis to be "sound."[118] The court analyzed the text of both confrontation clauses, noting the emphasis on the defendant's right to be confronted with "*witnesses* against him,"[119] which implies a focus on testimonial statements and not "other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[120] The court also noted that its prior decisions adopting federal law did not contain any "independent, state constitutional reasoning that demands adherence to the [existing] test for nontestimonial hearsay."[121] That is, because the earlier substantive holding was based almost entirely on federal law, the change in federal law removed the justifications underlying the earlier state constitutional decision.

2. Decisions Justifying Departures from Lockstep Methodology

i. Construing Prior Decisions in a Manner that Limits Precedential Weight of Lockstep Methodology

State courts that break from a prior lockstep decision often construe the earlier decision in a way that elevates the binding effect of the substantive holding over the methodology the prior court employed. They thus limit the earlier decision to have engaged only in static incorporation. This kind of reasoning takes several forms; I will illustrate three such interpretive frameworks here.[122] First, some courts narrowly construe the holdings of earlier decisions so that any discussion of lockstep methodology is effectively rendered dicta. Second, some courts limit the applicability of stare decisis to well-reasoned decisions, and thus do not consider broad incorporation statements binding. And finally, some courts justify deviation from a prior practice of adopting federal law on the basis that the circumstances under which federal law was adopted no longer exist.

ii. Narrowing the Holding to the Substantive Outcome

Unlike decisions that view the incorporation of federal law as broad and dynamic, other courts construe earlier lockstep decisions narrowly so that only the *substantive* holding of the decision is binding, and any statements about lockstep methodology are, in effect, dicta. When deciding whether to incorporate a change in federal law or incorporate federal law with respect to a different

118. *Id.* at 681–82.

119. *Id.* at 682 (quoting U.S. CONST. amend. VI, and referencing COLO. CONST. art. II, § 16) (emphasis added).

120. *Id.* (quoting Davis v. Washington, 547 U.S. 813, 821 (2006)).

121. *Id.*

122. Note that these frameworks are nonexclusive, and some courts use multiple frameworks to justify deviations from prior lockstep decisions.

application of a constitutional right, these decisions focus on whether the prior substantive holding binds them to a particular outcome.

A decision of the Supreme Court of Alaska offers a good example of this interpretive framework. In *Doe v. State*, the court broke from its prior practice of interpreting its state constitutional prohibition on ex post facto laws in tandem with the U.S. Supreme Court's interpretation of the federal constitutional analog.[123] Dedicating an entire section of its opinion to the issue of stare decisis,[124] the court recognized that it had "relied on federal precedent and analysis in addressing state ex post facto claims in the past."[125] It nevertheless noted that, in those decisions, it simply had "'no reason' to do otherwise," and had "never endorsed federal ex post facto analysis as superseding or limiting our independent consideration of Alaska's ex post facto prohibition."[126] So, even though the earlier decisions purported to incorporate federal ex post facto law dynamically into the state constitution, the court in *Doe* more narrowly construed those holdings as limited to their particular facts.[127] As the court explained, its "decision [did] not overrule or depend on overruling any prior decision of this court, nor does it depart from any past holding of this court," as the court had "never adopted a reading of Alaska's ex post facto prohibition that would, unless overruled, foreclose today's result."[128] The court concluded that "[s]tare decisis therefore has no application here."[129]

Likewise in *State v. Caraher*, the Supreme Court of Oregon explained its decision breaking from a prior practice of construing its constitution in tandem with the Fourth Amendment in the context of a search incident to arrest by noting that the earlier decision did not make the state and federal provisions "the same . . . for all times and purposes."[130] Construing the earlier *substantive* outcome as binding (not the methodology), the court noted that "[w]hen [it] gives Oregon law an interpretation corresponding to a federal opinion, [its] decision remains the Oregon law even when federal doctrine later changes."[131] This is a clear example of a court interpreting a prior

123. Doe v. State, 189 P.3d 999, 1003–05 (Alaska 2008).

124. *Id.* at 1004–07.

125. *Id.* at 1004.

126. *Id.* at 1005 (quoting Danks v. State, 619 P.2d 720, 722 (Alaska 1980)).

127. *Id.* at 1006. The court explained that "[w]hat we have said in our ex post facto cases cannot be read as prospectively limiting the protections of the Alaska Constitution to what federal courts might later say the corresponding federal clauses provide. *Nor could we have done so.*" *Id.* (emphasis added).

128. *Id.* at 1005.

129. *Id.* For another example of this type of reasoning, see *Raffensperger v. Jackson*, 888 S.E.2d 483, 492–93 n.11, 497 (Ga. 2023) (finding prior cases resolving state due process challenges were "not controlling" because they had not "expressly adopted the federal due process test" and, thus, striking down a statute as violating the state constitution even if it would not have violated the Federal Constitution).

130. State v. Caraher, 653 P.2d 942, 946 (Or. 1982) (en banc).

131. *Id.*

decision as statically—not dynamically—incorporating federal law.[132] The substance of Oregon law remains steady as the meaning of the analogous federal law fluctuates.[133]

This interpretive framework has also played out in the inverse—where a state court previously interpreted its state constitution to provide greater protection than an analogous federal constitutional provision but declines to adhere to that methodology in a future case. In *State v. McLellan*, for example, the New Hampshire Supreme Court noted that it previously had "found New Hampshire's Double Jeopardy Clause to provide greater protection than its federal counterpart in certain circumstances," but nevertheless explained in a subsequent case involving novel factual circumstances that "we are not persuaded that we should interpret the State Constitution differently than the Federal Constitution in this context."[134] There, again, the court did not construe the prior decisions' methodology to bind the future court to interpret their constitutions independently and more broadly than the Federal Constitution. And because the prior decisions' substance did not dictate the outcome of that case, stare decisis played no role in the decision.[135]

iii. Scrutinizing the Quality and Depth of the Prior Decision's Reasoning

Whether a court determines that stare decisis applies to the substantive application of a right or to the methodology of incorporating federal law may depend on how well-reasoned the initial state court opinion was. Some courts are less inclined to interpret a prior lockstep decision as having dynamically incorporated federal law when the lockstep methodology was employed without in-depth consideration. As former Oregon Supreme Court Justice Jack Landau put it, "in order for stare decisis to apply, the earlier decision must represent a considered and authoritative attempt to determine the meaning

132. *See also* State v. Tucker, 642 A.2d 401, 404–05 (N.J. 1994) (noting that the court typically conforms its state constitutional search-and-seizure doctrine in line with the U.S. Supreme Court, but declining to fully adopt the methodology in California v. Hodari D., 499 U.S. 621 (1991), because to do so would be "too radical a change," and therefore "continu[ing] to define a seizure under New Jersey constitutional law in accordance with [its] existing precedent"); Dennis v. State, 990 P.2d 277, 286 (Okla. Crim. App. 1999) (noting that "[t]he coincidence that the [U.S.] Supreme Court chose to interpret the federal provision differently does not change our state law precedent").

133. *See also* State v. Bevel, 745 S.E.2d 237, 246–47 (W. Va. 2013) (sustaining West Virginia precedent and declining to adopt the U.S. Supreme Court holding in Montejo v. Louisiana, 556 U.S. 778 (2009), based on the value of stare decisis, despite previously construing its constitutional provision and the Sixth Amendment as "mirrored").

134. State v. McLellan, 817 A.2d 309, 314 (N.H. 2003).

135. As another example, the Supreme Court of Arizona had previously interpreted its state constitution's "Private Affairs Clause [to provide] broader protections to the home than the Fourth Amendment," but deviated from that broader interpretation when considering whether the state constitutional provision provided more protection than the Fourth Amendment in the context of warrantless searches of IP addresses and ISP subscriber information. State v. Mixton, 478 P.3d 1227, 1235 (Ariz. 2021). The court distinguished the cases involving warrantless searches of the home, and then, noting a preference for uniformity with federal law, independently considered whether the state constitution more broadly protected against warrantless searches of information provided by internet service providers (ultimately concluding it did not). *Id.* at 1235–40.

of a given constitutional provision."[136] In contrast, "passing dictum concerning the meaning or effect of a constitutional provision . . . is [not] necessarily entitled to any weight in future cases."[137]

This interpretive framework may be especially relevant if the prior incorporation of federal law took place before Justice Brennan's groundbreaking article in 1977, when "state courts tended to interpret their own constitutions without much regard for interpretive principles, indeed, without much regard for the independent significance of state constitutions at all."[138] As discussed in Part I, following passage of the Fourteenth Amendment and incorporation of the Bill of Rights against the states, state courts took a back seat to the U.S. Supreme Court when construing state constitutional provisions with federal counterparts.[139] As federal law was developing rapidly, and often in a manner that provided more protection for rights than state constitutions, state courts frequently adopted federal law when interpreting their own constitutions without much independent consideration.[140] Today, state courts embracing Justice Landau's view give less weight to the lockstep methodology of those decisions.

The Supreme Court of Wyoming, for example, relied on this framework to break from a prior practice of interpreting its "search and seizure jurisprudence" in a manner that had "not distinguished between the two provisions," meaning the Fourth Amendment and the state constitutional analog.[141] The court recognized that development of the reach of the state constitutional provision had been "hamper[ed]" by "the fact that [the court had] both initiated and then all but abandoned independent analysis of the state constitutional provision during the 1920s and 1930s and began determining search and seizure issues under the Fourth Amendment with strict adherence to [U.S.] Supreme Court decisions."[142] The court justified that earlier lockstep "practice was essentially required in order to comply with the Supreme Court's expansive protection provided to individual rights during the 1960s and 1970s."[143] But the court also recognized that, as the Supreme Court began "shifting precedent," it "freed state courts to return to analyzing these issues under their own constitutions, and leading constitutional authorities soon began urging independent interpretations for state courts."[144] The court thus instructed litigants to "provide a precise, analytically sound approach when advancing an argument to independently interpret the constitution," and noted that

136. Landau, *supra* note 6, at 871.
137. *Id.* (emphasis omitted).
138. *Id.*
139. *See supra* Section I.B.
140. *See supra* Section I.A.
141. Vasquez v. State, 990 P.2d 476, 483 (Wyo. 1999).
142. *Id.* at 483–84.
143. *Id.* at 484.
144. *Id.*

when presented with such arguments, it would not consider itself bound by its prior practice of adopting Fourth Amendment precedent.[145]

In addition to scrutinizing the quality and depth of earlier state court decisions, state courts also justify breaking a practice of lockstepping by scrutinizing the reasoning of the U.S. Supreme Court decision that altered the status of federal law. The Supreme Court of Iowa, for example, has noted that, "given the similar wording of the Fourth Amendment and Iowa's search and seizure clause, these provisions are generally considered to be 'identical in scope, import, and purpose.'"[146] It nevertheless refused to "blindly follow federal precedent," explaining that it must "determine the soundness of the [Supreme] Court's analysis, for '[i]f precedent is to have any value it must be based on a convincing rationale.'"[147] After engaging in an in-depth critique of the Court's rationale, it ultimately decided not to follow the Court's adoption of the good-faith exception to the exclusionary rule.[148]

In a more recent decision, *State v. Wright*, the Iowa Supreme Court again deviated from its prior "'lockstep' approach to interpretation of state constitutional provisions," in favor of a historical approach to its state constitutional prohibition on unreasonable searches and seizures.[149] The court rendered a substantial critique of the U.S. Supreme Court's jurisprudence regarding reasonable expectations of privacy, established in *Katz v. United States*,[150] noting its view that "[c]urrent Fourth Amendment jurisprudence is a mess."[151] The court continued:

> Given the uncertainty and lack of clarity in federal search and seizure jurisprudence, we conclude it is no longer tenable to follow federal precedents in lockstep. [The state constitutional provision], as originally understood, was meant to provide the same protections as the Fourth Amendment, as originally understood, but the Supreme Court's interpretation and construction of the Fourth Amendment has deviated from the text and original meaning. Respectful consideration of the Supreme Court's precedents does not require adherence to federal doctrine that members of that great Court, other jurists, and commentators all acknowledge departs from the

145. *Id.* In *Vasquez*, the Wyoming Supreme Court proceeded to deviate from the U.S. Supreme Court's bright-line rule in *New York v. Belton*, that officers may search the passenger compartment of a car as a search incident to arrest. *Id.* at 489 (citing New York v. Belton, 453 U.S. 454 (1981)).

146. State v. Cline, 617 N.W.2d 277, 284 (Iowa 2000) (quoting State v. Beckett, 532 N.W.2d 751, 755 (Iowa 1995)), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001).

147. *Id.* at 285 (quoting State v. James, 393 N.W.2d 465, 472 (Iowa 1986) (Lavorato, J., dissenting)).

148. *Id.* at 288–93.

149. State v. Wright, 961 N.W.2d 396, 408 (Iowa 2021).

150. Katz v. United States, 389 U.S. 347, 350–51 (1967).

151. *Wright*, 961 N.W.2d at 410.

> text and original meaning of the constitutional prohibition against unreasonable seizures and searches.[152]

Having freed itself from the grip of U.S. Supreme Court interpretations of the Fourth Amendment, the court independently interpreted the analogous state constitutional provision, rejected the *Katz* framework, and held that law enforcement acts unreasonable when they "commit[] a trespass against a citizen's house, papers, or effects without first obtaining a warrant based 'on probable cause.'"[153]

iv. Identifying Changed Circumstances

Some state courts breaking from the lockstep methodology construe the holding to have been limited to the legal or factual circumstances known at the time of the decision.[154] Under this framework, a future state court is not bound by subsequent changes in federal law that were not considered the first time around.

a. Changes in Legal Circumstances

With respect to changes in legal circumstances, the Supreme Court of Arkansas embraced this approach in breaking lockstep with the U.S. Supreme Court on the issue of whether pretextual stops violate the state constitution's protections against unreasonable searches and seizures.[155] The court previously held that the protections under the state constitution were "parallel to those provided by the Fourth Amendment," and decided that pretextual stops violated both the federal and state constitutional prohibition on unreasonable searches and seizures.[156] The U.S. Supreme Court subsequently held the contrary, noting as a matter of federal law that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[157] Then, considering whether that development in federal law affected the meaning of the state constitutional provision, the Arkansas Supreme Court reaffirmed the substance of its earlier decision and abandoned its "parallel" approach.[158] It justified its deviation on the basis that the federal and state constitutions no longer "mirror" each other:

> We previously noted that the wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the [U.S.] Supreme Court's cases.

152. *Id.* at 411–12.

153. *Id.* at 412 (quoting IOWA CONST. art. I, § 8).

154. *See supra* Section I.C.

155. State v. Sullivan, 74 S.W.3d 215, 218 (Ark. 2002).

156. *Id.* at 217.

157. Whren v. United States, 517 U.S. 806, 813 (1996) (holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

158. *Sullivan*, 74 S.W.3d at 222.

> Current interpretation of the [U.S.] Constitution in the federal courts *no longer mirrors our interpretation* of our own constitution.[159]

The earlier incorporation of federal law, therefore, did not serve as a barrier to the court's independent interpretation of state constitutional law after the operative meaning of the federal law changed.

The Pennsylvania Supreme Court recently found that the overruling of *Roe* in *Dobbs* amounted to changed legal circumstances warranting reconsideration of its past lockstepping with the U.S. Supreme Court's recognition of a right to abortion based in the Federal Constitution.[160] In deciding to reopen the question of a right to abortion based on the Pennsylvania Constitution, the court acknowledged that it previously had "considered the protections under [its constitution] to be 'in essence the same' as those afforded by the federal Equal Protection Clause."[161] But in light of the change in federal law and lack of independent analysis of the state constitutional question, the court reasoned that it was "logical and necessary . . . to reconsider the premise of [its earlier decision] and address the unique state constitutional questions that are otherwise unanswered."[162] The court ultimately found that Article 1, Section 26 of the Pennsylvania Constitution guarantees "broader protections than the [F]ederal Equal Protection Clause."[163]

The Minnesota Supreme Court likewise says that changes in federal law alter its interpretive framework. It has said it will deviate from the U.S. Supreme Court and independently interpret its constitution, *inter alia*, "when . . . 'the [U.S.] Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure'" or when "the [U.S.] Supreme Court has 'retrenched on Bill of Rights issues.'"[164] The implication is that a significant change in federal law disrupts any prior relationship between state and federal constitutional law.[165]

b. Changes in Factual Circumstances

With respect to changes in factual or contextual circumstances underlying a prior lockstep decision, courts may deviate from the lockstep methodology and embrace independent state constitutional interpretation. For example,

---

159. *Id.* (quoting Griffin v. State, 67 S.W.3d 582, 593 (Ark. 2002) (Hannah, J., concurring)) (emphasis added).

160. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 944–45 (Pa. 2024).

161. *Id.* at 928 (quoting James v. Se. Pa. Transp. Auth., 477 A.2d 1302, 1305 (Pa. 1984)).

162. *Id.* at 943.

163. *Id.* at 945.

164. City of Golden Valley v. Wiebesick, 899 N.W.2d 152, 157 (Minn. 2017) (quoting State v. McMurray, 860 N.W.2d 686, 690 (Minn. 2015)).

165. *See, e.g.*, *In re* Welfare of E.D.J., 502 N.W.2d 779, 781, 783 (Minn. 1993) (noting that the court "invariably turn[s] [to the U.S. Supreme Court] in the first instance whenever we are asked in a criminal case whether the police conduct constitutes an unreasonable search and seizure," but declining to follow an on-point U.S. Supreme Court decision because the Court's decision "represents a departure" from its prior precedent).

the Supreme Court of North Carolina relied on changes to "contemporary understandings of adolescence" to break from a prior decision that "observed that '[the court] historically ha[d] analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state constitutions.'"[166] The court cabined that earlier decision as reflecting its approach to state constitutional interpretation "at the time [the] case was decided," but noted that following that approach "the same exact way today misses the mark."[167] The earlier case was "very much a product of its time" and "emerging science-based understanding of childhood development necessitates abandoning its reasoning."[168] The court, in turn, freed itself to consider textual differences between the federal and state constitution (noting that the state constitution prohibits "cruel *or* unusual punishments"[169]), the state court's "independent authority to interpret state constitutional provisions" and the "the unique role of state constitutions and state courts within our system of federalism," and the nature of the federal cruel-and-unusual punishment inquiry (which itself requires "independent judgment" in assessing whether a punishment is cruel or unusual).[170] The court concluded, in light of these considerations, that its cruel or unusual punishment clause "need not be interpreted in lockstep with the Eighth Amendment to the [U.S.] Constitution."[171]

The Massachusetts Supreme Judicial Court held that technological advancements can amount to changed factual circumstances justifying reconsideration.[172] In *Commonwealth v. Augustine*, the court departed from its past adoption of the U.S. Supreme Court's third-party doctrine, which instructed that defendants have no reasonable expectation of privacy as to information they voluntarily share with third parties.[173] In *Augustine*, the court held that the voluntary choice to use a cellphone does not defeat a reasonable expectation of privacy against the disclosure of their Cellular Site Location Information ("CSLI") to police without a warrant.[174] The court paid particular attention to how "the digital age ha[d] altered dramatically the societal landscape from the 1970s," when the third-party doctrine was created.[175] Social, cultural, and

166. State v. Kelliher, 873 S.E.2d 366, 384 (N.C. 2022) (quoting State v. Green, 502 S.E.2d 819, 828 (N.C. 1998)).

167. *Id.*

168. *Id.*

169. N.C. CONST. art. I, § 27 (emphasis added).

170. *Kelliher*, 873 S.E.2d at 383.

171. *Id.* at 385.

172. Commonwealth v. Augustine, 4 N.E.3d 846, 859 (Mass. 2014).

173. *Id.* at 858 ("In earlier cases considering a person's reasonable expectation of privacy in third-party telephone records under art. 14, this court essentially tracked Fourth Amendment jurisprudence, and applied in substance the Supreme Court's third-party doctrine.").

174. *Id.* at 867 ("In holding here that the Commonwealth generally must obtain a warrant before acquiring a person's historical CSLI records, this opinion clearly announces a new rule.").

175. *Id.* at 859.

technological change can amount to changed factual circumstances sparking departures from lockstep.

3. Construing Prior Decisions to Emphasize State Sovereignty

In addition to construing prior lockstep decisions in a manner that minimizes the binding effect of the lockstep methodology, some state courts justify breaking from lockstep by invoking principles of federalism, state sovereignty, and separation of powers. This interpretive framework emphasizes the inherent authority of state supreme courts to interpret their state constitutions independently and, in effect, denies that any earlier decision could have restrained the independent sovereign power of the state judiciary.

The Alaska Supreme Court in *Doe v. State*, discussed in Section II.B.2.ii, employed this reasoning as an additional justification for breaking lockstep when interpreting the state's prohibition on ex post facto laws.[176] The court noted that even though the U.S. Supreme Court "informs our analysis . . . it does not and cannot preempt our independent analysis or dictate the result we reach."[177] With respect to the case before it, "Alaska retains its sovereign authority."[178] The Iowa Supreme Court has likewise noted that it "would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law."[179] Further, the Pennsylvania Supreme Court declined to follow previously coextensive federal precedent because it considered the U.S. Supreme Court's more recent application to create "dangerous precedent, with great potential for abuse."[180] In deviating, it noted that it is free to do so because U.S. Supreme Court opinions "are like opinions of sister state courts or lower federal courts," regardless of past trends.[181]

---

176. Doe v. State, 189 P.3d 999, 1006–07 (Alaska 2008).

177. *Id.* at 1006.

178. *Id.* at 1007.

179. State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001). Other examples of this type of language abound. *See, e.g.*, State v. Wright, 961 N.W.2d 396, 403 (Iowa 2021) ("Our duty of independent interpretation is truly independent."); State v. Ochoa, 792 N.W.2d 260, 266–67 (Iowa 2010) (describing the "whipsawing" that lockstepping can cause and noting "that a state supreme court cannot delegate to any other court the power to engage in authoritative constitutional interpretation under the state constitution"); Heitman v. State, 815 S.W.2d 681, 688 (Tex. Crim. App. 1991) (en banc) (breaking from its prior practice of interpreting the Fourth Amendment and the Texas state constitutional analog in tandem and noting that the "state constitution is a doctrine independent of the [F]ederal [C]onstitution and its guarantees are not dependent upon those in the [F]ederal [C]onstitution"); State v. Lawson, 297 P.3d 1164, 1169–70 (Kan. 2013) (noting that "[t]he federal jurisprudence appears to ebb and flow on the tide of political influence" and "allowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state sovereignty").

180. Commonwealth v. DeJohn, 403 A.2d 1283, 1289 (Pa. 1979).

181. *Id.* (quoting Jerome B. Falk, Jr., *The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 283–84 (1973)); *see also* State v. Smith, 834 S.W.2d 915, 919 (Tenn. 1992) (breaking lockstep when "adherence to the spirit and principles of [the state constitutional provision] requires" deviation).

The Kentucky Supreme Court embraced its inherent power to interpret its state constitution even after a pattern of lockstepping, describing lockstepping as merely "parallel aspects of dual sovereignty rather than an immutable rule of law."[182] In *Keysor v. Commonwealth*, the court broke from its practice of interpreting the Sixth Amendment right to counsel as coextensive with its state constitution, disagreeing with the U.S. Supreme Court's decision in *Montejo v. Jackson*.[183] Though the court admitted that in the past it had observed that the Kentucky Constitution's right to counsel "is no greater" than that of the Sixth Amendment, it found grounds to depart in its own state sovereignty.[184] The court went as far to say that to *not* recognize such an obligation would render the court "derelict in [its] constitutional responsibility."[185]

The Minnesota Supreme Court likewise has invoked its inherent authority to justify deviations from prior lockstep decisions. In 1961, the court broke from its practice of reflexively following U.S. Supreme Court interpretations of constitutional rights provisions when it said, "we are not bound to follow what [the U.S. Supreme Court] says is not a violation of the Fourteenth Amendment. We should exercise our own judicial judgment as to what we deem a violation of our own constitution."[186] Since that case, the court has invoked this reasoning to deviate from U.S. Supreme Court interpretations of analogous rights provisions in a number of cases.[187] And, as a matter of course, the court says it will independently interpret its constitution when it "determine[s] that federal precedent does not adequately protect our citizens' basic rights and liberties."[188] In that way, the court recognized the state

182. Keysor v. Commonwealth, 486 S.W.3d 273, 280 (Ky. 2016).

183. *Id.*

184. *Id.* (quoting Allen v. Commonwealth, 410 S.W.3d 125, 133 (Ky. 2013)).

185. *Id.*

186. State v. Oman, 110 N.W.2d 514, 523 (Minn. 1961) (quoting State v. Lanesboro Produce & Hatchery Co., 21 N.W.2d 792, 800 (Minn. 1946) (Loring, C.J., dissenting)).

187. *See, e.g.*, State v. Carter, 697 N.W.2d 199, 210 (Minn. 2005) (holding that the Minnesota Constitution offers greater protection than the Fourth Amendment in the police use of drug detection dogs); State v. Askerooth, 681 N.W.2d 353, 362 (Minn. 2004) ("It is our responsibility as Minnesota's highest court to independently safeguard for the people of Minnesota the protections embodied in our constitution."); Women of State of Minn. *ex rel.* Doe v. Gomez, 542 N.W.2d 17, 30 (Minn. 1995) (holding "Minnesota possesses a long tradition of affording persons on the periphery of society a greater measure of government protection" and therefore "this tradition compels us to deviate from the federal course on the question of denying funding to indigent women seeking therapeutic abortions"); Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 184 (Minn. 1994) (holding unconstitutional the use of temporary roadblocks to search for alcohol impairment); *In re* Welfare of E.D.J., 502 N.W.2d 779, 783 (Minn. 1993) (declining to follow the U.S. Supreme Court's approach in California v. Hodari D., 499 U.S. 621 (1991), and "exercising [its] independent authority to interpret [its] own state constitution").

188. Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005); City of Golden Valley v. Wiebesick, 899 N.W.2d 152, 170 (Minn. 2017) (quoting *Kahn*, 701 N.W.2d at 828).

constitution as an independent safeguard for individual rights and liberties and may justify deviations from federal law on that basis.[189]

* * *

Table 1

Variations in State Court Adherence to Precedent Incorporating Federal Law	
Reasoning Justifying Continued Adherence to Lockstep Methodology	*Reasoning Justifying Departures from Lockstep Methodology*

• Prior decision dynamically incorporated federal law with respect to a specific issue
• Prior decision dynamically incorporated federal law with respect to all applications of a constitutional provision
• Extend incorporation of federal law to new scenario after independent consideration
	• Lockstep methodology in prior decision has limited precedential weight
	  ○ Narrow the holding to the substantive outcome
	  ○ Scrutinize the quality and depth of the prior decision's reasoning
	  ○ Identify changed circumstances
	• Prior decision could not have limited state sovereignty

III. STATIC INCORPORATION AND THE RULE OF LAW

This analysis reveals that a state court's adherence to a prior lockstep decision may vary dramatically depending on how the court construes the precedential effect of the earlier decision. And even if a court previously held that a state constitutional provision has the same meaning as its federal constitutional counterpart, that does not necessarily mean that the court will follow developments or changes in federal law in future cases. As a descriptive matter, that analysis is valuable in developing a clearer understanding of how state courts are grappling with the interaction between state and federal constitutions as constitutional principles develop and change. But beyond the descriptive value, the reasoning in these cases also informs normative questions about how state courts *should* interpret prior lockstep precedent and whether they should view a prior lockstep opinion to have incorporated federal law statically or dynamically.

189. As one former Minnesotan justice explained, "[o]ne thing is certain, the Minnesota Supreme Court will protect its citizens' individual rights to the fullest extent required by both the [U.S] Constitution and the Minnesota Constitution." Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 924 (2007).

This inquiry invokes age-old questions about how courts identify the holding of a case and how principles of stare decisis inform that analysis.[190] To begin to tackle those questions in this context, this Part first considers whether interpreting lockstep decisions as having statically incorporated federal law aligns with the primary justifications for stare decisis (reliance, equality, and legitimacy[191]), as compared to interpreting the prior decision as having dynamically incorporated federal law.

This Part then discusses how the concept of static incorporation advances separation-of-powers principles. In particular, limiting lockstep decisions to static incorporation of federal law may advance vertical separation of powers by giving meaning to the independent sources of law between the federal and state constitutions. It also may protect horizonal separation of powers by ensuring that state courts do not overstep their bounds vis-à-vis the public and political branches in state constitutional structure.

Ultimately, state courts will need to confront these issues on a case-by-case basis, interpreting and applying the law of their respective states. But as a general matter, construing prior lockstep decisions as having statically incorporated federal law advances both stare decisis and separation-of-powers principles and, in turn, serves the rule of law.

A. *Static Incorporation and Principles of Stare Decisis*

All state courts adhere to principles of stare decisis, even if they vary to some extent in how they apply it.[192] In its most basic sense, stare decisis is the general principle that "like cases should be treated alike."[193] It is a cornerstone of the rule of law because it fosters predictability in the operation of the law (in turn, allowing individual parties to develop reliance interests in the status quo). It also helps ensure that similarly situated individuals or groups are treated equally under the law, and thus promotes principles of fairness.[194] But beyond predictability and fairness, stare decisis further contributes to the legitimacy of the judicial system by holding courts accountable to decide cases based on stable legal principles and not on the political climate of the day.[195]

---

190. *See, e.g.*, Goodhart, *supra* note 69, at 161–62; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570–73 (2001); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–28 (1994); Varsava, *supra* note 69, at 71–72.

191. Varsava, *supra* note 69, at 68–80.

192. Zachary B. Pohlman, *Stare Decisis and the Supreme Court(s): What States Can Learn from* Gamble, 95 NOTRE DAME L. REV. 1731, 1747 (2020) ("[A]ll state supreme courts purport to abide by stare decisis."); *id.* at 1748 (noting that "despite slight differentiations among the states, state courts' recitations of stare decisis principles adhere to now-orthodox conceptions of how precedent is to be applied"); *see also* WILLIAMS & FRIEDMAN, *supra* note 43, at 389–91 (identifying different conceptions about how stare decisis does and should apply in state courts as compared to federal courts).

193. *See* Dorf, *supra* note 190, at 1997; Varsava, *supra* note 69, at 72.

194. *See* Varsava, *supra* note 69, at 71.

195. *Id.* at 68. For a detailed analysis of each of these primary justifications of stare decisis, see *id.* at 68–80.

Although stare decisis is not an unassailable principle,[196] it serves as an important backstop that pressures a court of last resort to offer special justifications before reversing the holding of a prior decision and changing course in the case before it.[197]

At first glance, a state court decision that breaks from a prior practice of lockstepping with the U.S. Supreme Court, such that state law does not continue to incorporate changes to federal law, may appear to contradict principles of stare decisis. As many of the cases in Part II show, however, decisions may still comport with stare decisis when they construe earlier lockstep decisions to have engaged only in static incorporation—they simply view a different aspect of the decision to be binding (substance, not methodology). A review of the underlying justifications for stare decisis shows that such a construction may better serve the stare decisis rationales of predictability, equality, and legitimacy than construing the decision to have engaged in dynamic incorporation.[198]

1. Predictability

It is widely accepted in the literature that predictability is fundamental to the rule of law because it allows individuals and communities to understand the boundaries of the law and conform behavior accordingly.[199] A precedential decision serves the value of predictability if it provides a stable rule that individuals can rely on to anticipate how the law would apply to them in a similar situation down the line.[200] In contrast, a precedential decision that is not likely to produce a stable rule in future cases is less likely to foster reliance interests.

As a general matter then, construing a precedential decision to statically incorporate federal law may further the value of predictability because state law would remain fixed based on the federal standard applicable at the time of the precedential decision. Even if the meaning of the Federal Constitution changes over time, the state constitutional rule would remain constant and predictable, at least relative to the meaning of federal constitutional law. Especially where individuals are concerned that their federal rights may change over time, they may conform behavior in reliance on a state constitutional right

196. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) ("[*S*] *tare decisis* is 'not an inexorable command . . . .'" (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009))).

197. "The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand." A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 50 (1934) (quoting WILLIAM GELDART, ELEMENTS OF ENGLISH LAW 15 (D.C.M. Yardley ed., 1975)).

198. In developing this analysis, I was inspired by Professor Varsava's meta-interpretive analysis, assessing how the classic methods of interpretation (precedent realism, direct-analogy, balance-of-factors, purposive or purpose-based, and rule-based methods) comport with principles of stare decisis. Varsava, *supra* note 69, at 65, 80–106.

199. *Id.* at 70; Goodhart, *supra* note 197, at 57 ("No one will dispute that where justifiable reliance has been placed on past decisions this reliance should not be disappointed by an unnecessary overruling of those judgments.").

200. Goodhart, *supra* note 197, at 58 ("[T]he most important reason for following precedent is that it gives us certainty in the law.").

(e.g., by remaining in or moving to states that would protect a right even if the federal law changes to no longer protect the right to the same extent as it previously had).[201] In contrast, a precedential decision that is construed to dynamically incorporate federal law may upset the value of predictability, because state constitutional law would change anytime the operative interpretation of the incorporated federal constitutional rule changes. The predictability of state law would depend substantially on the predictability of federal law. Thus, individuals and courts could not rely on state precedent to determine the extent of state constitutional rights; rather, that right would change indeterminately each time the federal right changes.

To be sure, the relevance of the predictability justification for stare decisis would vary depending on the nature of the change in federal law. It is most relevant when federal law changes in a way that narrows a federal constitutional right and exposes state law as a separate source of law that could preserve the right to the same (or a greater) extent as the previous conception of federal law. For example, if the Illinois Supreme Court interprets *Flores* as statically incorporating federal law at the time of that decision, then a key holding of the case—that the Illinois Constitution protects the right to an abortion under the *Roe/Casey* standard—would remain binding today, even though the right no longer exists as a matter of federal constitutional law.[202] The change in federal law would not disrupt any reliance interests that individuals may have developed in Illinois.

On the other hand, when federal law changes in a way that broadens a federal right beyond preexisting state or federal law, the value of predictability with respect to state courts is less salient because the new federal rule raises the federal constitutional floor and would apply regardless of whether the status of state law remains unchanged or rises with the new federal standard. For example, a number of state courts adopted the U.S. Supreme Court's bright-line rule in *New York v. Belton*,[203] which held that law enforcement may search the passenger compartment of a vehicle without a warrant as a search incident to arrest.[204] The U.S. Supreme Court later reversed course in *Arizona v. Gant*, holding that law enforcement cannot conduct such a search, except

201. *See, e.g.*, NPR Staff, *New Abortion Laws Changed Their Lives. 8 Very Personal Stories*, NPR (June 23, 2023, 5:00 AM), https://www.npr.org/sections/health-shots/2023/06/23/1183878942/abortion-bans-personal-stories-dobbs-anniversary [https://perma.cc/5PYJ-2UU4] (sharing the story of an individual who moved from Texas to Massachusetts after the *Dobbs* decision because they "knew [they] would have agency over [their] own health care and state-mandated IVF insurance coverage").

202. *See supra* notes 52–56 and accompanying text.

203. New York v. Belton, 453 U.S. 454, 462–63 (1981).

204. *Id.*; *e.g.*, State v. Fry, 388 N.W.2d 565, 573 (Wis. 1986) ("This court has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the [U.S.] Supreme Court under the [F]ourth [A]mendment."), *overruled by* State v. Dearborn, 786 N.W.2d 97 (Wis. 2010); State v. Charpentier, 962 P.2d 1033, 1035–37 (Idaho 1998) (adopting the *Belton* rule); People v. Bailey, 874 N.E.2d 940, 958–59 (Ill. App. Ct. 2007) (describing Illinois' "limited lockstep" approach to the Fourth Amendment and reaffirming adoption of the *Belton* rule).

when certain exceptions apply.[205] Whether state law changes with federal law or remains the same as the pre-*Gant* rule has little practical effect. In that sense, the value of predictability is neutral—the predictability of the law will not turn at all on whether the court adheres to a lockstep methodology or not.[206]

2. Equality

The value of equality focuses on whether individuals in similar circumstances are treated similarly under the law.[207] As Karl Lewellyn put it, this principle reflects "that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."[208] Interpreting prior decisions as statically incorporating federal law so that only the substantive outcome is binding (and not the incorporation of federal law) serves this value of equality in the application of state-law decisions.

Consider again the impact of the *Dobbs* decision on the Illinois Supreme Court decision in *Flores*. In *Flores*, the court recognized that the right to an abortion existed under state law.[209] A future decision adhering to that substantive outcome would result in the continuation of that right, such that individuals would be treated the same under state law before and after the *Dobbs* decision. In contrast, construing the *Flores* decision as having dynamically incorporated federal law, such that the state constitutional right changed with the federal right, would result in unequal application of state law before and after the *Dobbs* decision.

Of course, when the U.S. Supreme Court raises the floor of a federal constitutional right beyond the level of protection available under state law, federal law will control.[210] In the context of static incorporation, individuals subject to the new federal rule may be treated differently than they would have been had state law alone applied. But any such unequal treatment between an individual subject to the law before and after the federal change

---

205. Arizona v. Gant, 556 U.S. 332, 343 (2009).

206. Of course, it is possible that state law may have meaningfully different enforcement mechanisms or remedies available for violations of a state constitutional right than federal law provides for a violation of federal constitutional law. For example, in 2020, the Colorado legislature eliminated qualified immunity as a defense in a civil action for a violation of the Colorado Constitution's bill of rights. S.B. 20-217, 70th Gen. Assemb., Reg. Sess. (Colo. 2020); *see also Enhance Law Enforcement Integrity*, COLO. GEN. ASSEMB., http://leg.colorado.gov/bills/sb20-217 [https://perma.cc/3HW9-3M6U] (giving bill history and summary). Even if a provision of the federal bill of rights is interpreted to be broader than an analogous Colorado constitutional right, the availability of qualified immunity as a defense to a federal action brought under 42 U.S.C. § 1983 may limit the effect of any enhanced protection under federal law. In that situation and others like it, the predictability of state law remains relevant.

207. For a full review of the equality justification, see Varsava, *supra* note 69, at 71–75.

208. *Id.* at 72 (quoting Karl Llewellyn, *Case Law*, *in* ENCYCLOPEDIA OF SOCIAL SCIENCES 249 (1930)).

209. *See supra* notes 52–56 and accompanying text.

210. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819) ("[T]he constitution and the laws made in pursuance thereof are supreme; . . . they control the constitution and laws of the respective states . . . .").

would not result from unequal treatment under *state* law. It would reflect unequal treatment between the application of federal and state law.[211]

3. Legitimacy

Fundamental to the principle of stare decisis is the idea that the judiciary should be impartial and decide cases without prejudice to the parties or a particular outcome. That is, "by requiring the judges to follow precedent we live under a government of laws and not of men."[212]

As discussed in Section I.B, some courts and judges have justified entering lockstep with the U.S. Supreme Court as important to maintaining the integrity of state court decision-making.[213] Legitimacy concerns then permeate opinions in cases where the state courts are presented with the question whether they should adhere to a prior lockstep practice or deviate and interpret their constitutions independently. And courts that ultimately break lockstep strive to articulate principled justifications for deviating from federal law to alleviate any concern that the decisions are based on the judges' personal policy preferences.[214]

One could argue that dynamically incorporating federal law into state constitutional decisions might enhance the legitimacy of state courts, because it offers a principled basis to decide difficult questions that is untethered from the state judges' own personal policy preferences.[215] By leaning on the U.S. Supreme Court for a legal rule, state courts avoid having to make and justify controversial legal disputes on their own.

On the other hand, when the U.S. Supreme Court changes the nature of individual rights under the U.S. Constitution, the automatic revision of analogous rights under the state constitution may just as easily diminish confidence in state courts to serve as the guardians of state constitutional rights. As Tom Tyler observed, "people are found to believe [legal] authorities are more legitimate

---

211. It bears noting that, when equal treatment results in the perpetuation of unjust outcomes, courts need not adhere to equality at all costs. In the words of Arthur Goodhart, "equality or uniformity is only desirable up to a certain degree; from the standpoint of justice little can be said in favour of equality in error." Goodhart, *supra* note 197, at 57. If a state court interprets its prior precedent as having statically incorporated federal law, such that the state constitutional floor does not automatically rise with the federal constitutional floor, the state court of last resort is free to overrule its earlier substantive decision to bring it in line with present day conceptions of justice. But in doing so, it would affirmatively engage in its own stare decisis analysis to ensure that the circumstances warrant such a measure, instead of more passively allowing the U.S. Supreme Court to determine when it is appropriate to shift the meaning of state constitutional rights.

212. *Id.* at 56.

213. *See supra* Section I.B.

214. *See supra* Sections I.B, II.B.2.

215. *See* Liu, *supra* note 6, at 1334 (noting that "[v]ertical uniformity has been considered a jurisprudential virtue because it inhibits forum-shopping and confers 'the appearance of neutrality'" (quoting Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 733–34 (2016))).

when they view their actions as consistent with fair procedures."[216] The automatic revision of state rights—absent any meaningful involvement of the state judiciary or the public—would hardly amount to a full procedural process. It is of little surprise then that, in the aftermath of the *Dobbs* decision, state courts around the country have undertaken serious consideration of the status of the right to an abortion as a matter of state law, regardless of whether the state court previously lockstepped with the U.S. Supreme Court on the issue of due process or equal protection.[217]

Indeed, the Minnesota Supreme Court has expressed special concern for this conundrum, noting that, if "the [U.S.] Supreme Court has retrenched on Bill of Rights issues, or if [the Minnesota Supreme Court] determine[s] that federal precedent does not adequately protect [Minnesotan] citizens' basic rights and liberties," the Minnesota Supreme Court will independently consider the scope of the right under its state constitution.[218]

This is not to say that a state court loses legitimacy when it decides to continue to follow federal law.[219] To the contrary, state courts should always give "respectful consideration to federal precedent,"[220] and (as the Minnesota Supreme Court recognizes) may find a "persuasive reason to follow" the change in federal law.[221] But as the Honorable Goodwin Liu has explained, "there is nothing illegitimate about a state court rejecting the Supreme Court's interpretation of a parallel constitutional provision on grounds that are not

---

216. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 382 (2006).

217. For post-*Dobbs* state law cases related to state constitutional law, see, for example, *State v. SisterSong Women of Color Reprod. Just. Collective*, 894 S.E.2d 1, 13 (Ga. 2023) (applying *Dobbs* and reversing a lower court decision that struck down a state abortion ban based on the state constitution); *June Med. Servs., LLC v. Landry*, 375 So. 3d 456, 458, 461 (La. Ct. App. 2023) (upholding a district court decision that allowed an abortion ban to take effect based on the Louisiana Constitution); *Planned Parenthood Ass'n of Utah v. State*, No. 20220696, 2024 WL 3612730, at *17–37 (Utah Aug. 1, 2024) (considering the legality of an abortion ban based on the Utah Constitution); *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 77–87 (Fla. 2024) (finding no right to abortion in the Florida constitution after *Dobbs* and breaking prior lockstep with *Roe* after separately interpreting the history and text of Florida's Privacy Clause in its constitution); and *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1148 (Idaho 2023) (interpreting the Idaho Constitution, without prior lockstep, to hold that it does not provide a fundamental right to an abortion). For post-*Dobbs* state law cases unrelated to state constitutional law, see, for example, *Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262, 266–69 (Ariz. Ct. App. 2022) (avoiding constitutional issues by reasoning based on state statute), *vacated sub nom.* Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892 (Ariz. 2024); *Kaul v. Kapenga*, No. 2022-cv-001594, 2023 WL 11727006, at *3 (Wis. Cir. Ct. Dec. 5, 2023) (same); *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710, 715 (Iowa 2022) (reasoning based on civil procedure precedent).

218. Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005); *see also* City of Golden Valley v. Wiebesick, 899 N.W.2d 152, 160–67 (Minn. 2017).

219. For some examples of this, see *supra* Section II.B.1.iii.

220. Liu, *supra* note 6, at 1337–38.

221. *City of Golden Valley*, 899 N.W.2d at 157 (quoting State v. McMurray, 860 N.W.2d 686, 690 (Minn. 2015)).

state-specific."[222] So long as a court articulates principled reasoning for deciding not to follow changes in federal law, despite an earlier lockstep decision, such a decision may well enhance the legitimacy of the state court rather than diminish it.

B. *Static Incorporation and Principles of Separation of Powers*

Construing a decision that adopted a U.S. Supreme Court rule, so that it only statically incorporated federal law at the time of the decision, may advance concepts of vertical and horizontal separation of powers that are fundamental to federal and state constitutional structure.

1. Vertical Separation of Powers (Federalism)

Construing lockstep decisions as having engaged in static incorporation is consistent with the concept of federalism because it preserves a role for state constitutions as independent guardians of individual rights, even where the language of the state constitution mirrors the language of the Federal Constitution. As discussed in Part I, state constitutions historically played an important (though often inadequate) role in protecting constitutional rights of individuals within state territory.[223] Following the ratification of the Fourteenth Amendment and the subsequent incorporation of various provisions in the Federal Bill of Rights so that they apply to state actors, the U.S. Constitution has been construed to provide *supplemental* protection, but it is well settled that states retain independent authority to interpret the scope of rights under state constitutions.[224] That means that states may more expansively protect a right above the federal floor.[225] And there is good reason to think that in some circumstances, state courts should do just that. For example, "[t]he 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."[226] Also, the dialogue between the federal and state courts that follows may later inform how the Supreme Court conceives of federal constitutional rights.[227]

Even when the state constitution does not extend beyond interpretations of the U.S. Constitution at a given time, it remains a separate, parallel source of protection that may become relevant again in the wake of changes to the federal law—in particular, if the federal floor drops. That separate layer of protection collapses, however, if courts construe lockstep decisions as having

222. Liu, *supra* note 6, at 1338.

223. *See supra* Section I.A.

224. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940))).

225. *See* Brennan, *supra* note 11, at 502–04.

226. Liu, *supra* note 6, at 1330 (footnote omitted) (quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978)).

227. *See, e.g.*, SUTTON, *supra* note 11, at 22–30.

dynamically incorporated federal law. The state constitution would be tethered to the U.S. Constitution as a default and lose its status as a fully independent source of law with respect to analogous rights.[228]

Again, this is not to say that the state courts should not follow any given change in federal law after independent consideration of the question. There may be good reason for the federal change that a state court may recognize and, again, adopt.[229] But by considering for itself (employing principles of stare decisis) whether to overrule the substantive holding in its prior decision, rather than strictly adhering to the lockstep methodology, the court preserves its role as the primary interpreter of the state constitution.

2. Horizontal Separation of Powers

Construing prior lockstep decisions as statically incorporating federal law is also consistent with principles of horizontal separation of powers. Like the U.S. Constitution, state constitutions typically divide power between government institutions, i.e., the state legislative branch, the state executive branch, and the state judicial branch.[230] But unlike the U.S. Constitution, state constitutions often provide for more direct accountability to the people. In most states, judges and justices are elected or retained through public elections.[231] The people often elect members of the executive branch in addition to the governor, such as the secretary of state or election officials.[232] And state constitutions are typically more easily (and more often) amended than the U.S. Constitution.[233] Considering this context, construing a prior lockstep decision as having dynamically incorporated future changes in federal law may contravene the principle of popular sovereignty inherent in the structure of many state constitutions. If a change in federal law could trigger an automatic change to the meaning of the state constitution, without any contemporaneous involvement of the state judiciary or the public, that change arguably operates as a state constitutional amendment.[234] In contrast, interpreting prior lockstep decisions as having statically incorporated federal law would require the state's highest court to overrule or extend the holding of a prior constitutional decision through a full judicial process before recognizing a change in the state constitution.

228. In this scenario, the role of state constitutions would be limited to those provisions that are specific to the state or that do not overlap with the Federal Constitution. *See, e.g.*, MINN. CONST. art. XIII, §1 (requiring a "uniform system of public schools").

229. *See supra* Section II.B.1.iii. (discussing Nicholls v. People, 396 P.3d 675 (Colo. 2017)).

230. Marshfield, *supra* note 68, at 560–61.

231. *Id.* at 570.

232. *Id.* at 565–66.

233. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 868 (2021) (noting the "state constitutions' frequent amendment").

234. *See* Collins, *supra* note 7, at 1116 ("When a state court withdraws from a constitutional provision its independent legal authority over state action, the court assumes a power that has been constitutionally delegated to others. That power is the right of the people to 'alter' their constitution." (footnote omitted)).

CONCLUSION

Whether state supreme courts will interpret prior lockstep decisions as having statically or dynamically incorporated federal law has implications beyond the theoretical. All too often, state constitutional arguments are an afterthought.[235] Before this conundrum ever reaches a state court of last resort, advocates need to develop and present the issue in the lower courts, and the trial and intermediate courts of appeal will need to grapple in the first instance with the binding nature of existing precedent.

Especially in light of the divergent reasoning that state courts could (and do) apply when interpreting the precedential effect of an earlier lockstep decision, both advocates and the courts should be attuned to the issue. For advocates, it may help shape arguments as to whether a state constitution protects a particular right when the Federal Constitution does not. For courts, it is an important consideration in maintaining and advancing the rule of law.

235. *See, e.g.*, Garner v. People, 436 P.3d 1107, 1120 n.8 (Colo. 2019) ("We do not separately analyze our state constitutional due process guarantee because [defendant] has not argued that it should be interpreted any more broadly than its federal counterpart."); State v. Weber, 168 N.E.3d 468, 480 (Ohio 2020) ("Weber makes no attempt to discuss how this provision differs from the Second Amendment. He does not discuss the text or history of Article I, Section 4, nor does he discuss this court's precedent on that provision or otherwise argue why that provision protects his conduct in this case beyond the Second Amendment."); State v. Ramos, 387 P.3d 650, 667–68 (Wash. 2017) (en banc) ("Ramos does not provide any . . . explanation [why enhanced protection is warranted] and does not address the factors for determining whether a sentence independently violates the Washington Constitution."); State v. Barrow, 989 N.W.2d 682, 689 (Minn. 2023) (Chutich, J., concurring) ("I agree with the court that, under the [F]ederal [C]onstitution, the warrantless search of [the defendant's] purse was lawful, and the decision of the court of appeals should be affirmed. I write separately, however, to note that the outcome may have been different had [the defendant–appellant] raised an independent state constitutional claim."); Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 934 (Pa. 2024) ("[O]ur more recent references to the coterminous nature of Section 26 and the [F]ederal Equal Protection Clause stem from a failure of the parties to properly develop an argument that Section 26 affords broader protection than its federal counterpart.").