

INTRODUCTION

Lockstepping's critics have increasingly found their voice in the courts. State constitutions are unique documents, with their own histories, texts, and procedures.¹ But often, state courts import federal interpretations of the U.S. Constitution when interpreting similar provisions in state constitutions, a phenomenon known as "lockstep" interpretation.² State courts have turned to federal law when interpreting state constitutional provisions related to search and seizure, due process, right to counsel, and more.³ And this lockstepping, long prevalent, has persisted despite vehement critique.⁴ But some state courts are shaking off this complacency, voicing a strong repudiation of lockstepping.

Lockstepping's strongest critics call the practice "lazy"⁵ and an abdication of judicial responsibility and state sovereignty.⁶ Methodologically, lockstepping is unsound. Interpretations of the U.S. Constitution do not "*fix*" the meaning of . . . state constitution[s].⁷ "The U.S. Supreme Court has unequivocally endorsed the notion that state constitutions, as interpreted by state courts, may secure rights 'more expansive than those conferred by the Federal Constitution.'"⁸ State constitutional provisions were "written and adopted by different people at a different time for a different sovereign" than their federal comparators.⁹ These provisions were implemented for unique purposes.¹⁰ To apply federal interpretations to state constitutions is to accept a fiction that erases the unique history and intent behind state constitutional protections.¹¹

¹ Kevin Frazier, *A Rallying Cry Against Lockstepping*, STATE CT. REP. (Oct. 22, 2024), <https://statecourtreport.org/our-work/analysis-opinion/rallying-cry-against-lockstepping> [<https://perma.cc/C5BF-YR9M>]; Jonathan L. Entin, *Stare Decisis After the Rejection of Lockstepping in State Constitutional Law: An Ohio Perspective*, 17 CONLAWNOW 101, 101 (2025).

² Michael L. Smith, *Species of State Constitutional Lockstepping*, 71 VILL. L. REV. (forthcoming 2026) (manuscript at 4), <https://ssrn.com/abstract=5400514> [<https://perma.cc/T3WF-HHJD>].

³ *Id.* (manuscript at 3–4); see Robert F. Williams & Lawrence Friedman, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 225, 241 (2d ed. 2023). See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (discussing examples).

⁴ Smith, *supra* note 2 (manuscript at 4 & n.11).

⁵ *Id.* (manuscript at 6 & 4 n.12).

⁶ Frazier, *supra* note 1.

⁷ Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1504 (2005) (emphasis added) (quoting *State v. Kennedy*, 666 P.2d 1316, 1322 (Or. 1983)).

⁸ Lisa M. Lorish & Elizabeth Putfark, *The Emerging Virginia Constitution: Open Questions of Interpretation, and How Their Resolution May Impact Unenumerated Rights*, 59 U. RICH. L. REV. ONLINE 23, 27 (2024) (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980)).

⁹ Jonathan Papik, *Laboratories of Jurisprudence?: The Role of State Supreme Courts in a Federal System*, 74 VAND. L. REV. EN BANC 271, 273 (2021).

¹⁰ See Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. REV. 519, 523 (2023).

¹¹ See Papik, *supra* note 9, at 273; Frazier, *supra* note 1.

State judges acting in federal lockstep are failing to act on their distinct positionalities.¹²

And practically, lockstepping shrinks rights. When state constitutions are interpreted independently, that means parties have two layers of rights protection: the U.S. Constitution and their state constitution.¹³ But lockstepping collapses state constitutions under one federal meaning.¹⁴ “[L]aboratories of democracy” are lost.¹⁵ Avenues to state-based rights disappear,¹⁶ and federal rights doctrine is no longer challenged to expand by innovative state jurisprudence.¹⁷ “[A]bove ninety-five percent of cases that are filed in this country are filed in state courts.”¹⁸ Eroding state courts’ authority and rendering their opinions superfluous in the face of federal doctrine has the potential to eviscerate rights protections.

Classic lockstepping criticisms like these have made their way into recent state supreme court decisions in Pennsylvania, Hawaii, and Ohio. In its 2024 decision, *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*,¹⁹ the Supreme Court of Pennsylvania delivered an assertive rebuke of lockstepping.²⁰ Plaintiffs challenged state limits that restricted public insurance coverage of abortion.²¹ Under Pennsylvania law, state funds could not be used for an abortion, except to save the life of the mother or if the pregnancy was the result of rape or incest.²² Plaintiffs argued that these restrictions violated the equality guarantees in the Pennsylvania Constitution.²³ But *Allegheny* came down after *Dobbs v. Jackson Women’s Health Organization*,²⁴ in which the Supreme Court held that abortion restrictions *do not* violate the U.S. Constitution’s Equal Protection Clause.²⁵ Plus, the Supreme Court of Pennsylvania had already upheld limits on public

¹² Michael Milov-Cordoba & Alicia L. Bannon, *Foreword: The Promise and Limits of State Constitutions*, 99 N.Y.U. L. REV. 1915, 1920 (2024) (collecting statements by judges expressing this viewpoint).

¹³ This is not to say that state constitutions will always be rights-protective. *See id.* But it instead merely points out that having two levels of distinct constitutional protections gives litigants two bites at the apple. Jeffrey S. Sutton, Essay, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1977 (2008); *see* SUTTON, *supra* note 3, at 22.

¹⁴ Frazier, *supra* note 1.

¹⁵ Papik, *supra* note 9, at 274; *see id.* at 273–74.

¹⁶ Frazier, *supra* note 1.

¹⁷ Papik, *supra* note 9, at 273–74; SUTTON, *supra* note 3, at 30–31.

¹⁸ Papik, *supra* note 9, at 272.

¹⁹ 309 A.3d 808 (Pa. 2024).

²⁰ *Id.* at 933–34.

²¹ *Id.* at 819–20.

²² *Id.* at 819.

²³ *Id.* at 819–20.

²⁴ 142 S. Ct. 2228 (2022).

²⁵ *Id.* at 2245–46.

funding for abortion in 1985,²⁶ relying largely on federal case law.²⁷ If Pennsylvania courts were to continue their long history of lockstepping,²⁸ *Allegheny* should have mirrored *Dobbs* and found the state's abortion restrictions constitutional.²⁹

Instead, the Pennsylvania Supreme Court asserted its authority — and obligation — to thoroughly and independently interpret its state constitution: “A conclusion that our Constitution’s equal protection provisions are to be read in lockstep with the federal Equal Protection Clause runs the risk of rendering our own constitutional text, history, traditions, and jurisprudence ‘a mere row of shadows.’”³⁰ The Pennsylvania Supreme Court cited academic critiques of lockstepping³¹ and attacked its own earlier lockstepping methodology, claiming that its previous pro-lockstepping decision ignored the text and history of the Pennsylvania Constitution, thus “skipp[ing] over” critical analytical steps.³² The *Allegheny* court concluded that a lockstepping approach “suffers from incomplete reasoning and a disregard of our unique constitutional provisions in favor of blind (and incomplete) adherence to federal principles of Equal Protection.”³³

Joining Pennsylvania, the Supreme Court of Hawaii has recently rejected lockstepping. In a 2025 decision, the court declined to interpret the Hawaiian Establishment Clause in lockstep with the federal equivalent.³⁴ Plaintiffs challenged the state’s refusal to remove a deed restriction that limited property to “Church purposes only.”³⁵ The Hawaiian court considered history and the framers’ intent to find that the deed restriction violated Hawaii’s Establishment Clause.³⁶ After employing this independent analysis, the court explicitly rejected a lockstep methodology.³⁷ The Supreme Court of Hawaii reaffirmed its independent authority, stating: “[W]e must decide the best course for our state under the Hawai’i Constitution.”³⁸ “It would be discordant” to

²⁶ *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114, 126 (Pa. 1985), *overruled by, Allegheny*, 309 A.3d 808.

²⁷ See *Allegheny*, 309 A.3d at 940 (claiming *Fischer* “presum[ed] — without employing an actual analysis of the text or history — that challenges under [the Pennsylvania Constitution] reach identical results to those under a federal equal protections analysis”).

²⁸ See *id.* at 928–30 (listing examples of cases interpreting the Pennsylvania Constitution’s equal protection provisions).

²⁹ See *id.* at 921 (noting parties made similar arguments).

³⁰ *Id.* at 933 (quoting Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 347 (1993)).

³¹ See, e.g., *id.* at 926 (citing Williams, *supra* note 30).

³² *Id.* at 942.

³³ *Id.* at 943.

³⁴ *Hilo Bay Marina, LLC v. State*, 575 P.3d 568, 595 (Haw. 2025).

³⁵ *Id.* at 571–72.

³⁶ *Id.* at 595.

³⁷ *Id.* at 586–88, 595.

³⁸ *Id.* at 588.

find federal interpretations controlling, given that the Hawaiian Constitution and U.S. Constitution were adopted almost 200 years apart.³⁹

And there is Ohio. Considering a past opinion that followed a lockstep methodology, the Supreme Court of Ohio called the decision “ill-considered.”⁴⁰ It criticized the earlier opinion for failing to consider differences in text, purpose, and history between the Ohio Constitution and the U.S. Constitution.⁴¹ Earlier lockstepping case law “didn’t provide any analysis to support its conclusion that our state Constitution’s open courts guarantee provides no greater (or different) rights than the federal Constitution.”⁴² It was time for Ohio to reaffirm its independent interpretive authority: “[W]e are not bound to walk in lockstep with the federal courts when it comes to our interpretation of the Ohio Constitution.”⁴³

These decisions are loud. Pennsylvania, Hawaii, Ohio, and other state courts⁴⁴ are not just rejecting lockstepping, but they are doing so explicitly and with force. State courts have resisted lockstepping before.⁴⁵ In a 1970s movement commonly referred to as New Judicial Federalism, state court judges were encouraged to rely on state constitutions to identify rights guarantees.⁴⁶ While the wave of New Judicial Federalism certainly increased interest in state constitutional law,⁴⁷ and there were discrete areas of rights innovation in the states,⁴⁸ many empirical studies showed only limited change.⁴⁹ State courts generally

³⁹ *Id.* at 595.

⁴⁰ State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 88 (Ohio 2024).

⁴¹ *Id.* at 88–89.

⁴² *Id.* at 89.

⁴³ *Id.* at 88 (quoting State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020)). Technically, Ohio had previously announced a rejection of lockstepping back in 1993, but that announcement held little meaning in practice because the court sometimes continued to employ lockstep methodology. Entin, *supra* note 1, at 101 & n.3.

⁴⁴ Virginia, for example, recently delivered a very explicit rejection of lockstepping. See generally Lorish & Putfark, *supra* note 8, for a discussion of lockstep rejection in *Vlaming v. West Point School Board*, 895 S.E.2d 705, 716 (Va. 2023). Antilockstepping has also been a topic of conversation in other recent state court decisions. *E.g.*, Alicia Bannon, *Recent State Judicial Opinions Critique Lockstepping*, STATE CT. REP. (Aug. 4, 2025), <https://statecourtreport.org/our-work/analysis-opinion/recent-state-judicial-opinions-critique-lockstepping> [https://perma.cc/4G3L-Z4MA]; Andrew Willinger, *The Complexity of Lockstepping Post-Bruen*, STATE CT. REP. (Apr. 4, 2025), <https://statecourtreport.org/our-work/analysis-opinion/complexity-lockstepping-post-bruen> [https://perma.cc/N44B-8PB6]; Lisa M. Lorish, *Virginia Courts Are Revisiting How to Interpret the State Constitution*, STATE CT. REP. (Apr. 14, 2025), <https://statecourtreport.org/our-work/analysis-opinion/virginia-courts-are-revisiting-how-interpret-state-constitution> [https://perma.cc/L7ZW-X3PL].

⁴⁵ See Entin, *supra* note 1, at 101–02; Ronald K.L. Collins, Peter J. Galie & John Kincaid, Survey, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 599 (1986).

⁴⁶ G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–98 (1997).

⁴⁷ See *id.*

⁴⁸ See Sutton, *supra* note 13, at 1973 (explaining state supreme court identification of a fundamental right to education after the right had been rejected at the federal level).

⁴⁹ Tarr, *supra* note 46, at 1112–13.

retained their appetite for lockstepping.⁵⁰ But the conviction expressed in decisions like those surveyed here illustrates that this sentiment may be changing. At least some states have had enough of the lockstepping charade. As Pennsylvania Supreme Court Justice Wecht explained in a 2025 concurrence, it is:

[a] mistaken assumption that our Constitution is nothing more than a dependent derivative of the federal Constitution, a weak, me-too sidekick that mindlessly trudges along in lockstep wherever the United States Supreme Court's interpretation of the federal Constitution goes. It is high time that we insist that it is no such thing.⁵¹

Justice Wecht issued a clear message: Lockstepped interpretation is “erroneous.”⁵² State constitutions deserve to be given their full due.⁵³

In a way, this could be a period of state constitutional rebirth. State constitutions have long languished as mere mirrors of federal law,⁵⁴ but some judges have had enough. This revolution should not be overstated — some state courts still look to federal jurisprudence for guidance⁵⁵ — but episodes of explicit lockstepping rejection appear notable against a historical trend of adherence to federal standards.⁵⁶

Why exactly this shift is now happening remains unclear, as critiques of lockstepping have been longstanding.⁵⁷ But the erosion of rights protections in federal constitutional jurisprudence is likely part of the story.⁵⁸ As the Supreme Court increasingly rejects the protection of rights under the U.S. Constitution,⁵⁹ attention has been driven toward bolstering protections in state constitutions.⁶⁰ Advocates may see state constitutions as an additional layer of protection, and state courts might identify their role as necessary gap-fillers. A similar phenomenon contributed to the rise of New Judicial Federalism.⁶¹ When the Burger Court replaced the Warren Court, advocates turned to the states as a

⁵⁰ See *id.*

⁵¹ *Ferguson v. Dep't of Transp.*, 340 A.3d 278, 292–93 (Pa. 2025) (Wecht, J., concurring).

⁵² *Id.* at 293.

⁵³ See *id.* at 292–93.

⁵⁴ Recent Book, *Jeffrey S. Sutton*, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* (2018), 132 HARV. L. REV. 811, 811 (2018).

⁵⁵ E.g., *Access Indep. Health Servs., Inc. v. Wrigley*, No. 20240291, 2025 WL 3484611, at *35 (N.D. Nov. 21, 2025) (per curiam).

⁵⁶ Smith, *supra* note 2 (manuscript at 15).

⁵⁷ See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) for a well-known critique of lockstepping.

⁵⁸ Smith, *supra* note 2 (manuscript at 45).

⁵⁹ See SUTTON, *supra* note 3, at 33.

⁶⁰ Smith, *supra* note 2 (manuscript at 2–3).

⁶¹ See Tarr, *supra* note 46, at 1097–98.

new avenue for rights protection.⁶² Whatever the cause, there is no doubt that interest in state constitutional law is on the rise.⁶³

We may be entering a new antilockstepping era, where at least some state courts are forcefully rejecting federal lockstepping and charting their own paths forward. With this rising profile of independent state constitutional jurisprudence, understanding the unique features and histories of state constitutions is critically important.

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This *Developments in the Law* issue responds to the renewed independence of and attention to state constitutions. Each Chapter explores unanswered questions in state constitutional jurisprudence by synthesizing across states, identifying examples, summarizing history, and contrasting state constitutional law with federal law.

Chapter I, *The “History and Tradition” of Substantive Due Process in State Constitutions*,⁶⁴ responds directly to shifts in federal jurisprudence. Acknowledging that substantive due process has become increasingly disfavored in federal case law, the Chapter argues that states have their own unique substantive due process traditions that may justify preserving the doctrine at the state level. Looking to historic analog cases involving vested rights, partial legislation, and arbitrary mandates, the Chapter identifies how state constitutional law has long interpreted “due process” to require more than just process. Due process has long imposed substantive limitations on the power of the state. Understanding this history and case law puts federal substantive due process doctrine in perspective, while also painting a compelling case against lockstepping in this context.

Chapter II, *Enforcing State Constitutions Through Constitutional Torts*,⁶⁵ provides a similar examination of state constitutions in the face of federal obstacles. The Chapter explains the erosion of constitutional torts at the federal level and identifies unique features of state constitutions that justify preserving constitutional torts at the state level. The Chapter proceeds by developing a taxonomy for understanding when courts should identify state constitutional torts, emphasizing considera-

⁶² See *id.*

⁶³ At least three symposia on state constitutional law were held just last year. *E.g.*, 2025 Symposium, NW. UNIV. L. REV., <https://northwesternlawreview.org/symposium/2025-symposium/> [<https://perma.cc/V886-LYFN>]; Casey Bacot, *Law Review Symposium to Discuss State Constitutions in Times of Federal Uncertainty*, UNIV. OF KAN. SCH. OF L. (Sep. 29, 2025), <https://law.ku.edu/news/article/law-review-symposium-to-discuss-state-constitutions-in-times-of-federal-uncertainty> [<https://perma.cc/H3QB-UF2K>]; *Georgia Law Review*, Vol. 59 Presents, *A Nation of States: State Constitutional Rights in the Modern Era*, UNIV. OF GA. SCH. OF L., <https://calendar.law.uga.edu/event/georgia-law-review-vol-59-presents-a-nation-of-states-state-constitutional-rights-in-the-modern-era> [<https://perma.cc/F7FB-PZKC>].

⁶⁴ See *infra* ch. I, p. 1379.

⁶⁵ See *infra* ch. II, p. 1402.

tions including existing remedial schemes, legislature intent, constitutionality, immunities, and positive rights.

Where Chapters I and II identify new opportunities to resist lockstepping, Chapter III serves as a warning. *The Decline and Fall of the State Executive Council*⁶⁶ tracks the long-overlooked history of executive councils. At the Founding, those multimember bodies within the executive branch served as advisors, watchdogs, and power checks. Every state once had one, and no two councils were wholly alike. But over the years, Chapter III argues, states turned away from their mosaic institutions, instead marching in lockstep to remove their state executive councils to be more like the federal sovereign. Chapter III laments the loss of these institutions as internal checks on unitary executive power. It identifies the important roles executive councils played in state governments, the federal trends that led to their downfall, and the role of the modern state executive council in New Hampshire, its final true refuge. The Chapter concludes that reinvigorated executive councils might yet remedy the ills that plague modern executive branches at both the state and federal levels.

While Chapters I through III explore the lockstepping dynamics of states and the federal government, Chapter IV considers a different power dynamic: the relationship between states and localities. *Home Rule Reinforcement: Constitutional Local Autonomy Guarantees*⁶⁷ explores constitutional clauses, known as local autonomy guarantees (LAGs), that build upon home rule's prolocal reallocation of power by giving state judges interpretive instructions. The Chapter examines the historical origins of LAGs, provides the first-ever typology of these provisions, and evaluates the effectiveness of each type. Ultimately, the Chapter concludes that though LAGs have made real progress in solidifying the affirmative powers of localities, the rise of express preemption and continued judicial deference to state control has limited the impact of these clauses. In this current era of excited attention toward state constitutions as solutions to federal problems, Chapter IV reminds readers of the central role state constitutions play in local government.

These Chapters explore the understudied and often undervalued field of state constitutional law. By examining issues that make state constitutions unique, whether that be their history, texts, purposes, or problems, this *Developments in the Law* issue highlights the distinct nature of state constitutions. Critiquing a lockstepping approach in its own court, the Ohio Supreme Court explained, "By lockstepping, this court ignored the plain language of our state Constitution and its unique history and tradition and hooked our wagon to the United States Supreme Court,

⁶⁶ See *infra* ch. III, p. 1425.

⁶⁷ See *infra* ch. IV, p. 1449.

come what may.”⁶⁸ Perhaps it’s time to unhook the wagon and explore what independent strength lies behind state constitutions.

⁶⁸ State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 88 (Ohio 2024).