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## State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law

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# STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW

JAMES A. GARDNER\*

## ABSTRACT

*In the American constitutional tradition, federalism is commonly understood as a mechanism designed to institutionalize a kind of permanent struggle between state and national power. The same American constitutional tradition also holds that courts are basically passive institutions whose mission is to apply the law impartially while avoiding inherently political power struggles. These two commonplace understandings conflict on their face. The conflict may be dissolved for federal courts by conceiving their resistance to state authority as the impartial consequence of limitations on state power imposed by the United States Constitution. This reconciliation, however, is unavailable for state courts, which, by operation of the Supremacy Clause, cannot employ national law as a force for resisting national power while simultaneously appealing to it as a legitimating source of impartial restrictions on that power.*

*This Article argues that the tension between these understandings need not be resolved at all for state courts simply because there is nothing wrong with state courts using what powers they have to protect popular liberty by resisting, or by helping other state officials to resist, abuses of national authority. Through their control over state constitutions, state courts are capable of influencing the manner and the forcefulness with which state governments may wage the kinds of struggles against national authority contemplated*

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*by federalism. State courts may do so by folding into their interpretation of state constitutional provisions consideration of the "federalism effects" of their rulings—that is, the impact of their constructions on the ability of the state effectively to resist abuses of national power. In so doing, state courts become "agents of federalism."*

*The Article then considers and rejects a variety of strict constructionist objections to this approach to constitutional interpretation, discusses the conditions in which state courts might receive popular authorization to act as agents of federalism, and explores some of the ramifications for state constitutional interpretation of popular decisions concerning the authority of state courts.*

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## INTRODUCTION

In the American constitutional tradition, federalism is commonly understood as a mechanism designed to institutionalize a permanent struggle between state and national power. The ultimate beneficiaries of this power struggle are the American people, whose liberty is thus protected by a "double security."<sup>1</sup> The same American constitutional tradition also holds that courts are basically passive institutions whose mission is merely to apply the law impartially, while avoiding inherently political power struggles.<sup>2</sup> These two commonplace understandings conflict on their face. Courts are institutions of governance; the judiciary is, after all, one of the three coordinate branches of government created by the United States Constitution and by every state constitution. Yet if courts are institutions of governance, then the values underpinning federalism appear to compel them to stand with their own coordinate executive and legislative branches against the interests of other levels of government when push comes to shove in any intergovernmental power struggle. If, as Madison claimed, liberty is most threatened when the various organs of government cooperate, and it is best protected when the interests and motives of governmental actors conflict,<sup>3</sup> then courts, like legislatures and executives, ought to choose up sides at least some of the time. That is to say, they ought to assert the interests of their own level of government against the other—a conception of judicial power that conflicts directly with the ideal of judicial impartiality before the law.

One way to dissolve this tension is to conceive of courts as somehow standing outside of, and thus institutionally unconcerned with, the kinds of power struggles between state and national government that federalism contemplates.<sup>4</sup> A moment's reflection,

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1. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

2. See, e.g., THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (claiming courts have "neither FORCE nor WILL but merely judgment").

3. See generally THE FEDERALIST NO. 51 (James Madison).

4. The Supreme Court briefly embraced a very strong form of this principle in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), holding that the constitutional balance between state and national power was to be maintained almost entirely through political rather than judicial processes. See *id.* at 546. The Court has since

however, shows that this is certainly far from the case where federal courts are concerned. In fact, federal courts have long played a highly significant role in actively resisting what they take to be improper uses of state power, most notably by invalidating state laws that violate the U.S. Constitution. Indeed, Justice Holmes once remarked that he thought the power of federal courts to invalidate unconstitutional state laws so important that its loss would threaten the very survival of the Union.<sup>5</sup>

This kind of national activity, however, need not impugn the idea of courts as standing outside of intergovernmental power struggles. This is because the invalidation of a state law by a federal court can be understood as the impartial consequence of limitations on state power imposed by the U.S. Constitution—limitations imposed, that is to say, by law rather than upon the say-so of federal courts engaged in an intergovernmental power struggle against state authority. The idea of judicial neutrality can thus be preserved even within the federal structure: when federal courts resist state power they may be understood as merely undertaking a very traditional kind of impartial adjudication, thereby dissolving the tension between conventional understandings of federalism and judicial apoliticism.<sup>6</sup>

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distanced itself somewhat from this approach. *United States v. Lopez*, 514 U.S. 549 (1995). The Court of course continues to take the position that judicial intervention in federalism cases is mandated by the Constitution rather than by the Court's predisposition toward the exercise of power at any particular level. Interestingly, unlike its interventions during the late 1930s and 1940s, as in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court's recent interventions have sided with state over national power. This is the opposite position one would expect if federalism institutionalized a purely self-favoring attitude among officials at any particular level of government.

5. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Oliver Wendell Holmes, *Law and the Court*, in OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920).

6. Of course, the availability of this resolution has never stopped critics of the federal courts from claiming that the results in many cases are explained not by the Constitution, but by a desire on the part of the federal judiciary to expand national authority at the expense of state authority. See R. Kent Newmyer, *John Marshall*, *McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875 (2001) (describing attacks on the Court following the *McCulloch* decision); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002) (describing similar attacks during the Warren era).

This method of reconciling the two understandings is unavailable, however, when we turn to state courts because there is no superseding body of law to which state courts might resort that would enable them to control with finality the actions of national officials. Because the Supremacy Clause makes national law supreme,<sup>7</sup> and national law is controlled ultimately by federal courts, state courts cannot employ national law as a force for resisting national power while simultaneously appealing to it as a legitimating source of impartial restrictions on that power. Federal courts, not state courts, ultimately decide what powers the state and national governments legitimately possess under the U.S. Constitution.

This asymmetry between state and national judicial power suggests a different way of reconciling federalism's imperative of governmental self-partiality with notions of judicial apoliticism: it may be that this tension simply does not exist for state courts because they lack the tools to join effectively in any struggle against national power that other organs of state government might choose to wage. As Stalin once said of the Pope: "How many divisions has he got?"<sup>8</sup> What weapons do state courts possess that they could deploy against national power should some tyrannical action of the federal government justifiably prompt resistance from state governments? About the only thing state courts definitively control is the content of state law, yet state law generally cannot restrict officials in any branch of national government, and can often be displaced by Congress, through preemption, and by federal courts, through invalidation under the U.S. Constitution. Does this mean, then, that state courts have no role to play in maintaining the balance of state and national power contemplated by federalism? Are they mere bystanders to a permanent struggle against national power waged by the state legislative and executive branches?

I think not. State law is capable of controlling something potentially significant to any struggle by states to resist national power: other state officials. Through their control over state law, and in particular through their control over the state constitution, state

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7. U.S. CONST. art. VI, cl. 2.

8. WINSTON S. CHURCHILL, *THE GATHERING STORM* 135 (1948) (reporting Stalin's statement) (emphasis omitted).

courts are capable of exercising some influence over the manner and forcefulness with which state governments may wage the kinds of struggles against national authority contemplated by federalism. By construing the provisions of the state constitutions that both empower and restrict the state legislative and executive branches, state courts can influence the facility with which state government responds to threats originating at the national level; the tools that state actors have at their disposal to resist encroachments by national power; and the ways in which state officials may deploy those tools in intergovernmental power struggles.

If state courts are thus understood as potentially significant actors in the process by which states resist national power, then the tension between the imperatives of federalism and the imperatives of judicial neutrality cannot be dissolved on the ground that state courts are too weak to participate in federalism's mechanism of mutual intergovernmental checking. How then can the tension be resolved? In this Article, I argue that the tension need not be resolved at all for the simple reason that there is nothing wrong with state courts using what powers they have to protect popular liberty by resisting, or helping other state officials to resist, abuses of national authority. Indeed, there is much to recommend such an understanding of state judicial power.

Part I of this Article provides a brief overview of the mechanics of federalism and explores the role, if any, that state courts might play in the intergovernmental struggles contemplated by federalism. Part II introduces state judicial power by discussing two conventional and well-understood ways in which state courts can use their powers to improve the lives and protect the liberty of the state's citizens: by using affirmatively granted judicial powers to advance the public good directly; and by using the power of judicial review to restrain state governments from tyrannizing their own citizens. When state courts use their powers in these ways, they are acting, I shall say, as "agents of state power."

Part III examines the ability of state courts to use their powers for a different purpose: to resist tyranny resulting not from actions taken by state officials, but from actions of the national government. Part III thus examines the ability of state courts to act as "agents of federalism"—that is, as organs of state government



devoted to fulfilling the federal plan of mutually checking state and national power. State courts, I argue, are fully capable of serving as agents of federalism in at least two ways, one direct and the other indirect. In a recent article, I explain how state courts may take a *direct* role in checking abuses of national power—especially abuses of national judicial power—by interpreting generously the scope of individual liberty under the state constitution.<sup>9</sup> In this Article, I expand that argument into a general theory of state judicial resistance to national power by extending the analysis to structural provisions of state constitutions that govern the allocation of state power. I argue that state courts may serve *indirectly* as agents of resistance to national power by construing the state constitution in such a way as to assure, insofar as possible, that the state legislative and executive branches have powers adequate to resist abuses of national power. In laying out this account, Part III discusses at some length the tools available to state courts acting as indirect agents of federalism, and explains how state courts might fold into their interpretation of state constitutional provisions an analysis of what I call the “federalism effects” of their rulings—namely, the impact of their constructions of the state constitution on the ability of the state effectively to resist abuses of national power.

This account of state judicial power departs considerably from the conventional view in that it regards state courts as possessing, at least in theory, the authority to interpret the state constitution instrumentally, to achieve a particular result: effective resistance to national tyranny. This places my account squarely in opposition to a well-developed contemporary theory of constitutional jurisprudence that rules out instrumental, result-oriented constitutional interpretation as inherently illegitimate.<sup>10</sup> Part IV responds to these strict constructionist objections by arguing that their force, whatever it may be, is confined to the national setting of national judicial power and is inapplicable to state judicial power which,

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9. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. (forthcoming June 2003).

10. For a thorough exposition of this theory of constitutional interpretation, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutman ed., 1997).

because of the federal structure of American government, operates in a significantly different institutional context.

Having disposed of the theoretical objections, I turn in Part V to the practical question of popular authorization. Just because state courts are equipped to play a role in resisting abuses of national power does not mean that they are authorized to do so. As with any other branch of state government, whether a state court has the authority to join this struggle depends upon whether the people of the state have constitutionally authorized it to participate. Such authorization, in turn, depends to a great degree on the patterns of distrust that prevail among the people of the state. The more the people trust the state judicial branch to protect their liberty actively, through direct resistance to national tyranny, the more likely they are to grant it the authority to do so, and vice versa. In reviewing the likelihood that the people of a state might trust their courts enough to grant them authority to act as agents of federalism, Part V considers both institutional factors and the actual historical record of state courts in protecting liberty against incursions by the national government.

Part VI concludes with a brief examination of the ramifications for state constitutional interpretation of popular decisions concerning the authority of state courts to act as agents of federalism. The basic principle may be simply stated. The more authority state courts are granted to serve as agents of federalism by monitoring and resisting abuses of national power, the more flexibility they are necessarily authorized to bring to the interpretation of the state constitution.<sup>11</sup> Conversely, the more tightly the people of the state have, through their state constitution, reined in the exercise of judicial power, the less flexibly state courts may approach state constitutional interpretation, and the more fastidiously they must observe popular decisions set forth in the state constitution.<sup>12</sup> Constitutional decisions concerning state judicial authority thus allocate between the people and their courts the authority to monitor and check abuses of national power. Federalism requires that some state actors monitor vigilantly the actions of the national

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11. *See infra* Part VI.B.

12. *See id.*

government. Which organs of government undertake this job, or whether the people reserve it entirely to themselves, is a question to be decided in the adoption of a state constitution. Significantly, popular resolution of this question simultaneously resolves a good deal of uncertainty about how state courts should approach and interpret state constitutions.

### I. FEDERALISM AND STATE COURTS

The theory underlying the American practice of federalism could not be simpler. People create governments to "secure the[ir] rights."<sup>13</sup> Yet because governments must be run by human beings, and human beings are weak, concentrated governmental power can be dangerous to liberty.<sup>14</sup> Consequently, the only form of government in which liberty is safe is one in which governmental power is dispersed and divided in such a way as to set different parts of government against the others. In Madison's words, "[a]mbition must be made to counteract ambition."<sup>15</sup> Our Constitution thus divides power not only horizontally among three branches of government, but also vertically between state and national governments.<sup>16</sup> In this way "a double security arises to the rights of the people."<sup>17</sup> Federalism thus aims to institutionalize a more or less permanent struggle between the state and national governments for the purpose of better protecting the liberty of all: "a healthy

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13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). As Madison stated:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

*Id.*; see also THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961) (describing human tendency toward the pursuit of self-interest).

15. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

16. U.S. CONST. arts. I-III; *id.* amends. X-XI.

17. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

competition between federal and [state] officials can help protect citizens against government tyranny."<sup>18</sup>

Despite its theoretical transparency, surprisingly little is understood about how federalism works in actual practice.<sup>19</sup> How exactly, and in what circumstances, do state and national governments struggle against one another? What tools are available to governmental actors engaged in this struggle? Who is responsible for taking the battle to the other side, and how is that responsibility discharged? To the extent these questions have been studied at all, most of the research has focused on the roles of the national government and the state legislative and executive branches. Virtually no attention, however, has been paid to the role state courts might play in implementing federalism's plan of mutually checking governmental power.

A moment's contemplation of American constitutional history reveals clearly that all three branches of the *national* government have at various times played significant roles in resisting abusive exercises of *state* power. Congress, for example, has often used its power of preemption to invalidate state laws of which it disapproves,<sup>20</sup> and has used its ability to attach conditions to federal spending as a powerful means of inducing states to behave in ways that Congress desires.<sup>21</sup> Similarly, the national executive branch has resisted state power by means ranging from the prosecution of the Civil War, to the use of force to enforce national civil rights law against recalcitrant states,<sup>22</sup> to the wholly peaceful use of negotiation with state officials in the routine administration of national law.<sup>23</sup> The national courts have also played a significant

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18. Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498-99 (1991).

19. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487-91 (1994).

20. The Supremacy Clause provides: "This constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land: and the judges, in every state, shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

21. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding Congress' use of its spending power to induce states to set the minimum drinking age at twenty-one).

22. For an account of the armed enforcement of desegregation in Little Rock in 1957, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63*, at 222-24 (1989).

23. This is one of the cornerstones of the contemporary notion of "cooperative federalism."

role in resisting improper uses of state power, frequently striking down state laws that violate the U.S. Constitution.<sup>24</sup>

At the state level, it is clear that state legislatures and executives have often played an important part in resisting national power. For example, these branches occasionally have employed force or the threat of force against the national government in instances ranging from secession during the Civil War, to the threat of armed resistance during the Nullification Crisis,<sup>25</sup> to the threatened seizure of federally owned public lands during the Sagebrush Rebellion.<sup>26</sup> State legislatures have publicly denounced<sup>27</sup> and

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For some classic expositions of this position, see DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (Daniel J. Elazar ed., 1966); MICHAEL D. REAGAN, *THE NEW FEDERALISM* (1972). For a more recent account placing cooperative federalism in historical perspective, see DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* chs. 4-6 (1995).

24. In its most recent Term, the Court struck down state laws in four cases. See *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (invalidating a state law prohibiting issue-based campaigning by judicial candidates pursuant to the First Amendment); *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (invalidating a state statute requiring trial judges to determine the existence of aggravating factors in capital cases pursuant to the Sixth Amendment); *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (invalidating a state law permitting execution of the mentally retarded pursuant to the Eighth Amendment); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 122 S. Ct. 2080 (2002) (invalidating a local ordinance requiring all solicitors to obtain a permit for door-to-door advocacy pursuant to the First Amendment). For a complete listing of state laws struck down through June 28, 2000, see CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 2033-41 (Johnny H. Killian & George A. Costello eds., 1992 & Supp. 2000), available at <http://www.access.gpo.gov/congress/senate/constitution> (last visited Jan. 30, 2003).

25. See WILLIAM H. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1966) (describing the South Carolina legislature's enactment of and attempts to enforce an "Ordinance of Nullification," which was passed to abolish tariffs established by Congress).

26. For an overview of the "Sagebrush Rebellion," see R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 109-10 (1993); WILLIAM L. GRAF, *WILDERNESS PRESERVATION AND THE SAGEBRUSH REBELLIONS* 225-32 (1990). For accounts of specific threats by states to claim federally owned land, see PAUL WALLACE GATES, *PRESSURE GROUPS AND RECENT AMERICAN LAND POLICIES* 3 (1980) (describing Nevada's 1979 legislation "declaring state sovereignty over 49 million acres of Nevada territory" owned by the national government); *"Sagebrush Rebels" Are Reveling in Reagan*, N.Y. TIMES, Nov. 24, 1980, at D9 (reporting that the legislatures of Nevada, Utah, Arizona and Wyoming had passed resolutions "laying claim to Federal lands within their boundaries").

27. Important examples are the Kentucky and Virginia Resolutions, drafted by Thomas Jefferson and James Madison, respectively, in which the legislatures of those two states

defied<sup>28</sup> national laws of which they disapprove, and have sometimes attempted to subvert disfavored national legislation by foot-dragging<sup>29</sup> and by deliberately ineffective enforcement.<sup>30</sup> State legislatures and governors also routinely attempt to influence the content of national legislation through the use of lobbying and political pressure.<sup>31</sup> They have also been known to refuse national financial incentives when they disapprove of federally-imposed

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denounced the federal Alien and Sedition Acts of 1798 as unconstitutional. 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528-29, 540-44 (Jonathan Elliot ed., photo. reprint 1987) (1888). The Resolutions are also available online at <http://www.yale.edu/lawweb/avalon/18th.htm> (last visited Feb. 25, 2003).

28. State acts of defiance have included, for example, post-*Lochner* enactment of wage and hour laws, and post-*Roe* enactment of abortion prohibitions, often as deliberate test cases. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating Nebraska's ban on "partial birth" abortions); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down detailed regulation of abortion procedures); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating a requirement that abortions be performed in a hospital); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (striking down spousal consent requirement for abortion); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women); *Bunting v. Oregon*, 243 U.S. 426 (1917) (invalidating maximum hour and overtime pay law for factory workers); *Muller v. Oregon*, 208 U.S. 412 (1908) (invalidating maximum hours law for women engaged in factory or laundry work). For a comprehensive analysis of state defiance of *Roe*, see BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 10-12 (2d ed. 1999).

29. One particularly vivid example of this phenomenon is the general failure of states to exercise delegated authority to regulate nonpoint source pollution under section 319 of the Clean Water Act. See U.S. ENVTL. PROT. AGENCY, MANAGING NONPOINT SOURCE POLLUTION 32 (1992).

30. A notorious example is Montana's nonenforcement of the fifty-five mile-per-hour national speed limit established by Congress in 1974. Instead of enforcing violations of the fifty-five mile-per-hour speed limit as traffic infractions, Montana issued five-dollar "environmental" citations to drivers traveling above fifty-five miles-per-hour, but below what Montana police considered a safe speed. Violations were not charged against drivers' insurance records. See generally Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U.L. REV. 155, 157-62 (1999) (discussing the ineffectiveness of Montana's fifty-five mile-per-hour speed limit); Timothy Egan, *Speeding Is Easy (and Almost Free) in Montana*, N.Y. TIMES, July 10, 1989, at A14 (same). According to news accounts, the "conventional wisdom" was that no serious infractions would be charged for daytime driving below about eighty-five miles-per-hour in good weather conditions. Tom Kenworthy, *New Life in the Fast Lane: Wide-Open Throttles in Wide Open Spaces*, WASH. POST, Dec. 9, 1995, at A3.

31. See ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995); DONALD H. HADIER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974); John Dinan, *State Government Influence in the National Policy Process: Lessons from the 104th Congress*, 27 PUBLIUS 129 (1997).

conditions,<sup>32</sup> and to sue the national government in federal court to assure its compliance with limitations imposed by the U.S. Constitution.<sup>33</sup>

Missing from this picture, however, is any obvious role for the state judicial branch in efforts by the state to resist abuses of national power. In a way, this gap is not surprising. Courts in the American tradition are essentially passive institutions, and their ability to participate in the resolution of political issues depends greatly on whether litigants bring such disputes before them.<sup>34</sup> Yet unlike federal courts, state courts are unlikely to adjudicate lawsuits attacking purported abuses of national power by national officials, or to have any legitimate and binding authority to resolve them. First, although state courts typically have jurisdiction to hear cases brought against organs of the national government, national officials have an absolute right to remove such cases to federal court,<sup>35</sup> a right which the United States Justice Department exercises routinely as a matter of basic policy.<sup>36</sup> Second, state courts are

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32. For example, New Hampshire has refused repeatedly to enact a mandatory seatbelt law, thereby forgoing a portion of its allocation of federal highway maintenance and construction funds. See Donn Tibbetts, *Lift Seat-Belt Sanctions, Merrill Urges DOT Chief*, THE UNION LEADER (Manchester, N.H.), Jan. 28, 1995, at A-1, available at LEXIS, News & Business, The Union Leader File. Nevada and Wisconsin have sacrificed federal highway funds by refusing to lower their statutory threshold for drunken driving convictions to a blood alcohol level of 0.8%, in defiance of federal law requiring the adjustment. Amy Rinard, *State Pays for Its 0.10 Standard*, MILWAUKEE J. SENTINEL, Apr. 21, 2002, at A1, available at LEXIS, News & Business, The Milwaukee Journal Sentinel File; Ed Vogel, *Lower Drunken Driving Standard Sought*, LAS VEGAS REV.-J., Mar. 7, 2001, at 3B, available at LEXIS, News & Business, Las Vegas Review-Journal File. Kentucky recently abolished state vehicle emission standards, threatening its ability to meet federally mandated pollution limits, which would lead to the loss of nearly \$2 billion in federal highway funds. Tom Loftus, *Patton Signs Bill Abolishing Vehicle Emissions Tests in Jefferson*, THE COURIER-J. (Louisville, Ky.), Apr. 9, 2002, at A1, available at LEXIS, News & Business, The Courier-Journal File.

33. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (challenging federal attempt to commandeer state executive branches); *New York v. United States*, 505 U.S. 144 (1992) (challenging federal attempt to commandeer state legislatures).

34. See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (acknowledging the passive nature of the federal courts and advocating the use of prudential jurisdictional doctrines to limit constitutional adjudication).

35. 28 U.S.C. § 1442(a) (2000).

36. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, CIVIL RESOURCE MANUAL 45 (laying out department's preference for removal to federal court in most circumstances), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/) (last visited Feb. 25, 2003).

required to obey national law,<sup>37</sup> and are in any event subject to direct appellate oversight by the United States Supreme Court,<sup>38</sup> drastically limiting their ability to strike out at the national government. It is true, of course, that state courts could join the fray by defying federal law, as state legislative and executive branches have sometimes done, but this is a particularly unattractive option for courts, which are, after all, uniquely dedicated to upholding law, not defying it.<sup>39</sup> Thus, anything a state court might gain in successfully resisting national power through illegal means might in the long run work to that court's disadvantage by undermining its claim to legitimacy as an impartial instrument of the law.

Does this mean, then, that state courts are solely organs of state internal power that have no role to play in the external projection of state power against the national government? If federal courts possess and often exercise the authority to resist abuses of state power, why, given the goals and methods of federalism, should state courts not perform a similar and reciprocal function? Consider the nature and purposes for which state power may be allocated. Generally speaking, state power can be deployed for at least three different purposes, each of which promotes liberty in a slightly different way.<sup>40</sup> First, state power can be used to advance the public good directly, through the exercise of ordinary governmental power. Second, state power can be allocated and deployed for the purpose of imposing upon state government some form of internal self-restraint, as through mechanisms such as separation of powers, judicial review, and a bill of rights. Third, state power can be granted and deployed for the purpose of resisting abuses of power originating at the national level.

State courts have obvious roles to play in exercising the first two kinds of power. They clearly can use their granted powers to advance the common good directly—for example, by shaping the

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37. The Supremacy Clause specifically provides that "the Judges in every State shall be bound" by national law. U.S. CONST. art. VI, cl. 2, and that they shall take an oath to that effect. *Id.* art. VI, cl. 3.

38. *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 354-58 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342, 351 (1816).

39. See CANON & JOHNSON, *supra* note 28, at 38 (noting that defiance is "a relatively rare event" and "threatening to the judicial system").

40. The balance of this paragraph draws on a fuller discussion in Gardner, *supra* note 9.



state's common law to accomplish desirable social and economic objectives. State courts also have a clear role in restraining state power by enforcing the separation of powers established by the state constitution and by protecting rights guaranteed under the state constitution against infringement by other branches of state government. The third kind of power, however, presents a more difficult question. Do state courts have any role in maintaining the balance of state and national power contemplated by federalism? Are they mere bystanders to an ongoing struggle against national power carried on by the state legislative and executive branches? Or are they active participants, charged at least on occasion with exercising their powers to resist national abuses?

The answer to these questions, I argue here, is: it depends. This answer rests on two fundamental propositions. First, despite their limited and sometimes passive role in state governance, state courts nevertheless have powers which are capable of being turned against the national government and used as weapons to resist tyrannical abuses of national power. Second, whether state courts may use these powers to resist national authority depends, quite simply, on whether they have been authorized to do so by the people of the state—it is a matter, that is to say, of positive legal authorization.

## II. STATE COURTS AS AGENTS OF STATE POWER

### *A. The Affirmative Use of Granted Powers to Advance the Public Good*

The most obvious function of any government is to exercise its granted powers for the direct benefit of its citizens. As one of the three primary branches of state government, the state judiciary typically possesses considerable power, which it may deploy to serve the public good in some very direct ways.

In its most basic manifestation, state judicial power serves the public good when state courts do nothing more than undertake the routine adjudication of individual cases. Deciding cases arising under clearly established legal principles resolves disputes among individual litigants, and reaffirms and reinforces the rule of law. In criminal cases, the conviction and punishment of the guilty does

justice and protects the public from further harm. In civil cases, enforcement of the laws of tort, contract, and property not only does justice in individual cases (or so one hopes), but also gives effect to economic expectations, thereby establishing and maintaining a necessary condition of economic prosperity.<sup>41</sup> Adjudication in its most ordinary and least controversial forms thus promotes the public good in significant ways.

State courts, however, typically have other, more discretionary means at their disposal to advance the public good beyond the somewhat "ministerial" function of applying established law to individual cases. Surely the most prominent of these is the power of a state court to make new law by deliberately shaping and self-consciously improving the state's common law. The common law is generally understood to embrace "[a] tradition of law improvement by creative judicial action."<sup>42</sup> Although the bulk of common law litigation consists of the routine application of existing legal rules to familiar fact patterns, courts engaged in common law adjudication are sometimes in a position to choose quite deliberately among alternative potential legal rules on the basis of "whether those rules will conduce to a good or a bad state of affairs."<sup>43</sup> In these situations, common law courts actively shape and remake the law.<sup>44</sup>

Throughout the twentieth century, and especially in its middle decades, American state courts developed a record of substantial and rapid innovation in numerous areas of common law. In tort law, for example, state courts developed the new torts of "false light" and "disclosure of embarrassing private facts," and greatly expanded the scope, and thus the utility to plaintiffs, of intentional infliction of emotional distress.<sup>45</sup> They drastically restricted the scope of existing

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41. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 16-30, 85-99, 173-210 (1977).

42. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 13 (1969).

43. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 43 (1988).

44. Common law courts also reshape the law passively, or at least indirectly, insofar as common law rules evolve with each successive decision. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-4 (1949). This is a process that goes on continually and irrespective of judicial intentions. I am concerned more here with the kind of deliberate shaping of the law that occurs, for example, when courts overrule prior decisions. See KEETON, *supra* note 42, chs. 1, 3.

45. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished*

tort doctrines of municipal and charitable immunity, thus subjecting to liability numerous entities that had previously been exempt.<sup>46</sup> During this period, state courts also developed tort doctrines of strict liability that greatly expanded the ability of injured consumers to recover damages caused by defective products,<sup>47</sup> going so far in some instances as to create a form of "enterprise liability" in which traditional principles not only of fault, but of proof of causation, were displaced.<sup>48</sup> Some tort cases, such as *MacPherson v. Buick Motor Co.*,<sup>49</sup> which set the law of product liability on a course away from restrictive contract principles and toward more generous principles of tort,<sup>50</sup> have become well-known classics, held up within the legal profession as examples of the best and highest expression of judicial craft.<sup>51</sup>

In these kinds of cases, courts do something more than mechanically apply the law to new sets of facts: they alter the law, in effect making new law, and do so with the deliberate aim of adjusting controlling legal principles to bring about better, fairer, and generally more desirable results. Although this function has long been thought of as an integral part of adjudication in the Anglo-American tradition, it is an aspect of the adjudicatory power by which state courts historically have participated directly and actively in the process of state-level governance—much more so than if they routinely took the position that any changes in the common law must be made by legislatures rather than courts.

Although the power to shape the common law is the most visible and probably the most powerful way in which state courts

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*Business*, 88 CAL. L. REV. 1815, 1834-35 (2000); see also Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1541-42 (1997) (noting the rise of intentional infliction of emotional distress, strict products liability, invasion of privacy, and wrongful discharge from employment as new torts in the twentieth century).

46. Lawrence Baum & Bradley C. Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 85-87 (Mary Cornelia Porter & G. Alan Tarr eds., 1982).

47. See KEETON, *supra* note 42, ch. 7.

48. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1317-32 (2001); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 505-18 (1985).

49. 111 N.E. 1050 (N.Y. 1916).

50. *Id.*

51. See, e.g., ANDREW L. KAUFMAN, CARDOZO 269-79 (1998); LEVI, *supra* note 44, at 9-25.

participate actively in state-level governance, it is not the only way. For example, many states grant their highest court the power to issue advisory opinions, which the executive or legislative branches are authorized to request.<sup>52</sup> These branches often request advisory opinions to assist their deliberations concerning the constitutionality of proposed or pending legislation.<sup>53</sup> When a court issues an advisory opinion concerning the constitutionality of proposed legislation, it inserts itself directly into the deliberative process by which law is made, becoming an active player in the legislative process.<sup>54</sup> This is a more direct kind of participation in state governance than a court undertakes when it merely reviews the constitutionality of legislation after the fact.

State courts also participate directly in governance through their power to make rules for judicial proceedings, a power typically granted by state constitutions.<sup>55</sup> Although the judicial rule-making power is most often exercised to make procedural and evidentiary rules, the impact of which is confined mainly to regulating the

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52. See generally Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 *FORDHAM L. REV.* 81 (1975) (discussing the role that state court advisory opinions serve in those states that allow for advisory opinions); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 *HARV. L. REV.* 1833, 1844-52 (2001) (discussing the scope and function of state court advisory opinions).

53. Some state constitutional provisions authorizing the issuance of advisory opinions specifically limit the subject matter of such decisions to advice on constitutional issues. See, e.g., MICH. CONST. art. III, § 8 ("Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."). Alabama and Delaware have enacted similar limitations by statute. See ALA. CODE § 12-2-10 (1995) (limiting this power to situations involving "important constitutional questions"); DEL. CODE ANN. tit. 10, § 141(a) (1999) ("The Justices of the Supreme Court ... may give ... their opinions in writing touching the ... constitutionality of any law or legislation passed by the General Assembly.").

54. See Hershkoff, *supra* note 52, at 1851 ("Advisory opinions thus allow state courts to [engage in] ... the ... dialogic process" with other branches of government.).

55. See generally ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 702-23 (3d ed. 1999). In some states, the power to make rules is considered an inherent and exclusive aspect of judicial power. See, e.g., *State ex rel. Kelman v. Schaffer*, 290 A.2d 327, 331 (Conn. 1971), *overruled on other grounds*, *Serrani v. Bd. of Ethics*, 622 A.2d 1009 (Conn. 1993) ("[T]he General Assembly lacks any power to make rules of administration, practice or procedure which are binding on either the Supreme Court or the Superior Court."); see also Jeffrey A. Parness, *Public Process and State-Court Rulemaking*, 88 *YALE L.J.* 1319 (1979) (discussing how state courts have used their constitutionally granted power to avoid legislative attempts to curb judicial rule-making powers).

adjudicatory process,<sup>56</sup> judicial rules sometimes can touch upon highly significant subjects. For example, well before the United States Supreme Court decided in *Gideon v. Wainwright*<sup>57</sup> that the U.S. Constitution guarantees indigent criminal defendants a right to appointed counsel,<sup>58</sup> several state courts had so provided by ordinary rulemaking.<sup>59</sup> State courts also engage in a form of independent regulatory governance by making and administering rules governing the legal profession, including rules for admission to the bar and lawyer ethics and discipline.<sup>60</sup> Finally, state courts increasingly have come to participate directly in state governance by creating and administering social service programs that are more often associated with executive than with judicial power. Among these are family court mediation programs, domestic violence programs, and victim assistance programs.<sup>61</sup>

### *B. Judicial Restraint of State Tyranny*

If state courts generally have the authority under state constitutions to advance liberty by using their powers to achieve the public good directly, they also universally have the constitutional authority to use their power of judicial review to protect liberty in another way: by serving as a force for state governmental self-restraint. If a state government is to advance the public good, it must possess a certain amount of power. The more power a state government possesses, however, the more capable it is of threatening the liberties of its people. This threat may be restrained to a

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56. See, e.g., COLO. CONST. art. VI, § 21 ("practice and procedure in civil and criminal cases"); N.J. CONST. art. VI, § II, para. 3 ("administration ... practice and procedure in all [state] courts").

57. 372 U.S. 335 (1963).

58. *Id.*

59. See *Williams v. Commonwealth*, 216 N.E.2d 779 (Mass. 1966); *People v. Parshay*, 148 N.W.2d 869, 871 (Mich. 1967); *State v. Delaney*, 332 P.2d 71, 80 (Or. 1958).

60. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 61.2 (3d ed. 2001).

61. See Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601 (2001); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997). For a recent overview, see generally Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 FORDHAM URB. L.J. 1751 (2002).

degree by institutionalizing some form of internal self-restraint, such as horizontal separation of powers, creation of a bill of rights, and establishment of judicial review. State courts play a significant role in the exercise of power to achieve this kind of internal self-restraint.

Consider the separation of powers—often said to be an essential safeguard of liberty<sup>62</sup>—under state constitutions. In enforcing these principles, state courts have, among other things, barred legislators from sitting on executive branch commissions,<sup>63</sup> prohibited legislative officials from appointing executive branch officials,<sup>64</sup> prevented state judges from being required to serve on administrative mediation boards,<sup>65</sup> prohibited judicial appointment of special prosecutors,<sup>66</sup> barred the use of a legislative veto,<sup>67</sup> and invalidated numerous instances of excessive delegations of legislative authority to executive branch agencies.<sup>68</sup> State courts have also enforced many other kinds of state constitutional restrictions on the exercise of governmental power. They have invalidated constitutionally-prohibited special legislation,<sup>69</sup> struck down laws that violated single-subject requirements,<sup>70</sup> and enforced provisions requiring bills to have accurate descriptive titles.<sup>71</sup> They have enforced state constitutional debt ceilings<sup>72</sup> and borrowing limitations.<sup>73</sup>

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62. Regarding the importance of separation of powers, see generally THE FEDERALIST NOS. 47, 48, 51 (James Madison).

63. *Alexander v. State*, 441 So. 2d 1329, 1343 (Miss. 1983). *Contra In re Advisory Opinion to the Governor*, 732 A.2d 55, 63-64 (R.I. 1999) (allowing legislators to hold posts in executive branch agencies).

64. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 923-24 (Ky. 1984).

65. *Application of Nelson*, 163 N.W.2d 533, 537 (S.D. 1968).

66. *In re House of Representatives*, 575 A.2d 176, 178-79 (R.I. 1990).

67. *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622 (Kan. 1984).

68. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999) (collecting many of these cases and analyzing different treatment of the nondelegation doctrine, an aspect of the horizontal separation of powers, in state constitutional law).

69. *Haman v. Marsh*, 467 N.W.2d 836, 847-48 (Neb. 1991).

70. *Senate of the State of Cal. v. Jones*, 988 P.2d 1089, 1106 (Cal. 1999); *Evans v. Firestone*, 457 So. 2d 1351, 1354-55 (Fla. 1984).

71. *Borough of Mt. Joy v. Lancaster, E. & M. Turnpike Co.*, 38 A. 411 (Pa. 1897).

72. *City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n, Inc.*, 408 P.2d 818, 829-34 (Ariz. 1965); *Boe v. Foss*, 77 N.W.2d 1, 5-7 (S.D. 1956).

73. *Schulz v. N.Y. State Executive*, 699 N.E.2d 360 (N.Y. 1998); *State ex rel. Brown v.*

In the area of individual rights, state courts have issued many rulings restraining state legislative and executive officials from infringing liberties protected by state constitutions.<sup>74</sup> Such rulings, far too numerous to mention with any specificity, include decisions protecting free speech, equal protection, and privacy, among many others.<sup>75</sup> In some areas without federal counterparts, such as the right to an adequate education, state courts have in recent years been extremely active in policing state constitutional requirements.<sup>76</sup> According to one recent study, state courts today invalidate more than twenty percent of the state laws they review.<sup>77</sup>

In all these areas, then, state courts have periodically used judicial power to protect liberty by restraining other branches of government from taking actions forbidden to them by the state constitutions—actions forbidden because they have been deemed to pose actual or potential threats to the liberty of the state's citizenry.

### III. STATE COURTS AS AGENTS OF FEDERALISM

The two different uses of state judicial power just described are "internal" to the state in the sense that their exercise neither refers to nor depends upon the activities or goals of any entity other than the state itself. In exercising its power to shape the common law, for example, a state court has no particular reason to consider the good of the citizens of neighboring states or of Americans generally. So long as it acts within any constraints imposed by national law, a state court is free to adapt the state's common law so as to promote the good of the people of the state, a good that need not be assessed

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Beard, 358 N.E.2d 569 (Ohio 1976).

74. For data, see James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183 (2000).

75. Many examples are collected in WILLIAMS, *supra* note 55, especially chapters 3 and 4. Specific examples of some of the more significant cases include *Ravin v. State*, 537 P.2d 494 (Ala. 1975) (policing privacy); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (policing privacy and equal protection); *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991) (policing free speech).

76. See generally Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231 (1998) (reviewing state court activity in the education rights context).

77. LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS* 1 (2002).

in relation to the good of any other group.<sup>78</sup> Similarly, when a state court protects the liberty of the citizenry by enforcing the state constitution against other branches of state government, it is free to consider the liberty of the state's citizens independently of the liberty enjoyed by citizens of other states. In the exercise of these functions, state courts thus act as "agents of state power," exercising that power for the good of the state polity.

But organs of state government need not act exclusively in this inward-regarding manner. Federalism requires that state power be available for deployment outwardly, against threats to liberty originating at the national level. This raises the question of whether state courts have any role to play in the process of using state power to resist national tyranny—whether, that is to say, they may serve as what I refer to as "agents of federalism." This question, in turn, raises two others. First, do state courts have the authority to act as agents of federalism by using or attempting to use their powers against the national government for the purpose of resisting what they suppose to be abuses of national power? Second, if state courts have any such authority, how specifically might it be exercised? At this point, I wish to set aside temporarily the question of whether state courts have such a role in fact, in order to focus on the second, and in some ways more preliminary, question just posed: if state courts *did* have such a role, how could they fulfill it? Is it even possible for a state court to use its own powers to resist national authority, and if so, by what means?

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78. It might be argued that some of the pathbreaking commercial common law decisions were motivated by, or at least responded to, an interest in improving the operation of the national economy. See HORWITZ, *supra* note 41, ch. 7. But this is not necessary in a common law decision. It is also consistent with a judicial interest to improve the welfare of the people of the state, who would be expected to benefit from improved economic activity. Indeed, it seems likely that a state court would issue a commerce-facilitating common law ruling precisely because benefits to the nationwide economy would be expected to accrue to the state populace. One would certainly not expect a state court to care about facilitating some kind of commerce nationwide from which the people of the state would *not* be expected to benefit.



*A. Judicial Tools of Federalism Agency**1. National Tools of Judicial Federalism Agency*

If the federal structure contemplates a role for state courts as agents of federalism, how might state courts perform that function in practice? To see how state courts could serve as agents of federalism, it is useful to begin by considering how national courts do so.

Federalism is a two-way street, and courts of the United States serve as agents of federalism when they use their powers to restrain abuses of power by state governments. This is clearly one of their most important functions.<sup>79</sup> Yet federal courts perform this function merely by enforcing the United States Constitution according to its terms. That is because the Constitution *by its own terms* restrains the ability of state governments to behave tyrannically. The Constitution, for example, prohibits states from creating aristocratic forms of government.<sup>80</sup> It prevents them from abridging rights of free speech, freedom of the press, and freedom of religion.<sup>81</sup> It forbids them from violating principles of equal protection or due process.<sup>82</sup> It restrains them from impairing the obligations of contracts,<sup>83</sup> or from impeding economically desirable interstate commerce.<sup>84</sup> To invoke these limits, and thus to serve as agents of federalism, federal courts need do nothing more than enforce the Constitution as it is written. The national government's role in enforcing the American system of federalism is inscribed directly in the Constitution itself; it is woven deeply into the fabric

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79. See Justice Holmes' oft-quoted comment, *supra* note 5.

80. U.S. CONST. art. I, § 10, cl. 1.

81. See *id.* amends. I, XIV; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-16 (1947) (holding First Amendment's religion clauses applicable against the states through incorporation under the Fourteenth Amendment's Due Process Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (holding free speech and freedom of the press provisions of the First Amendment applicable against the states through incorporation under the Fourteenth Amendment's Due Process Clause); see also *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 253-58 (1963) (Brennan, J., concurring) (defending incorporation of the Establishment Clause).

82. U.S. CONST. amend. XIV, § 1.

83. *Id.* art. I, § 10, cl. 1.

84. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

of the document—in its text, structure, theoretical foundations, and history.

This national role appears most obviously in the litany of textual limitations on state power set forth in Article I, Section 10 and, even more significantly, in Section 1 of the Fourteenth Amendment, which places explicit, extremely broad, and judicially enforceable limits on state power.<sup>85</sup> Virtually the entire national Bill of Rights is enforceable against the states under this provision.<sup>86</sup> Federal courts have also construed the Constitution to place implicit, judicially enforceable, structural limitations on state power. For example, the Supreme Court has on structural grounds invalidated state taxation of national banks<sup>87</sup> and state imposition of term limits on members of Congress.<sup>88</sup> It has also held that the Commerce Clause, by its own force, limits the authority of states to regulate interstate commerce.<sup>89</sup> These rulings rest on the belief that the Constitution embodies and implements a theory of federalism that authorizes federal courts to invalidate state actions which threaten to disrupt the Constitution's careful, liberty-protective balance between national and state power. Finally, the national government's role in restraining state tyranny is also founded in a historical understanding of the Reconstruction amendments, which fundamentally altered the Constitution by adding explicitly to the functions of the national government a significant role in protecting American citizens from their own state governments.<sup>90</sup>

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85. See U.S. CONST. amend. XXIV, § 1.

86. See NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW § 6.02 (1995) (giving an overview of the incorporation doctrine).

87. *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819).

88. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

89. See *Cooley v. Bd. of Wardens*, 53 U.S. (1 How.) 299 (1851).

90. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 582 (Henry Steele Commager & Richard B. Morris eds., 1988) (observing that Reconstruction "marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens"); *id.* at 24 (describing rise of national consciousness following the Emancipation Proclamation, which "clothed national authority with an indisputably moral purpose"); see also JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 137-38 (1991) (The identification of national military power with "Union and freedom.... helped change the course of American constitutional development. Eleven of the first twelve amendments to the Constitution limited the powers of the national government; six of the next seven dramatically expanded those powers at the expense of states and individuals."); JACOBUSTEN

## 2. *State Tools of Judicial Federalism Agency*

State courts obviously cannot serve as agents of federalism in the same way as federal courts because they have no ability to control the content of national law or to enforce it against national actors. Assuming, then, that a state court does have authority to act as an agent of federalism, how might it assert that authority? What tools, in other words, might a state court employ to resist national power? State courts, it must be conceded, possess far fewer resources to deploy against national power than do the state executive and legislative branches. State courts typically lack binding authority over organs of the national government<sup>91</sup> and are subject to direct national judicial oversight on questions of national law.<sup>92</sup> Furthermore, although state courts are typically more active and involved in policy formation than federal courts, they still are relatively passive institutions. Unlike the governor and state legislature, state courts cannot simply voluntarily insert themselves into pressing disputes, but must ordinarily wait for problems to come to them before acting. Nevertheless, state courts do have one fairly powerful tool at their disposal: their control over state law, and, more particularly, over the state constitutions.

In a recent article, I explain how state courts can resist and counteract liberty-invasive abuses of national judicial power by giving a more generous construction to individual rights found in the state constitution than national courts give to similar provisions appearing in the Constitution.<sup>93</sup> Here, I want to focus on a different

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BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* chs. 4, 11 (1951) (making similar arguments about the Fourteenth Amendment's elevation of national power at the expense of the states and conceiving of it as a basis for continuing military protection of the rights of ex-slaves against the states).

91. The United States cannot be sued in any court unless it waives its sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Even when the United States has waived its sovereign immunity to suit, it has by statute retained the authority to remove to federal court cases filed against it in state court. 28 U.S.C. § 1442(a) (2000). State courts also typically lack the authority to issue orders to national officials. *Tarble's Case*, 80 U.S. (1 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (1 How.) 506 (1858); *M'Clung v. Silliman*, 19 U.S. (1 Wheat.) 598, 604-05 (1821).

92. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

93. *Gardner*, *supra* note 9.

method by which the state constitution can be deployed to resist national power. This method derives its force from the fact that the state constitution is the legal document that ultimately grants, allocates, and structures any powers possessed by state officials in other branches of state government. To put this proposition in its bluntest form, state courts may participate in state resistance to national power by construing the state constitution in such a way as to assure, insofar as possible, that the state legislative and executive branches have powers adequate to resist abuses of national authority.

Within the federal structure, most state acts of resistance to national tyranny will be undertaken by the state executive or legislative branches.<sup>94</sup> To resist national authority with the greatest possible effectiveness, governors and state legislatures require ample powers. What powers these branches possess is a question determined solely by reference to the state constitution, the final meaning of which is settled by the state judiciary. Should state power come into conflict with national power concerning controversial issues, it is possible, and perhaps likely, that legal challenges will ensue, thereby offering state courts opportunities to construe the constitutional authority of coordinate branches of state government engaged in the dispute. In these circumstances, state courts may well play an important role in state-national disputes by being forced to decide whether the state constitution authorizes other state actors to carry out effective forms of resistance to national power.

For example, the degree of centralized state control over federal grant funds has long been a contentious flash point in intergovernmental relations. Congress presently supplies approximately thirty percent of all state revenue.<sup>95</sup> In exercising this responsibility, Congress often has been interested in distributing federal funds in whatever way is best calculated to achieve as directly and efficiently as possible the programmatic goals for which the grant money is intended.<sup>96</sup> This approach has often led Congress to

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94. See generally *THE FEDERALIST* NO. 46 (James Madison).

95. Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 *GEO. L.J.* 461, 462 (2002).

96. This interest has consistently manifested itself in a congressional preference for

provide grant money directly to state executive agencies.<sup>97</sup> State legislatures, on the other hand, have sometimes viewed such targeted grants as undermining state legislative control over the ways in which state executive agencies raise and spend funds to achieve programmatic goals.<sup>98</sup> Indeed, Congress has occasionally viewed state legislatures, with some justification, as interlopers bent on undermining congressionally imposed spending conditions so as to divert state funds to unauthorized uses.<sup>99</sup> To avoid this, Congress has sometimes acted in a way that looks very much as though it is attempting to peel off state executive agencies from state legislative oversight so as to accomplish purposes dictated by Congress rather than by state governmental processes.<sup>100</sup> State legislatures, for their part, tend to see this practice as an intrusive abuse of the national spending power.<sup>101</sup>

Congress, of course, has a great deal of freedom to specify the conditions under which federal grant money may be spent,<sup>102</sup> and

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federal conditions and oversight of state expenditures made under federal programs, and in a concomitant congressional reluctance to simplify the associated administrative burdens through use of block grant programs. See, e.g., TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 40-43, 55-58, 157 (1998).

97. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1260 (1999) ("Federal statutes typically bestow federal grants on state executive agencies or governors ...."). For example, the Women, Infants and Children Program (WIC) provides grants directly to the state health department. 42 U.S.C. § 1786(b)(13), (c)(1) (2000). For an overview of federal grant programs bypassing the state legislature as of 1980, see COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. 660-81-3, REPORT TO THE CONGRESS: FEDERAL ASSISTANCE SYSTEM SHOULD BE CHANGED TO PERMIT GREATER INVOLVEMENT BY STATE LEGISLATURES 11-19 (1980) [hereinafter GAO REPORT]. The GAO recommended increasing state legislative involvement. *Id.* at 54-55. Congress seems to have followed this recommendation.

98. The federalism implications of this practice are helpfully discussed in Hills, *supra* note 97.

99. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 831 (1998) (describing long-standing presupposition in American constitutional law that "state governments are unfit to implement federal law because state officials are devious, demagogic, untrustworthy, parochial, and inherently rebellious and, therefore, ought to be excluded entirely from implementing federal policy").

100. See Hills, *supra* note 97, at 1216-17.

101. One way legislatures responded was by increasing their involvement in oversight of federal grants despite significant federal discouragement. See GAO REPORT, *supra* note 97, at 38-43.

102. The main restriction is that Congress may not provide incentives so strong as to amount to coercion. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). Coercion, however, has

may specify that grants be made directly to specific state agencies.<sup>103</sup> It does not follow, however, that state executive agencies have the authority to *spend* money that they receive from sources other than the state legislature. Many state constitutions, like the United States Constitution, contain provisions requiring that expended funds be appropriated specifically by the legislature.<sup>104</sup> In reliance on such provisions, state legislatures have from time to time enacted laws requiring that federal grant funds be paid into the state's general treasury for subsequent reappropriation by the legislature and prohibiting state executive agencies from spending federal grant funds that have not been legislatively appropriated.<sup>105</sup>

On several occasions state courts have been called upon to adjudicate the constitutionality of these restrictions on the spending of unappropriated funds. Some state courts have construed the state constitutional requirement of appropriation narrowly, holding that it applies only to spending out of state general treasury revenue, a description that does not apply to federal grant money.<sup>106</sup> Other state courts, however, have taken a different view. The Pennsylvania Supreme Court, for example, has held that the state constitution limits the spending authority of state executive agencies to the spending of funds that have been appropriated by the state legislature,<sup>107</sup> and it has accordingly upheld legislative

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never been found in practice. *See, e.g., Kansas v. United States*, 214 F.3d 1196, 1201-02 (10th Cir. 2000) ("The Court has never employed the [coercion] theory to invalidate a funding condition.").

103. *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260 (1985) (holding that the terms of such a grant may, under certain circumstances, preempt inconsistent state law).

104. *Compare* PA. CONST. art. III, § 24 ("No money shall be paid out of the treasury, except on appropriations made by law ...."), *with* U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ....").

105. *See* GAO REPORT, *supra* note 97, at 27-30.

106. *See Navajo Tribe v. Ariz. Dep't of Admin.*, 528 P.2d 623, 625 (Ariz. 1974); *McManus v. Love*, 499 P.2d 609, 610-11 (Colo. 1972); *Opinion of the Justices*, 378 N.E.2d 433, 436 (Mass. 1978) (advisory opinion); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 986 (N.M. 1974); *In re Dep't of Transp.*, 646 P.2d 605, 607 (Okla. 1982); *see also* Colo. General Assembly v. Lamm, 738 P.2d 1156, 1173-74 (Col. 1987) (holding that the legislative appropriation requirement applies only to those portions of federal block grants that Congress has allowed state legislatures to control).

107. *Shapp v. Sloan*, 391 A.2d 595, 605 (Pa. 1978); *accord Anderson v. Regan*, 425 N.E.2d 792, 798 (N.Y. 1981); *see also* *Opinion of the Justices*, 381 A.2d 1204, 1209 (N.H. 1978) (holding the National Health Planning and Resources Development Act did not preempt state

restrictions on agency spending of unappropriated federal grants.<sup>108</sup> In so doing, the Pennsylvania Supreme Court has delivered to the state legislature a significant constitutional tool for defending its control over state executive spending from erosion worked by congressional grant-making strategies.

Even when these kinds of state constitutional issues do not arise in the course of an active, ongoing dispute with the national government, constitutional rulings by state courts concerning the scope of state executive and legislative authority can have obvious ramifications for the ability of those branches successfully to oppose abuses of national authority in subsequent clashes. For example, to resist national tyranny successfully, a state legislature may find itself called upon to do two things: enact some kind of legislation and appropriate money to fund its implementation. The legislature's ability to do both obviously can be affected by the construction given by state courts to the relevant state constitutional provisions.

Consider, for example, the California Constitution's urgency legislation clause. Article IV, Section 8 of the California Constitution prevents most laws enacted by the legislature from taking effect sooner than ninety days after enactment.<sup>109</sup> This provision, however, has an exception for what it terms "urgency statutes," which it defines as laws "necessary for immediate preservation of the public peace, health, or safety."<sup>110</sup> Such laws may take effect immediately.<sup>111</sup> It is clear that this exception for urgent legislation is intended to give the state legislature sufficient flexibility to deal

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legislative authority to require the governor to designate a particular state agency as the agency authorized to receive federal categorical grants under the Act).

108. It is not clear that this holding survives the Supreme Court's ruling in *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260 (1985).

109. CAL. CONST. art. IV, § 8(c)(1), (c)(2). In practice, the delay is likely to be considerably longer than ninety days: Section 8(c)(1) sets the effective date of most legislation as "January 1 next following a 90-day period from the date of enactment of the statute." *Id.* art. IV, § 8(c)(1). Given that the legislature is constitutionally required to adjourn by November 30 of each even-numbered year, and its successor to convene on the first Monday in December, *id.* art. IV, § 3(a), the effect of section 8(c) will often be to push the effective date of the legislation to the next legislative session, giving the successor legislature a window of opportunity in which to repeal the law before it takes effect.

110. *Id.* art. IV, § 8(d).

111. *Id.* art. IV, § 8(c)(3).

quickly and effectively with crises. Yet the degree to which the exception will be available to the legislature turns to a great extent on the construction given the clause by California courts. The language of the exception limits its use to situations where there is an immediate "necessity," dealing with "public peace," "health," or "safety."<sup>112</sup> The meaning of these terms is hardly self-evident.

In practice, the California courts have given the language of the clause a generous interpretation and have tended to defer almost completely to the legislature's definition of "urgency" by giving laws enacted under the urgency exception a strong presumption of validity.<sup>113</sup> But nothing compelled the courts to take such a deferential approach. The ninety-day waiting period for legislation and the careful wording of the urgency exception presumably have their roots in some popular distrust of the state legislature's judgment concerning the effective date of legislation.<sup>114</sup> Such considerations might just as easily lead a state court to construe an urgency exception narrowly. A narrow construction might thus serve the constitutional purpose of protecting the people of California from the bad judgment of the state legislature, but only at the price of inhibiting the legislature's ability to protect them quickly and effectively from national tyranny (among other things) through prompt exercises of state legislative power.

Much the same can be said about funding. The California Constitution provides that total annual appropriations may not exceed appropriations for the previous year, adjusted for inflation and population growth.<sup>115</sup> Any excess revenues must be refunded to taxpayers.<sup>116</sup> However, the constitution directs the legislature to establish a "prudent state reserve fund in such amount as it shall deem reasonable and necessary."<sup>117</sup> No California court has yet had occasion to construe the meaning of the term "prudent reserve," but

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112. *Id.* art. IV, § 8(d).

113. *See, e.g.,* *People ex rel. McCullough v. Pacheco*, 27 Cal. 175, 221 (1865); *People v. Kinsey*, 40 Cal. App. 4th 1621, 1629 (2d App. Div. 1995).

114. *See* *Busch v. Turner*, 161 P.2d 456, 460 (Cal. 1945) (concluding the purpose of the ninety-day provision was to allow the people an opportunity to file a referendum petition to express their opinion on a statute).

115. CAL. CONST. art. XIII B, § 1.

116. *Id.* art. XIII B, § 2(b).

117. *Id.* art. XIII B, § 5.5.



it seems clear that a restrictive definition of the term could impede the ability of the state legislature to respond rapidly to abuses of national authority which the legislature might wish to resist.

In these situations concerning legislation and funding authority, state courts have an opportunity to influence the ability of other branches of state government to resist tyrannical abuses of national power with the greatest possible speed and effectiveness. Construing the relevant provisions of the state constitution with an eye toward what I call the "federalism effects" of their rulings might not lead state courts to different results—but, then again, it might.

Here, then, is the critical point: in the ways outlined above, state constitutional interpretation itself can be a tool of resistance to national power. It can be a vehicle by which state courts participate in the project of deploying state power to check abuses of national power, a project contemplated—indeed, demanded—by a properly functioning system of federalism. Constitutional law is a means by which official power is projected into the political world. As a result, judicial shaping of constitutional doctrine is necessarily a means by which state courts may influence the way that state power is projected against the national government and, to a lesser extent, the way in which exercises of national power are experienced by the people of the state. As a tool of resistance, self-conscious judicial shaping of state constitutional doctrine is neither as dramatic nor as likely to be effective as the tools typically available to a state's governor or legislature. That should hardly be surprising given the comparative weakness of courts as institutions of governance. Nevertheless, just because state courts are weaker than state executives and legislatures does not mean that they are incapable of playing any role at all in the enterprise of state resistance to abuses of national power.

#### *B. Federalism Effects as a Factor in State Constitutional Analysis*

If state courts possess these tools of federalism agency, how would they deploy them in practice? This is not the place to elaborate a full-blown theory of state constitutional interpretation but, in brief, the process would involve nothing more radical or complicated than having state courts add to the usual elements of

constitutional analysis an additional factor that takes into account the structural role that state power plays in maintaining liberty within a national system of federalism. As previously noted, when a state court acts solely as an agent of state power, it need concern itself only with norms and decisions internal to the state—established, that is to say, by the people of the state and by state government actors working solely to achieve the good of the state's populace. For example, when a state court interprets a provision of the state constitution dealing with a home rule provision dividing power between the state and local governments, or allocating functions between the state legislative and executive branches, it is dealing with provisions devoted primarily to restraining state power as it is felt by the people of the state. Its decisions therefore have relatively few ramifications for liberty outside the state's borders. In these circumstances, the usual factors of constitutional analysis—text, drafters' intentions, legislative history, structural analysis, and so on—suffice to give meaning to the provision in question.<sup>118</sup>

However, because federalism gives states a role to play in resisting encroachments on liberty by the national government, state power will sometimes be exercised for the purpose of resisting national tyranny. In those circumstances, it might be appropriate to authorize state courts to consider, when construing the state constitution, an additional factor in the analytical mix—namely, the potential impact of its rulings on present abuses of national power and on the ability of the state successfully to resist such abuses in the future. A court authorized to approach state constitutional interpretation in this way would thus be authorized to ask, and to construe the state constitution in light of its answers to, the following kinds of questions:

1. Has the national government abused its authority or acted tyrannically in some way to which the outcome of this case is relevant?

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118. This is where the so-called "primacy" approach to state constitutional interpretation may with greatest force claim to provide an accurate and relatively complete framework for the interpretation of state constitutional provisions. For further discussion, see *infra* Part VI.

2. If so, is there any possibility that a ruling by this court might act to thwart or in some way minimize the effects of this abuse of national authority?
3. Might a ruling by this court affect in any way the authority or ability of any other organ of state government to resist as effectively as possible any present or future abuses of national authority?

To answer these questions, a state court must look beyond the state's boundaries. It must decide *for itself* whether the national government has abused its authority, a process that not only invites, but may well demand, examination and independent evaluation of federal judicial rulings construing the United States Constitution. A state court must recognize and evaluate the ways in which its own rulings may affect the liberty not merely of the citizens of its own state, but of Americans generally. And it must examine the capabilities of other branches of state government with an eye toward maintaining their efficacy as actors in a permanent, nationwide struggle between state and national power.<sup>119</sup> In short, to permit state courts to become active agents of federalism is to recognize that decisions interpreting the state constitution can have ramifications outside the state—indeed, that the power to interpret state constitutional provisions can itself serve as a weapon capable of being enlisted in the service of resistance to national authority.

In the next Part, I address several potential objections to this account of state judicial power. Before turning directly to those objections, however, I want to say a few words about what this approach to state constitutional interpretation does *not* entail. First, just because a state court is capable of acting in this way does not mean it possesses some kind of inherent authority to do so. Granting courts the authority to act as agents of federalism entails certain risks that a state polity might be unwilling to undertake. Later in this Article, I discuss the question of whether, and in what

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119. An analogous kind of "trans-constitutional" structural inference is often made in national constitutional law where the power of the President to act efficaciously on the global stage is in issue. In such cases, federal courts have often self-consciously construed the Constitution for the purpose of enhancing executive efficacy in foreign policy. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

circumstances, state courts should be understood to possess such authority.<sup>120</sup> This is ultimately a question that turns, I shall argue, on the degree to which the people of a state trust their courts as protectors of liberty. But the power to act as an agent of federalism is one that must be granted affirmatively to a court just as it must be granted affirmatively to any other branch of state government.

Second, when it acts as an agent of federalism, the authority of a state court does not somehow become unlimited; it does not acquire the power to "rewrite" the state constitution in its entirety for the purpose of converting it into a more effective framework for the resistance of national tyranny. State constitutions must serve several functions at once,<sup>121</sup> and authorizing resistance to the national government is only one of them. Moreover, these functions often conflict: the more power a state government possesses to resist national tyranny, for example, the more it may be capable of threatening the liberty of its own citizens. Ultimately, it is the state's people who decide how to balance these competing considerations,<sup>122</sup> a decision that state courts are thus obliged to respect whenever they engage in constitutional interpretation.

Finally and relatedly, judicial authorization to consider the ultimate impact of the court's rulings on abuses of national power does not imply authority to reduce the process of state constitutional interpretation to consideration of that single factor above, or at the expense of, all other factors in constitutional analysis. Text, framers' intentions, structural considerations, and other routine elements of constitutional analysis do not somehow become irrelevant just because a court is also authorized to consider the federalism implications of its rulings.<sup>123</sup> On the contrary, the federalism implications of the ruling must be folded into the

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120. See *infra* Part V.

121. For example, it seems obvious that a state constitution must grant the state government at least some significant authority sufficient to permit it to work directly for the public good of its citizens, and that it should establish some limits on state power sufficient to restrain, at least to some extent, the ability of state officials to use state power for tyrannical ends.

122. See James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 634-39, 652-54 (2001).

123. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 8 (1982) (arguing that different approaches to and methods of constitutional interpretation typically coexist as alternatives, to be deployed depending upon the circumstances).

analysis and should affect the ultimate outcome no more than their relative weight requires.

#### IV. STRICT CONSTRUCTIONIST OBJECTIONS

At this point, it is appropriate to address a set of related objections to the account of state judicial power I have just given. In the system described above, state courts may be granted the authority, in a set of narrow circumstances, to serve as agents of federalism by self-consciously interpreting the state constitution to achieve a particular result: helping the state resist abuses of national power. This is an account of judicial power that runs against the grain of the dominant contemporary understanding of how courts ought to engage in constitutional adjudication, which I shall call "strict constructionism." According to strict constructionism, the very idea of result-oriented judicial decision making, even when consideration of the result and its consequences is only one factor among many in the analysis, introduces into the enterprise of state constitutional interpretation an element of instrumentalism that is simply inconsistent with the appropriate use of judicial authority.<sup>124</sup>

For strict constructionists, the job of a court always is to faithfully interpret a constitution, and the practice of faithful constitutional interpretation, on this view, generally excludes any consideration of the consequences of an interpretation.<sup>125</sup> This is

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124. In this sense, what I am calling strict constructionism does not align precisely with the commonly recognized cleavage in constitutional jurisprudence dividing originalist and nonoriginalist theories of interpretation (or their predecessors in terminology, interpretivism and noninterpretivism). Even within a nonoriginalist methodology it is possible to take the position that a result-oriented approach is improper on the ground that judicial authority to consult more general conceptions of the good requires that such conceptions be consulted in a noninstrumental way, or at least, if results may be considered in certain circumstances, that their influence on outcomes is subject to significant constraints. For example, this is the position of Ronald Dworkin, perhaps the best-known academic defender of nonoriginalist methodology. *See, e.g.*, RONALD DWORKIN, *LAW'S EMPIRE* 164-275 (1986). I do not intend to suggest here, however, that result-oriented decision making of the kind I describe is unconstrained—it is constrained significantly by the kinds of results state judges are authorized to pursue.

125. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 262 (1990). Judge Bork argues:

The person who judges constitutional law by results reverses [the appropriate] process. He asks what decision in each case is politically or morally attractive

because the meaning of a constitutional provision is something *given* to a court by the polity that made the document;<sup>126</sup> it is not something to be determined by a court on the basis of its discretionary judgment about what the constitution ought to say to achieve some normatively desirable result—even a result desired by the constitution’s drafters and ratifiers.<sup>127</sup> The constitution, in other words, says what it says, not what a court thinks it should say.<sup>128</sup> For a court to ignore this rule by choosing among potential constitutional interpretations based even partly on their consequences is to engage in something forbidden: it is to amend, alter, or update the constitution, actions that the people do not delegate to courts but reserve for themselves.<sup>129</sup> The reason for this rule of constitutional interpretation, strict constructionists typically contend, is that any other rule would be too dangerous: to allow courts to alter the meaning of the constitution would give the people’s agents too much power, thereby putting popular sovereignty itself at risk.<sup>130</sup>

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to him, devises a rule that achieves that result, and then works backward. The rule does not come out of, but is forced into, the Constitution.

*Id.*

126. See, e.g., RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* 66 (1986) [hereinafter BERGER, *DEATH PENALTIES*]; BORK, *supra* note 125, at 16, 144; Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350-51 (1988); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 9 (1988); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 376 (1981) (“Our legal *gründnorm* has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999).

127. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16-18, 38 (Amy Gutmann ed., 1997) (arguing that the intent of the drafters does not take precedence over what they actually wrote).

128. See *id.* at 39; Edwin Meese III, Address Before the Washington, D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), reprinted in *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 26 (1985). But see Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811-12 (1983).

129. See BORK, *supra* note 125, at 146, 174, 178; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) [hereinafter Bork, *Neutral Principles*].

130. This view probably achieved its best known expression as the so-called “counter-majoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE*

Strict constructionism suggests at least two kinds of objections to any practice that would put state courts in the position of acting as self-conscious agents of federalism. First, such a practice would be incoherent as an understanding of proper judicial authority. Second, even if it is not, allowing such a practice would be a bad idea because of the dangers involved.

One way to respond to these objections is to dispute strict constructionism on its own merits. Strict constructionism, after all, is a conception of constitutional interpretation that is far from universally embraced,<sup>131</sup> and in its more extreme forms it presents some serious conceptual difficulties and internal contradictions.<sup>132</sup> It is, moreover, a tradition that might be said, even on its own terms, to provide ample room for judicial consideration of the consequences of constitutional rulings.<sup>133</sup> I do not find it necessary,

SUPREME COURT AT THE BAR OF POLITICS 16 (1962); see also BERGER, DEATH PENALTIES, *supra* note 126, at 66; RAUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 263-64 (1977); Raoul Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L. J. 87, 87 (1981) ("[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives."); Bork, *Neutral Principles*, *supra* note 129, at 3, 6; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695-96 (1976).

131. Justice William Brennan famously disparaged originalism as "arrogance cloaked as humility." Speech by Justice William J. Brennan, Jr. to the Text and Teaching Symposium, Georgetown University, Washington, D.C. (Oct. 12, 1985), in THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (1986). In practice, Justice William O. Douglas utilized a distinctly nonoriginalist methodology in numerous cases. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.... [W]e have never been confined to historic notions of equality.... Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). Contemporary academic critics of originalism are legion, to say nothing of past movements such as Legal Realism and Critical Legal Studies.

132. One of the best critiques of originalism's coherence as a methodology of constitutional interpretation remains Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980). See also DWORKIN, *supra* note 124, at 318-20; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6, 10, 16, 339-40 (1996); Brennan, *supra* note 131, at 11; Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 377-96 (1982); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85 (1983).

133. Chief Justice John Marshall, for example, often relied on the adverse consequences of proposed constitutional interpretations as a basis for rejecting them in favor of interpretations that yielded more acceptable consequences. See, e.g., *Gibbons v. Ogden*, 22

however, to argue against strict constructionism on its merits. The strict constructionist objections fail here for the more pedestrian reason that strict constructionism simply does not speak directly to the practice of *state* constitutional interpretation: it is an account of judicial power that was developed to describe *national* judicial authority.<sup>134</sup> To attempt to apply it without modification to the practice of state constitutional interpretation assumes the very similarity between state and national constitutions that it is my purpose to deny; it is to elevate the principles of strict construction of the U.S. Constitution to the level of some incontestible "natural law" of judicial power which, needless to say, does not exist.

### A. *The Objection from Incoherence*

Strict constructionists might first object that the self-consciously instrumental use of the power to interpret a constitution is by definition an abuse of judicial power. For a court to engage in result-oriented interpretation for the purpose of resisting national power or for any other purpose, it might be said, is deliberately to manipulate the document's meaning rather than to discern it, an approach inconsistent with a proper understanding of judicial power. Judicial power rightly understood, strict constructionists might say, cannot be used instrumentally because it is not a tool to be used self-consciously to achieve ends; rather, the judicial role is merely to apply the law.<sup>135</sup> A court that used its powers instrumentally would be making law rather than applying it, yet courts should never take it upon themselves to make law because doing so usurps power allocated to other organs of government.<sup>136</sup>

This is a respectable and, in the United States, a venerated conception of judicial power. Although this view presents well-

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U.S. (1 Wheat.) 1, 222 (1824) (arguing against interpretation that would make the Constitution "a magnificent structure, indeed, to look at, but totally unfit for use"); *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 421 (1819) (arguing that interpretation of the Constitution that would convert it into a "splendid bauble" should be rejected).

134. See generally Hershkoff, *supra* note 52 (noting that state courts are not bound by Article III of the Constitution and often diverge from federal courts on certain issues, such as justiciability).

135. See, e.g., BORK, *supra* note 125, at 4-5, 16, 143-53, 174, 178; SCALIA, *supra* note 127, at 7, 38-39.

136. See *supra* notes 129-30 and accompanying text.



known difficulties at the margin in distinguishing improper judicial invention of law from proper judicial application of law,<sup>137</sup> it is fundamentally coherent and supported by a well-developed theory of the allocation of governmental power. This theory, however, is one that is derived from the structure of *national* power under the *national* Constitution, a model that need not be followed, and frequently is not followed, on the state level. It is, on the contrary, merely one possible model of judicial power among many.<sup>138</sup>

Even in the Anglo-American tradition, judicial power has been arranged in many different ways. Originally, the judicial function was united with other governmental functions in the monarch,<sup>139</sup> and then in Parliament.<sup>140</sup> South Carolina's first two constitutions, written in 1776 and 1778, provided that the vice-president or lieutenant governor in conjunction with a privy council "shall exercise the powers of a court of chancery."<sup>141</sup> Similarly, the governor exercised ultimate judicial power in Connecticut until 1813 and in Rhode Island until 1842, when those states finally replaced their royal charters.<sup>142</sup> Moreover, although American national courts today generally adhere to the strict constructionist model, they have not always understood it to create the sharp distinction between lawmaking and interpretation that prevails today. During the long reign of *Swift v. Tyson*,<sup>143</sup> the United States Supreme Court freely invented federal common law, which it then used to displace state common law.<sup>144</sup> The Court eventually came to see this process as inconsistent with a proper understanding of the federal judicial power and repudiated it in *Erie Railroad Co. v.*

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137. There is surely no better example of this problem than *Bush v. Gore*, 531 U.S. 98 (2000), in which the Justices could not agree whether the Florida Supreme Court was merely interpreting Florida law or whether it was judicially amending it. On the Court's flirtations with this issue, see Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493 (2001).

138. See Hershkoff, *supra* note 52 (discussing divergence between state and federal courts on justiciability doctrine).

139. See DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 58 (1999).

140. See H.G. HANBURY & D.C.M. YARDLEY, *ENGLISH COURTS OF LAW* 16 (5th ed. 1979).

141. S.C. CONST. of 1776, art. XVI; S.C. CONST. of 1778, art. XXIV.

142. CHARTER OF CONNECTICUT of 1662; CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS of 1663.

143. 41 U.S. (16 Pet.) 1 (1842).

144. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1412 (2001).

*Tompkins*,<sup>145</sup> but the Court's repudiation was for itself and lower federal courts, not for state courts. As I have repeatedly emphasized, state courts are situated very differently from federal courts. They retain the common law functions that federal courts renounced, as well as other quasi-lawmaking functions discussed above.<sup>146</sup> It is always possible, of course, that state constitutions have allocated state judicial power in exactly the same way that national judicial power is allocated under the national Constitution,<sup>147</sup> but the numerous actual and potential differences between state and national constitutions and between the nature and functions of state and national power make that a conclusion to be demonstrated rather than one to be assumed.

The proper question, then, is whether state constitutions *in fact* authorize state courts to use their powers of constitutional interpretation instrumentally. That brings us to the next potential strict constructionist objection: a state constitution could not coherently authorize result-oriented judicial interpretation of the document itself because such an exercise of judicial power is inconsistent with basic constitutional conceptions of agency. Strict constructionism rests on a positive theory of constitutional law.<sup>148</sup> According to this theory, constitutions are created by the people for certain purposes, and in so doing the people create organs of government as agents to do their bidding. The constitution thus comprises a set of instructions from principal to agent,<sup>149</sup> and, strict constructionists might say, it is by definition inconsistent with the agency relationship for an agent to alter the terms of its instructions or of instructions issued to other agents.

There is, however, no necessary contradiction between agency principles and the result-oriented shaping of constitutional doctrine

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145. 304 U.S. 64 (1938).

146. See *supra* notes 41-61 and accompanying text.

147. The more recent state constitutions have tended to borrow rather heavily from the U.S. Constitution. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 46-47 (1998). No state constitution, however, appears to adopt a model of judicial power as limited as that set out in Article III of the U.S. Constitution. See generally WILLIAMS, *supra* note 55, ch. 9 (comparing state constitutional provisions regarding judicial power with the strictly defined role for the federal courts created by Article III of the Constitution).

148. See James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 7-9 (1991).

149. *Id.* at 9.

for the simple reason that there is no reason why the state constitution itself could not instruct state courts to use their powers to achieve particular results. At the most general level, there is a respectable argument to be made that an agent should always treat any set of explicit instructions as provisional, and thus as authorizing deviations, when compliance with the strict letter of the instructions would thwart achievement of the principal's purpose in ways unforeseen at the time the instructions were issued.<sup>150</sup> But one need not go that far in this context because the possibility cannot be ruled out that the people of an American state might in fact affirmatively desire their courts to participate by any means possible in state resistance to tyrannical abuses of national power.

It is certainly plausible—indeed, it is virtually certain—that the people of a state would wish to have a state government that is capable of fulfilling its role in the federal system as a potential check on national tyranny; that is why the national polity, of which each state polity is a part, adopted a constitutional system of federalism. If the state polity further believes that the judicial branch should stand alongside the executive and legislative branch when resistance to national authority becomes necessary, it is by no means inherently self-contradictory to ask whether the people might directly charge state courts with the responsibility to do what they can to make such resistance effective, including issuing facilitative interpretations of the state constitution. In these circumstances, state courts would not really be “using” the state constitution instrumentally, but “interpreting” it according to conventional understandings of positive constitutional law. Their method of interpretation would, to be sure, include in the interpretational mix a factor that plays no role in the federal judicial analysis, but state courts are not federal courts and their actions cannot necessarily be judged by the same criteria.

As noted earlier, federal courts need not self-consciously “use” national judicial power to restrain tyrannical uses of state authority—even though they often do just that—because such a role is inscribed explicitly into the United States Constitution. For federal

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150. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 52-55 (1994). But see Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 544 (1988) (finding formalism desirable if the goal is to limit decisional opportunities of certain classes of decision makers).

courts, judicial restraint of state tyranny and straightforward application of national constitutional law are usually one and the same.<sup>151</sup> State constitutions, on the other hand, do not explicitly authorize any organ of state government to resist national power, yet such resistance is nevertheless common enough. More generally, the lack of express constitutional authority has rarely been thought to be equivalent to a bar to the exercise of authority even within the federal tradition, much less within the state constitutional tradition, where constitutional grants of government power generally have been understood to be plenary except to the extent expressly denied.<sup>152</sup>

The critical question, then, is not whether state courts *can* be authorized, in appropriate circumstances, to treat the state constitution instrumentally as a tool of state resistance to abuses of national power. State courts can be so authorized. The real question is whether they *have* been so authorized. And the critical factor in determining whether a state court has been authorized to serve as a self-conscious agent of federalism, I shall argue, is trust: do the people of a state *trust* their courts enough to allocate to them the unique and potentially dangerous power of resisting national authority through result-oriented construction of the state constitution?

### *B. The Objection from Danger*

Strict constructionism offers two possible objections to the proposition that any state polity might actually authorize its courts to engage in result-oriented interpretation of the state constitution. Both objections are based on the belief that such a practice would be so inherently dangerous to liberty that no rational state polity would willingly assume the risks.

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151. See *supra* notes 3-6 and accompanying text.

152. See, e.g., *Pratt v. Allen*, 13 Conn. 119, 124-25 (1839) ("The constitution of the United States is a *grant* of powers, where they did not before exist; the constitution of this state is a *limitation* of powers already existing."). Similarly, the New York Court of Appeals held:

[T]he people, in framing the constitution, committed to the legislature the whole law making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception.

*People ex rel. Wood v. Draper*, 15 N.Y. 534, 543 (1857).

One possible objection to the idea of authorizing state courts to interpret the state constitution instrumentally is that such an arrangement inevitably delegates to courts the authority to rewrite the state constitution.<sup>153</sup> This creates obvious dangers in that it would deprive the people of control over the constitution, the principal means by which they control their governmental agents. Notwithstanding that the federalism effects of a judicial decision would amount, at most, to only one factor among many that courts would be authorized to consider, a result-oriented approach, strict constructionists might argue, cannot be so confined. Once a court is authorized to interpret the constitution instrumentally, it possesses for all intents and purposes the power to interpret any provision of the constitution however it pleases.

This kind of slippery slope argument, so often implicit in strict constructionist critiques of federal judicial rulings,<sup>154</sup> is analytically unsound. The power to shape judicially the meaning of a state constitution is not a power capable of being granted solely in all-or-nothing terms. Authorizing a result-oriented approach in one area need not set a state polity on a slippery slope from popular sovereignty to some kind of judicial enslavement. In this context, to authorize state courts to act as agents of federalism would be to authorize them to shape constitutional meaning only in a very limited and well-circumscribed area, and then only when doing so would serve the purpose of resisting abuses of national authority—a function that federalism in any event charges state governments to perform.

Strict constructionists like to divide constitutional adjudication into two sharply distinct categories: faithful application of the law and faithless invention of the law; judicial obedience to popular will and judicial usurpation of the power to make fundamental law.<sup>155</sup> Yet even on its own terms, the strict constructionist model does not neatly resolve the difference between judicial application of the law and judicial invention of the law. On the contrary, strict

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153. See BORK, *supra* note 125, at 262 (criticizing judges who rewrite the Constitution to conform to their personal preferences).

154. See, e.g., SCALIA, *supra* note 127, at 47 (criticizing the concept of a “living constitution” as creating “a ‘morphing’ document that means, from age to age, what it ought to mean”).

155. This argument comprises the essential burden of BORK, *supra* note 125.

constructionism's categories leave a distinct area of uncertainty between the two, especially where the law is ambiguous. A state constitutional instrumentalism responsive to federalism effects of judicial rulings would do nothing more than shift the interpretational difficulties from one location to another. Instead of trying to discern the line between permitted application of the law and forbidden invention of the law, courts would have to discern the line between permitted and forbidden judicial shaping of the state constitution. The authority of state courts would extend only so far as necessary to regulate state power properly, for the successful resistance of national tyranny. State courts would not be authorized to adjust state power more than necessary to achieve this purpose, or for other purposes, or in other ways. There is no reason to suppose that this line would be any more difficult to discern than the line presently defended by strict constructionism. Indeed, such a line might be easier to identify insofar as it lays explicitly on the table a degree of self-conscious manipulation of the law that, many would say, is always present in the adjudicatory process but which the strict constructionist analysis obscures by denying.<sup>156</sup>

Even if the slippery slope argument is rejected, strict constructionists still might argue that *any* instrumental judicial manipulation of constitutional meaning gives courts too much power and is therefore too dangerous to permit. Every grant of constitutional authority represents an allocation of authority between the people and their government. In our Lockean ideology, the people are understood to have an indefeasible right to govern themselves directly in all matters.<sup>157</sup> They typically delegate much of this authority, of course, but a popular decision to create a government by constitutional means does not transfer in some irrevocable, Hobbesian way the people's right to self-governance.<sup>158</sup>

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156. See, e.g., DWORKIN, *supra* note 124; Levinson, *supra* note 132; Tushnet, *supra* note 132.

157. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 4, 87, 89, 95-99, 243 (C.B. Macpherson ed., 1980) (1690). These ideas are clearly echoed in such canonical American works as THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) and *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 404-05 (1819).

158. Cf. THOMAS HOBBES, LEVIATHAN PART II 145 (Bobbs-Merrill Company, Inc. 1958) (1651).

[B]ecause the right of bearing the person of them all is given to him they make sovereign by covenant only of one to another and not of him to any of them,

Rather, the constitution merely embodies a popular judgment concerning which functions will be performed by governmental agents and which functions the people will continue to perform for themselves. Direct popular action in a large republic is, of course, difficult and cumbersome, but it can be, and frequently is, accomplished through constitutional amendment.

Consider the allocation of legislative authority. It is conceivable that a polity could so strongly prefer to make all legislative decisions itself, or could so fear allocating authority to a legislative agent, that it reserves for itself all authority to make laws by creating a direct democracy. Conversely, the decision to create a legislature with unrestricted legislative power (as in the United Kingdom) would allocate authority between polity and government in a diametrically opposite way. By the same token, when the people create a legislature but withdraw certain authority from it through constitutional limitation, they allocate some law-making power to the legislature and retain some for themselves: The legislature exercises legislative authority in the areas permitted to it, while the people exercise exclusive legislative authority in the areas forbidden to the legislature. This popular retention of legislative authority is undoubtedly cumbersome, because the people can legislate only through constitutional amendment,<sup>159</sup> but

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there can happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretense of forfeiture, can be freed from his subjection.

*Id.*

159. *But see* BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 266-94 (1991) (arguing that fundamental social understandings of a constitutional nature can be changed through other processes of "higher lawmaking," including consistent expressions of popular political support for particular positions). This idea is further elaborated in BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* (1998). Occasionally, the people also retain direct law-making power through the referendum power. For example, the Colorado Constitution states:

The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

COLO. CONST. art. V, § 1(1).

the difficulty of exercising direct popular authority does not change the nature of the underlying allocation.

Things stand no differently in principle regarding constitutional grants of judicial power; all that differs is the type of authority allocated through such grants. One authority typically granted to courts in our system is the power to interpret constitutions.<sup>160</sup> The people could of course allocate this power to themselves—one could perhaps envision some kind of mass, Athenian-style popular convocation—but questions of constitutional meaning come up so frequently, and popular decision making of this type would be so cumbersome, that the power to interpret the constitution is inevitably granted to courts.<sup>161</sup>

Nevertheless, strict constructionism holds that federal courts must always confine themselves to interpreting the United States Constitution, and must never alter even the tiniest part of it, for any reason. This principle rests on the belief that the Constitution embodies the people's decision to allocate to themselves rather than to courts the power to alter the document's meaning.<sup>162</sup> Any other approach, they suggest, would create a situation dangerous to popular sovereignty, in which unelected, unaccountable judicial agents would be able to alter the people's constitutional instructions.<sup>163</sup>

Whatever the ultimate merits of this view, however, it is at most a contingent, contextual judgment concerning the best allocation of *national* judicial authority between the *national* polity and a *national* court system. Although the reasoning underlying the allocation of national judicial power is by no means irrelevant to an

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160. See, e.g., U.S. CONST. art. III, § 2.

161. In 1911, Progressive reformers developed a proposal for "recall of judicial decisions," a mechanism that would have allowed popular referenda on judicial rulings of constitutional law. The idea was to allow popular "correction" of erroneous judicial constructions of the Constitution. Unlike much of the Progressive agenda, such proposals were successfully opposed by advocates of judicial independence. For an account, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 130-54 (1994); Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 935-37, 943 (1997).

162. As Justice Harlan once explained: "[W]hen, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process." *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

163. See *supra* note 130 and accompanying text.



analysis of how judicial power should be allocated on the state level, it is hardly conclusive. In fact, when Americans subdivide themselves into state polities, the problem of how government power should be allocated between the people and their governmental agents looks quite different.

In the first place, the people of the states already have a set of national agents charged with pursuing their collective good and protecting their liberty, both from the national government and from any state governmental agents they choose to create. The people of every state thus engage the state constitutional decision making process possessed of a nationally guaranteed minimal level of liberty, as well as a powerful external agent, in the form of the national government, charged directly with restraining any state tyranny that might appear. In the second place, the instructions issued constitutionally to the national government, because they have been formulated through a nationwide process of compromise, are beyond the ability of any single state polity to influence. By contrast, each state polity has direct and exclusive control over its own state constitution. This not only gives a state polity an opportunity to improve upon the United States Constitution if it so desires, but more importantly gives the state polity the ability to change or correct any aspect of the state constitution whenever it pleases. Consequently, a mistake in the constitutional allocation of power is much easier to fix, as the extensive record of state constitutional amendment attests.<sup>164</sup>

These differences in the context of state and national constitutional decision making have an important ramification: the stakes for liberty are lower in the creation of a state constitution. No matter how the state constitution is structured, and no matter how state government actors behave under it, the national government is always available to enforce a floor of individual rights that has been deemed acceptable to the national polity as a whole. The national government is also available to use its powers of persuasion, preemption, and conditional spending, among others,

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164. As of 1996, the *current* constitutions of the various states had been amended nearly 6000 times. TARR, *supra* note 147, at 24. This figure does not even take into account the frequency with which states discard and replace their constitutions, something a majority of states have done at least three times and which some states have done as many as ten or eleven times. *Id.* at 23.

to prevent states from behaving tyrannically toward their own citizens. Moreover, the direct control that the people of the state exercise over their own constitution allows them with much greater facility to control their state government by altering the constitutional allocation of powers. This enhances the ability of state polities to tinker with different constitutional structures because any poor decisions can be more readily corrected than at the national level.<sup>165</sup>

In these circumstances, it is perfectly sensible to ask of any state constitution the very question that strict constructionism assumes away: *how* does it allocate the power to monitor and resist national tyranny? Have the people retained all such power for themselves? If so, then the people of each state will be responsible not only for exercising careful vigilance over the actions of the national government, but also for parceling out repeatedly, by constitutional amendment, just so much power as the organs of state government require on any particular occasion to resist national abuses effectively. This would of course be a cumbersome and probably not very effective arrangement. Assuming, then, that the people of a state have delegated at least some power to state government to monitor and resist national tyranny, to which organs of state government have they delegated it? Presumably, if the people delegate any such power, they will delegate some of it to the state executive and legislative branches, as these are the organs of state government most capable of quickly and successfully resisting national abuses. This leaves the question of whether the people of a state might also wish to delegate to the judiciary some authority to resist national power.

Of course the risks of such a delegation are obvious. If state courts have the authority to reach result-oriented interpretations of the state constitution, they may use this authority badly, making poor decisions that the people of the state dislike. The state polity might then have to chase after its courts, so to speak, regularly amending the state constitution to undo or modify bad judicial rulings. A particularly dangerous problem would arise if state

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165. See Hershkoff, *supra* note 52, at 1888 ("Nor are state constitutional decisions 'final' in the federal sense. Rather, the ease of state constitutional amendment through popular mechanisms ... give[s] state judicial decisionmaking a conditional quality that further attenuates countermajoritarian concerns.") (footnotes omitted).

courts, in an effort to give the other branches ample power to resist national tyranny, interpreted the state constitution to give those branches power of a kind or in an amount that enabled them to threaten directly the liberties of the people of the state.

On the other hand, there are also risks involved in *not* granting state courts the authority to stand with the governor and legislature in resisting tyrannical national actions. If the state constitution, strictly construed, bound the executive or legislature so tightly that they were unable in a given set of circumstances to resist national authority effectively, the people's only recourse would be to amend the state constitution to grant the necessary power. It is typically easier to amend a state constitution than the United States Constitution, but that does not make it easy: even at its simplest, it is a relatively slow and cumbersome process. In the event of a crisis, it is by no means certain that a state constitution could be amended in time to grant state actors the authority they need to protect threatened liberties from invasion at the hands of the national government.

#### V. TRUST AND DISTRUST OF STATE COURTS

To what extent, then, might state polities trust their courts to engage actively in the process of protecting their liberties against encroachments by the national government? Unlike strict constructionists, I do not believe it is possible to come to any universal conclusions on this topic—far from it. Just as state polities differ in the degree to which they trust other organs of state and local government, so they inevitably will differ in the degree to which they trust their courts. Indeed, a preliminary task a state court faces when it interprets a state constitution is to determine the degree to which its own state polity has manifested any actual inclination to trust the state judiciary to serve as an agent of federalism.

There are, generally speaking, two factors that might influence the degree to which a state polity might be willing to trust its state courts to act as agents of federalism: the extent to which institutional arrangements may be capable of producing a judiciary that will reliably and competently protect liberty against encroachments;

and the actual historical record of state courts as protectors of liberty.

### *A. Institutional Considerations*

The trustworthiness of courts as guardians of liberty is usually defended on one of two grounds. The first is that courts are insulated from politics and basically unresponsive to popular sentiment. The other is that they are not.

The first argument has been applied most frequently to federal courts—though it is equally applicable to state courts that follow the national model—and is based upon the institutional arrangement under which federal judges are appointed rather than elected, and hold office for life.<sup>166</sup> The belief that unelected, politically unaccountable judges are the best guardians of liberty goes back as far as the founding, if not all the way back to Plato's *Republic*.<sup>167</sup> In a well-known essay, Alexander Hamilton argued that only an independent judiciary could be counted on to dispense justice, and that the necessary independence could be secured only by lifetime appointment.<sup>168</sup> “[J]udges who hold their offices by a temporary commission,” Hamilton claimed, can hardly be counted on for “inflexible and uniform adherence to the rights of the Constitution.”<sup>169</sup> On this view, the judiciary's lack of political accountability enables it to resist majoritarian pressure,<sup>170</sup> the very thing that makes it a reliable defender of liberty. Hamilton's

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166. U.S. CONST. art. III, § 1.

167. See, e.g., THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (complaining of the king that “[h]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries”); PLATO, THE REPUBLIC bks. II, III (G.M.A. Grube trans., 1974) (describing the role and education of the Guardians, a class of enlightened absolute rulers selected on the basis of ability and trained for leadership).

168. THE FEDERALIST NO. 78 (Alexander Hamilton).

169. THE FEDERALIST NO. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

170. Not everyone agrees with this position. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that the impact of Court decisions is slight because the Court is ineffective at resisting or mobilizing public opinion when that opinion is aligned against it, and that it is thus institutionally responsive to public opinion); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (arguing that the judicial appointments process and disciplining methods applied by other institutional actors eventually keep the Court's decisions in line with public opinion).

position dominated American political thought for the republic's first few decades: the first twenty-nine states admitted to the Union all created nonelective judiciaries on the national model.<sup>171</sup>

Recent empirical studies provide some limited support for the intuition that electorally unaccountable judges will be more willing to defend liberty from popular passion than judges who must satisfy the voters to gain or retain office. One comparative study, for example, found that judges in nonelective state judicial systems are significantly more likely than their elected counterparts not only to hear challenges to controversial state laws but, when they hear them, to invalidate the laws.<sup>172</sup> Another study found that elected state judges are less likely to dissent in controversial cases when their constituents agree ideologically with the outcome of the case.<sup>173</sup>

Since the Jacksonian era, however, a second and basically incompatible view of judicial trustworthiness has grown up along-side the Hamiltonian position. According to this view, courts are suspect precisely when their judges are electorally unaccountable to the people through democratic processes. Jacksonians, suspicious of the corruptibility of politicians and convinced of the innate virtue and capacity for self-government of the ordinary citizen, rejected the founding generation's republican elitism in favor of a democratic egalitarianism characterized by strong popular control over government.<sup>174</sup> In 1832, Mississippi became the first state to establish a fully elective judiciary,<sup>175</sup> and every state to join the Union between 1846 and 1958 followed suit.<sup>176</sup> The ideological preference for elective judiciaries was reinforced during the early-twentieth century by the Progressive movement, which pushed with

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171. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716 (1995).

172. Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265 (1999).

173. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992).

174. See generally MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* (1957); 3 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845* (1984); GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA, 1828-1848* (1959); HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* (1990).

175. MISS. CONST. of 1832, art. IV, §§ 2, 5, 11, 16, 18, 23.

176. Croley, *supra* note 171, at 716-17.

great success on the state level for democratizing reforms including not only an electorally accountable judiciary but also the initiative, referendum, recall and direct primary election.<sup>177</sup> Today, supreme court judges in thirty-nine states must face voter approval at some point in their careers.<sup>178</sup>

If independence and a lack of political accountability were thought by the Founders to be necessary prerequisites for judicial protection of liberty, proponents of democratic control over judges have thought such independence to be a serious threat to liberty in that it frees judges to ignore popular sentiment, invalidate popular laws, and obstruct democratically desired reforms. The Progressives, in particular, believed that appointed judges tended to be drawn from a small class of economic elites and that they often used their powers of judicial review to protect the wealthy and powerful from urgently needed political and economic reforms.<sup>179</sup> On this view, popular control over judges, far from putting them at the mercy of illicit mob passions, subjects them to a form of democratic discipline that maintains liberty by curbing their arrogance. This view stands at the foundation of strict constructionist objections to judicial activism.

The available evidence suggests that electoral accountability accomplishes its goal of keeping judicial decisions in line with popular sentiment at least to some degree and in some circumstances. The main limitation on the effectiveness of popular control is the public's apparently limited interest in monitoring judicial performance.<sup>180</sup> On the other hand, in those elections where public attention does focus on judicial performance, electoral accountability clearly can affect judicial decision making. Exhibit A for this point is the electoral defeat of three justices of the California Supreme Court in a 1986 retention election. These jurists, including Chief Justice Rose Bird, were turned out of office largely as the result of a high-visibility, negative electoral campaign

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177. See, e.g., BENJAMIN PARKE DEWITT, *THE PROGRESSIVE MOVEMENT* 213-43 (1915).

178. COUNCIL OF STATE GOVERNMENTS, 33 *THE BOOK OF THE STATES* 137-39 (2000-2001).

179. See DEWITT, *supra* note 177, at 238 ("Most judges, before they are appointed or elected to the bench, receive their training in the employ of corporations.... [This gives rise to a] tendency to bias the minds of judges in favor of corporations and property interests as against individuals and human interests...."); see also *id.* at 23, 158, 160, 239 (discussing capture of the judiciary by special corporate interests).

180. Croley, *supra* note 171, at 730-31.

charging them with being "soft on criminal matters, especially the death penalty."<sup>181</sup> The ensuing replacement of the defeated judges with appointments by a more conservative governor fundamentally altered the California Supreme Court's death penalty jurisprudence: the rate at which the court overturned death sentences dropped dramatically after the change in personnel.<sup>182</sup>

Since then, judicial elections have attracted increasing public attention, as well as vastly increased spending by special interest groups dissatisfied with the decisional track record of individual judges.<sup>183</sup> In 2000, total fundraising by judicial candidates exceeded \$45 million, a sixty-one percent increase from 1998.<sup>184</sup> There are, moreover, indications that "judicial elections are more and more often high-salience events that mobilize large portions of the citizenry."<sup>185</sup> Elected judges seem to be "targeted" more often by political opponents, occasionally for single, unpopular decisions. Following the controversial Florida recount in the 2000 presidential election, for example, some groups that had supported George Bush threatened political retribution against the members of the Florida Supreme Court who had ruled in favor of Democratic candidate Al Gore in procedural wrangling over the recount process.<sup>186</sup>

In reviewing these opposing accounts of the conditions for judicial trustworthiness, I do not mean to take, or even to suggest, any particular position on the merits of the debate. Indeed, the nature of the dispute reveals clearly that one's position on judicial independence depends critically on fundamental and controversial

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181. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, The Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 350 (1987).

182. After Governor George Deukmejian, a Republican, replaced the three defeated justices, who had been appointed by Democrat Jerry Brown, the California Supreme Court's affirmance rate in death penalty cases went from six to seventy-seven percent. HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 50, 149-50 (1992).

183. For an account of business-oriented interests spending against judges who have issued rulings favoring environmental concerns, see ENVIRONMENTAL POLICY PROJECT, *CHANGING THE RULES BY CHANGING THE PLAYERS: THE ENVIRONMENTAL ISSUE IN STATE JUDICIAL ELECTIONS* (2000).

184. DEBORAH GOLDBERT & CRAIG HOLMAN, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 7 (2002).

185. Croley, *supra* note 171, at 734.

186. See Dexter Filkins, *Republican Group Seeks to Unseat Three Justices*, N.Y. TIMES, Dec. 20, 2000, at A31; Lucy Morgan, *House Speaker Says [Florida] Supreme Court Needs Overhaul*, ST. PETERSBURG TIMES, Feb. 6, 2001, at 4B.

assumptions about the comparative political virtue and competence of democratic citizens and public officials. Clearly, there is no universal agreement on these principles at the state level. Today, twenty-two states have chosen to elect judges of the highest court, ten use appointment, and sixteen use a system of initial appointment followed by retention elections.<sup>187</sup> In New Mexico judges are initially appointed and then face subsequent partisan elections, and in Virginia all judges are elected by the state legislature.<sup>188</sup> The methods of selection are even more diverse for lower court judges.<sup>189</sup> On the other hand, I *do* wish to suggest by this discussion that there are possible grounds upon which a state polity could decide to invest its trust in state courts as guardians of liberty; that these grounds are potentially serious and substantial; and that they cannot be dismissed out of hand as inadequate to support a rational decision to charge state courts with significant responsibility for protecting the state polity against abuses of power by the national government.<sup>190</sup>

### *B. The Record of State Courts as Guardians of Liberty*

The institutional considerations discussed above operate mainly at a theoretical level. It is thus worth looking beyond the structural parameters to inquire whether the actual record of state courts in the protection of individual liberty furnishes any additional reasons to trust or distrust them.

Although generalizations in this area can be misleading, it seems fair to say that courts today enjoy a relatively solid reputation in American society as guardians of liberty.<sup>191</sup> Certainly, it is not

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187. COUNCIL OF STATE GOVERNMENTS, 33 THE BOOK OF THE STATES 137-39 (2000-2001).

188. *Id.* at 138-39.

189. *Id.* at 137-39.

190. For recent, informative, and wide-ranging discussions of judicial selection and independence, see Special Series, *Judicial Independence*, 29 FORDHAM URB. L.J. 791-1053 (2002); Symposium, *Selection of State Judges*, 33 U. TOL. L. REV. 287 (2002).

191. To the extent that polling data can bear out this impression, it seems to do so. For example, according to a poll taken in September 2002, sixty percent of Americans surveyed approved of the way the Supreme Court was handling its job. The Gallup Poll, Sept. 5-8, 2002, available at <http://www.pollingreport.com/Court.htm> (last visited Oct. 27, 2002). Even in December 2000, just after the Court issued its controversial ruling halting the Florida recount in the 2000 presidential election, forty-six percent of respondents said they had "a great deal" or "quite a lot" of confidence in the Supreme Court. An additional thirty-three



venturing too much to say that independent judicial review under and enforcement of a protective Bill of Rights is widely considered to be one of the cornerstones of American liberty.<sup>192</sup> To be sure, this view is not universally held. Critics on the right often complain that courts usurp popular authority, whereas those on the left often criticize courts for refusing to go far enough in the protection of individual rights.<sup>193</sup> Even among the general public, perceptions of the judiciary change with time. During the early-twentieth century, the United States Supreme Court was sometimes seen as obstructionist and tyrannical.<sup>194</sup> During the Warren era, the Court gained a reputation as a vigorous protector of individual rights, though in the South it acquired a reputation as insufficiently observant of the liberty-protective properties of federalism.<sup>195</sup> Today, the federal judiciary is sometimes seen as inhospitable to claims of individual right, or at least less hospitable than it was during the Warren and Burger periods.<sup>196</sup>

To the extent that courts enjoy a favorable reputation as protectors of liberty, it must be acknowledged that such a reputation is probably confined for the most part to federal courts and derives principally from the record of rights protection compiled by the United States Supreme Court during the 1960s and early 1970s.<sup>197</sup> Indeed, the Warren Court gained its reputation as a guardian of liberty largely at the expense of state courts, which it

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percent had "some" confidence in the Court. CBS News Poll, Dec. 2000, *available at* <http://www.pollingreport.com/Court.htm> (last visited Oct. 27, 2002).

192. See, e.g., Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1530-36 (2000).

193. This kind of criticism can be found even within the Supreme Court itself. Just last Term, for example, Justice Scalia excoriated the Court's ruling in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), as resting "obviously upon nothing but the personal views of its members," and revealing an "arrogan[t] ... assumption of power" by the majority. *Id.* at 2259, 2265 (Scalia, J., dissenting).

194. Popular dissatisfaction with the Court during this period is well recounted in WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

195. On the general reputation of the Warren Court, see, for example, LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 238, 255, 284-85 (2000). For a vivid account of Southern reaction against the Warren Court, see Ross, *supra* note 6.

196. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 57-59, 64 (1996).

197. See, e.g., JOHN J. DINAN, *KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* ch. 7 (1998).

repeatedly reversed in reaching many of its most significant rights-protective rulings. In *Mapp v. Ohio*,<sup>198</sup> for example, the Court reversed a ruling of the Ohio Supreme Court allowing the admission in a criminal case of evidence that had been seized in violation of the Fourth Amendment.<sup>199</sup> In *Gideon v. Wainwright*,<sup>200</sup> the Court reversed a Florida Supreme Court decision holding that the state owed no constitutional obligation to an indigent criminal defendant to provide appointed counsel.<sup>201</sup> In *Miranda v. Arizona*,<sup>202</sup> the Court reversed a ruling of the Arizona Supreme Court upholding the interrogation of a criminal suspect without first advising the suspect of his rights to remain silent and to be represented by counsel.<sup>203</sup> In *New York Times v. Sullivan*,<sup>204</sup> the Court reversed an Alabama ruling upholding a libel verdict against civil rights protestors for criticizing a local police official.<sup>205</sup> In *Loving v. Virginia*,<sup>206</sup> the Court reversed a Virginia Supreme Court decision upholding a state statute criminalizing interracial marriage.<sup>207</sup> The list goes on and on. In all these cases, the protection of rights came not from state courts, but from federal courts enforcing federal law. In the body of law generated by the Warren Court, state courts all too often appear as insensitive rubber-stamps of rights-invading state legislatures at best, and as outright collaborators in state-level deprivations of liberty at worst.

Much of this has changed. In the last quarter century, state courts have issued hundreds of decisions that not only protect individual liberty, but do so to a degree that exceeds the levels of protection mandated by United States Supreme Court rulings construing the Fourteenth Amendment of the U.S. Constitution.<sup>208</sup> Many of the cases in which the Warren Court made its reputation reversed extremely stingy rulings by southern state courts in civil

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198. 367 U.S. 643 (1961).

199. *Id.* at 660.

200. 372 U.S. 335 (1963).

201. *Id.* at 345.

202. 384 U.S. 436 (1966).

203. *Id.* at 499.

204. 376 U.S. 254 (1964).

205. *Id.* at 292.

206. 388 U.S. 1 (1967).

207. *Id.* at 12.

208. See Cauthen, *supra* note 74.

rights cases.<sup>209</sup> Yet today, state courts in the South may be as likely as state courts elsewhere to issue rights-protective state constitutional rulings. For example, in recent decisions, the Georgia Supreme Court has barred the use of electrocution for capital punishment on the ground that it is cruel within the meaning of the state constitution,<sup>210</sup> and has invalidated a state sodomy statute as applied to consenting unmarried heterosexuals.<sup>211</sup> The Texas Supreme Court has expanded state constitutional protection for free speech beyond the boundaries of the First Amendment of the United States Constitution.<sup>212</sup> Tennessee's highest court has construed the state constitution to hold police to a more demanding standard than does the United States Constitution for obtaining a search warrant on the hearsay testimony of an anonymous informant.<sup>213</sup> At the same time, at the national level, the United States Supreme Court has decisively halted the expansion of federal protection of individual rights,<sup>214</sup> and in some areas has even contracted the scope of protections that the Constitution had previously been understood to provide.<sup>215</sup> In this environment, state

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209. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating conviction of civil rights demonstrator for breach of the peace); *New York Times*, 376 U.S. at 292 (reversing state libel ruling against civil rights groups based on trivial errors in newspaper advertisements protesting mistreatment); *NAACP v. Alabama*, 357 U.S. 449 (1958) (reversing state court order requiring the NAACP to disclose membership lists).

210. *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001).

211. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

212. *Davenport v. Garcia*, 834 S.W.2d 4, 9-10 (Tex. 1992).

213. *State v. Jacumin*, 778 S.W.2d 430, 435-38 (Tenn. 1989).

214. Since the mid-1980s, the Court has recognized only one new due process right: the right to be free from unwanted medical treatment. *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990). At the same time, the Court has refused numerous explicit requests to recognize additional due process rights. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (refusing to recognize constitutionally protected right to physician-assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to recognize constitutionally protected right to engage in consensual homosexual sex).

215. This process has probably been most notable in decisions concerning the Fourth Amendment. For example, within the last twenty years the Court has excluded dog sniffs and aerial surveillance from the constitutional definition of a search, *Florida v. Riley*, 488 U.S. 445 (1989); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Ross*, 456 U.S. 798 (1982), made it easier for police to obtain a warrant based on information provided by an anonymous informant, *Illinois v. Gates*, 462 U.S. 213 (1983), and it has extended the scope of permissible searches incident to an automobile stop, *Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Ross*, 456 U.S. 798 (1982). Additionally it has made it easier for police to search the effects of public school students, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and office employees, *New York v. Burger*, 482 U.S. 691 (1987).

courts compare much more favorably to national courts than they did forty years ago.

Nevertheless, these changes seem very far from having penetrated public consciousness. If actual litigation decisions are any guide, state courts today appear to be less trusted than federal courts when it comes to the protection of individual rights. Although evidence is difficult to come by, it appears that litigants, given a choice between suing in state and federal court, prefer to bring civil rights claims in a federal forum.<sup>216</sup> Even when they proceed in a state court, litigants tend overwhelmingly to raise civil rights claims under the United States Constitution rather than under their state constitution,<sup>217</sup> suggesting that they have more faith in the body of constitutional law developed by federal courts than in the similar body of law developed by state courts construing state constitutions.

Interpreting the record of state courts is made even more difficult by the apparently cyclical nature of rights-protectiveness on the state and national benches. If state courts were less willing than federal courts to stand up to state legislatures during the middle-to late-twentieth century, they were far more active than federal

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216. It seems reasonably clear that this is the case when the plaintiff possesses a federally protected right. That is to say, plaintiffs tend to prefer going to federal court to enforce federal rights, a premise consistent with the rationale for both federal question jurisdiction and removal. *See, e.g.,* Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315 (finding that plaintiffs hoping to obtain enforcement of federal rights prefer to go to federal court). When this fact is added to the general perception of a lack of "parity" between the state and federal benches—the belief, in other words, that state courts are not as hospitable to claims of constitutional right or that state judges are not as competent to deal with such issues, *see* MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* (1999)—it seems likely that plaintiffs with potential claims under both the state and federal constitutions would be more likely to proceed in federal court, even if that meant forgoing the potential state constitutional claim. For a very quick and dirty inquiry supporting this conclusion, *see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 784 (1992). Indeed, it might be the case that any civil plaintiff with a federal constitutional claim will also, in the overwhelming majority of cases, possess a parallel state constitutional claim. Such a plaintiff, by proceeding in federal court on a theory of federal question jurisdiction, might forgo the possibility of raising the state constitutional claim entirely. It is possible for a federal court to hear a state constitutional claim through its exercise of supplemental jurisdiction, but federal courts are not always eager to hear such claims. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1418-24 (1999).

217. *See* TARR, *supra* note 147, at 166-68 (citing a number of very useful sources).

courts in striking down state legislation on constitutional grounds during the late-nineteenth century.<sup>218</sup> According to one study, the Virginia Supreme Court invalidated about one-third of all state statutes it reviewed during this period.<sup>219</sup> In what may be the only comparative study of the protection of liberty by different organs of state government, John Dinan found that, in general, state courts have historically done no worse than state legislatures at protecting liberty, and have often done a better job, particularly during periods of political stress.<sup>220</sup> The United States Supreme Court, it might be noted, has not always done its best work during such times, as the *Dred Scott v. Sanford*<sup>221</sup> and *Korematsu v. United States*<sup>222</sup> rulings attest.

To complicate the picture further, it is not entirely clear that the record of state courts in standing up to other organs of *state* government is particularly relevant for present purposes. Our inquiry here focuses on whether state polities might have reasons to trust state courts to stand up to the *national* government, not the state legislature or governor. On that score, state courts appear to have achieved decidedly, though by no means uniformly, better results.

Before 1850, state courts routinely asserted state judicial power against the national government. It was widely assumed at the time, for example, that state courts had the authority to issue writs of mandamus and habeas corpus to federal officials,<sup>223</sup> a power that state courts exercised with some frequency. For example, in numerous cases state courts issued writs of habeas corpus to national military officers ordering them to release from custody minors who had illegally enlisted in the armed forces.<sup>224</sup> In at least

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218. *Id.* at 123-24.

219. *Id.* at 124 (citing MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 362 (1977)).

220. DINAN, *supra* note 197, at 155, 166.

221. 60 U.S. (1 How.) 393 (1857).

222. 323 U.S. 214 (1944).

223. See Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964); James L. Bishop, *The Jurisdiction of State and Federal Courts over Federal Officers*, 9 COLUM. L. REV. 397 (1909); Michael Vitiello, *The Power of State Legislatures to Subpoena Federal Officials*, 58 TUL. L. REV. 548 (1983).

224. See *Commonwealth v. Downes*, 41 Mass. 227 (1836); *Commonwealth v. Cushing*, 11 Mass. 67 (1814); *Commonwealth v. Harrison*, 11 Mass. 63 (1814); *In re Carlton*, 7 Cow. 471 (N.Y. 1827); see also *State v. Dimick*, 12 N.H. 194 (1841) (denying writ of habeas corpus on

one case, a state court ordered national military officials to release from custody a soldier who, the court found, had been improperly convicted of treason.<sup>225</sup> In ordering the prisoner released from national military custody, the state judge, Chancellor Kent of New York, observed: "It is the indispensable duty of this court ... to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security."<sup>226</sup> In all of these cases, federal officials produced the prisoners upon state court order, and released them when commanded to do so.

In 1821, complaining of "the growing pretensions of some of the State Courts over the exercise of the powers of the general government," the United States Supreme Court ruled in *M'Clung v. Silliman*<sup>227</sup> that state courts lacked the authority to issue writs of mandamus to national officials or their agents.<sup>228</sup> Even so, state courts continued for almost forty years to issue writs of habeas corpus releasing prisoners from federal custody until the Court ruled in 1858, in the case of *Ableman v. Booth*,<sup>229</sup> that state courts lacked the authority to issue such writs.<sup>230</sup> *Ableman* arose out of a dispute under the Fugitive Slave Act of 1850 in which Booth, a Wisconsin abolitionist, had been convicted by a federal commissioner of abetting the escape of a fugitive slave. Booth, imprisoned for the offense, applied for a writ of habeas corpus to the Wisconsin courts, which ordered him discharged. The United States Supreme Court reversed, observing pointedly that "no one will suppose that a Government which has now lasted nearly seventy years ... could have lasted a single year ... if offences against its laws could not have been punished without the consent of the State in which the culprit was found."<sup>231</sup>

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ground that the minor ratified his enlistment upon reaching majority); *United States v. Wyngall*, 5 Hill 16 (N.Y. 1843) (concluding plaintiff's alienage does not void validity of enlistment and denying writ of habeas corpus).

225. *In re Samuel Stacy, Jr.*, 10 Johns. 327 (N.Y. 1813).

226. *Id.* at 333.

227. 19 U.S. (1 Wheat.) 598 (1821).

228. *Id.* at 598.

229. 62 U.S. (1 How.) 506 (1858).

230. *Id.* at 515.

231. *Id.*

Notwithstanding the ruling in *Ableman*, state courts continued to issue writs of habeas corpus ordering the release of federal prisoners for another decade. Apparently giving *Ableman* the narrowest possible construction, the Wisconsin Supreme Court in 1870 thus affirmed the decision of a lower court issuing a writ of habeas corpus to a federal military officer ordering the release from military custody of an underage enlistee. In *Tarble's Case*,<sup>232</sup> the U.S. Supreme Court delivered what was apparently the coup de grâce to this particular kind of flexing of state judicial muscle.

The struggle waged by state courts over their authority to issue writs of mandamus and habeas corpus was itself the residue of a much more general and at times bitter struggle state courts waged earlier in the nineteenth century against the appellate authority of the United States Supreme Court. In the best known dispute, Virginia's highest court refused to acknowledge the authority of the United States Supreme Court to overturn its decisions construing federal law. In a case dealing with the effect of a post-Revolutionary War United States treaty on the rights of a landowner, the Virginia court held in favor of one party and the United States Supreme Court reversed, remanding the case with instructions to the Virginia appellate court to enter judgment for the opposite party.<sup>233</sup> The Virginia court refused to do so, arguing that the Constitution did not confer upon the United States Supreme Court the authority to exercise appellate jurisdiction over state courts.<sup>234</sup> On a subsequent appeal, the United States Supreme Court was required to issue an additional ruling affirming its authority to exercise such jurisdiction and renewed its order to the Virginia courts to comply with the appellate mandate,<sup>235</sup> which the state court reluctantly did.

If in the first half of the nineteenth century state judicial resistance to national power was based primarily on principled disagreement over the scope of national power, after 1850 such resistance took on a decidedly different character. In that year, Congress enacted the Fugitive Slave Act,<sup>236</sup> a law designed to strengthen enforcement of the Fugitive Slave Clause of the U.S.

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232. 80 U.S. (1 Wall.) 397 (1871).

233. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (1 Cranch) 603, 627-28 (1813).

234. *Hunter v. Martin*, 18 Va. 1, 7-8 (1813).

235. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337-38, 362 (1816).

236. The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

Constitution<sup>237</sup> by nationalizing it. A 1793 act of Congress had given, or at least had been construed by state courts to give, substantial independent responsibility to state judicial systems for adjudicating issues arising in connection with the rendition of escaped slaves.<sup>238</sup> State courts outside the South, occasionally unfriendly to the institution of slavery, had sometimes exercised their independence in ways that impeded the efforts of slave owners to recover escaped slaves.<sup>239</sup> The Fugitive Slave Act was meant to prevent state interference with the rendition of slaves by bypassing state judicial systems entirely. The Act thus created a system of federal commissioners to preside over the rendition process who were authorized to adjudicate any necessary legal or factual issues.

With the appellate authority of the United States Supreme Court well established, and Supreme Court rulings on the books substantially limiting the authority of state courts to interfere with the exercise of national power, any state judicial resistance to the Fugitive Slave Act partook more of the flavor of outright defiance of national authority than of reasoned disagreement over first principles of constitutional law. Unwilling to defy apparently lawful national authority, a succession of "independent and high-minded judges" sitting on state courts in Massachusetts, Pennsylvania, New York and elsewhere upheld the constitutionality of the Act against abolitionist attacks.<sup>240</sup> Not all did so, however; some state judges did engage in defiance of a national law that they believed intolerably invaded liberty through its support for the institution of slavery.

Particularly in Ohio and Wisconsin, the willingness of state judges to defy national authority under the Fugitive Slave Act led

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237. The Fugitive Slave Clause reads:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

238. The Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

239. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* ch. 10 (1975); 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 (1992).

240. COVER, *supra* note 239, at 178.



to what soon became a well-choreographed routine. Abolitionists in the state helped a fugitive slave escape to freedom. The owner obtained a warrant for return of the slave from a federal commissioner.<sup>241</sup> A federal marshal arrested the fugitive. Friends of the escapee went to state court to obtain a writ of habeas corpus ordering the fugitive released.<sup>242</sup> The marshal refused to comply with the state court order, and was arrested by a state law enforcement official on charges of contempt of court. The marshal then sought and obtained from the local federal court a writ of habeas corpus ordering the state law enforcement official to release him.<sup>243</sup> The United States Supreme Court's decision in *Ableman*, combined perhaps with the tactic's overall lack of ultimate success, eventually put an end to this particular method of state judicial resistance.

A century later, some state courts again evinced a willingness to resist national power when, they believed, it was exercised in a manner inconsistent with a proper understanding of the requirements of liberty. Although the partisans took different sides on the merits of the issues in question, the nature of the resistance itself was similar. During the 1950s and 1960s, state judicial resistance to national authority often took the form of refusals to comply with, or fully to enforce, rulings of the Warren Court concerning desegregation and the protection of individual liberty under the Fourteenth Amendment. Although most state courts seem to have tried their best to comply with Supreme Court mandates, examples of defiance, or at least evasion, are plentiful.<sup>244</sup> In clearly meritorious litigation to force desegregation of the University of Florida Law School, for instance, the Florida Supreme Court managed to rule three times against the plaintiff, issuing two of its decisions even after the United States Supreme Court's ruling in *Brown v. Board of Education*.<sup>245</sup> A few years later, the Florida Supreme Court again defied the United States Supreme Court, necessitating

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241. *Id.* at 183-84.

242. *Id.* at 184.

243. *Id.* at 183-87.

244. See generally Jerry K. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260 (1972).

245. See *Florida ex rel. Hawkins v. Board*, 347 U.S. 971 (1954), remanded to 83 So. 2d 20 (Fla. 1955), rev'd, 350 U.S. 413 (1956), remanded to 93 So. 2d 354 (Fla. 1957).

multiple reversals, in litigation attempting to bar prayer in public schools.<sup>246</sup>

In *Williams v. Georgia*,<sup>247</sup> a capital murder case, a black defendant had been convicted by a jury from which blacks had been excluded, the unconstitutionality of which the Georgia Attorney General conceded at oral argument before the United States Supreme Court.<sup>248</sup> For procedural reasons, and as a matter of comity, the Supreme Court remanded for reconsideration in light of the state's concession, observing that it felt compelled to "reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled."<sup>249</sup> On remand, the Georgia Supreme Court affirmed the conviction and sentence, stating defiantly that "we will not supinely surrender sovereign powers of this State."<sup>250</sup>

In other litigation over individual rights during the 1960s, the United States Supreme Court needed two successive reversals to gain compliance from the supreme courts of Virginia, Alabama, Arizona, California, Ohio, and Georgia.<sup>251</sup> A study of the impact of the Court's Establishment Clause jurisprudence found fifteen instances of state court evasion or noncompliance between 1950 and 1972.<sup>252</sup> This kind of resistance was unsuccessful in the long run, but it does demonstrate a willingness among state courts to assert themselves against national power, at least in ways falling short of complete and permanent disobedience.

By the mid-1970s, state courts began to develop a different method for defying national judicial authority that was far more effective than its predecessors because it could not be thwarted by persistent United States Supreme Court oversight. Once again, the state and national roles had reversed on the merits: this time, state courts were the ones giving expansive interpretations to the

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246. See *Chamberlin v. Bd. of Pub. Instruction*, 143 So. 2d 21 (Fla. 1962), *vacated mem.*, 374 U.S. 487 (1963), *remanded to* 160 So. 2d 97 (Fla. 1964), *rev'd per curiam*, 377 U.S. 402 (1964).

247. 349 U.S. 375 (1955).

248. *Id.* at 377-78, 381-82.

249. *Id.* at 391.

250. *Williams v. State*, 88 S.E.2d 376, 377 (Ga. 1955).

251. These cases are described in Beatty, *supra* note 244.

252. G. ALAN TARR, *JUDICIAL IMPACT AND STATE SUPREME COURTS* 54-55 (1977).

individual rights protected by the U.S. Constitution, and the United States Supreme Court was reversing those state rulings in favor of a less generous view of the scope of federally protected rights. State judicial defiance now took the form of transplanting to the state constitution, and thereby placing beyond federal appellate review, the very rights-protective rulings that the United States Supreme Court was rejecting as readings of the U.S. Constitution.

An early example of this approach appears in successive rulings by the South Dakota Supreme Court in *State v. Opperman*.<sup>253</sup> Initially, the South Dakota Supreme Court reversed Opperman's conviction on the ground that his trial had been tainted by the admission of evidence discovered through an "inventory search" conducted in violation of the Fourth Amendment of the United States Constitution.<sup>254</sup> On appeal, the United States Supreme Court reversed, holding that the search was not unreasonable under the Fourth Amendment,<sup>255</sup> and remanded the case. On remand, the South Dakota Supreme Court reaffirmed its initial ruling, but this time under the state constitution.<sup>256</sup> The court reached this result even though the defendant had neither briefed nor argued the state constitutional issue in the first proceeding. This approach, of course, insulated the decision of the South Dakota Supreme Court from further appellate review by the United States Supreme Court.<sup>257</sup>

The California Supreme Court employed much the same strategy in *People v. Ramos*,<sup>258</sup> a capital murder case. In its initial ruling, the California Supreme Court invalidated the defendant's death sentence on the ground that one of the jury instructions violated the defendant's due process rights under the national Constitution.<sup>259</sup> The United States Supreme Court reversed.<sup>260</sup> On remand, the California Supreme Court held that the same instruction violated

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253. 228 N.W.2d 152 (S.D. 1975).

254. *Id.* at 36-37.

255. *South Dakota v. Opperman*, 428 U.S. 364, 384 (1976).

256. *State v. Opperman*, 247 N.W.2d 673, 674-75 (S.D. 1976).

257. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If a state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course will not undertake to review the decision.").

258. 639 P.2d 908 (Cal. 1982).

259. *Id.* at 936.

260. *California v. Ramos*, 463 U.S. 992, 1014 (1983).

the due process clause of the California Constitution and so reaffirmed its original ruling vacating the death sentence.<sup>261</sup>

State supreme courts have also pursued the same strategy in civil cases raising constitutional issues. For example, in a New York case, a biomedical research company filed a libel suit against a scientific journal that published a letter to the editor criticizing its animal research policies. The journal defended on the ground that the letter stated an opinion, not fact, and thus could not constitutionally be the subject of a libel suit under the First Amendment to the U.S. Constitution. The New York Court of Appeals ruled for the defendant and dismissed the case.<sup>262</sup> On appeal, the United States Supreme Court granted certiorari, but during the pendency of the appeal decided *Milkovich v. Lorain Journal Co.*,<sup>263</sup> in which the Court held that expressions of opinion enjoy no automatic immunity from libel suits under the First Amendment.<sup>264</sup> The Supreme Court accordingly vacated the judgment and remanded the case to the New York Court of Appeals for reconsideration in light of *Milkovich*.<sup>265</sup>

On remand, the court of appeals once again ruled for the defendant, and on precisely the same ground.<sup>266</sup> In its opinion, the court of appeals not only distinguished *Milkovich* from the facts of the case before it, but went on, apparently gratuitously, to adjudicate the case under the free speech provision of the New York Constitution.<sup>267</sup> It interpreted this provision to create a state constitutional privilege for expressions of opinion—the very doctrine the court had held initially, and erroneously as it turned out, existed under the First Amendment of the U.S. Constitution. Of course, this move prevented a subsequent appeal to the United States Supreme Court on the question of whether *Milkovich* actually controlled.

I raise these instances of state judicial resistance to national authority not to demonstrate any patterns of judicial behavior, or

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261. *Ramos*, 689 P.2d at 443-44.

262. *Immuno-AG v. Moor-Jankowski*, 549 N.E.2d 129 (N.Y. 1989).

263. 497 U.S. 1 (1990).

264. *Id.* at 22-23.

265. 497 U.S. 1021 (1990).

266. *Immuno-AG v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991).

267. *Id.* at 1279-80, 1282-83.

to suggest that state courts can or cannot be trusted to stand up to national authority in any particular way, or at any particular time, or in any particular set of circumstances.<sup>268</sup> Rather, I hope to have demonstrated something more modest: that there is sufficient evidence on the question so that reasonable minds might differ as to whether or to what degree a state polity ought to repose its trust in the state judiciary to protect its liberty from invasions by the national government. In fact, the record of state courts, considered in light of the available institutional arrangements, supports a broad range of possible choices about judicial power. Certainly, it is impossible to conclude *a priori* that a polity's choice to trust its courts would be either irrational or imprudent. Thus, the only question is: what has any given state polity in fact chosen to do?

## VI. INTERPRETATION AND THE CONSEQUENCES OF FEDERALISM AGENCY

### A. *A Brief Introduction to State Constitutional Interpretation*

Undoubtedly the greatest jurisprudential puzzle in state constitutional law concerns how state constitutions ought to be interpreted. For much of American history, even to have framed such a question would have seemed odd, for it was widely believed that the state and national constitutions were nothing more than separate instantiations of essentially universal constitutional principles requiring, as a matter of course, similar methods of interpretation.<sup>269</sup> The possibility of a distinct jurisprudence of state

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268. Sometimes things can work the other way, with state courts narrowing state constitutional rights by following federal rulings that narrowly construe the scope of nationally guaranteed rights. A recent example is *Edelstein v. City and County of San Francisco*, 56 P.3d 1029 (Cal. 2002), in which the California Supreme Court overruled a prior case which had taken a more expansive view of the free speech implications of write-in voting than the United States Supreme Court took when it subsequently addressed the matter. Compare *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) (invalidating a ban on write-in voting as violating the free speech clauses of the state and federal constitutions), with *Burdick v. Takushi*, 504 U.S. 428 (1992) (finding no violation of the First Amendment in a state law banning write-in voting). In *Edelstein*, the California State Court thus pruned back its free speech jurisprudence to match a comparable pruning in federal First Amendment jurisprudence.

269. James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 117-28 (1998).

constitutional law began to emerge with the United States Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*.<sup>270</sup> In that decision, the Court embraced a legal positivism that deemed all law, including constitutional law, to be the positive command of a particular sovereign.<sup>271</sup> Because states are distinct sovereigns, the *Erie* analysis brought into view the previously obscured possibility that state constitutions could differ meaningfully from the national Constitution and from one another, even concerning issues that were addressed by all American constitutions.

Questions concerning a distinctive state constitutional jurisprudence did not take on any particular urgency, however, until 1977, when Justice William Brennan wrote a now-famous article in the *Harvard Law Review* urging state courts to step up the protection of individual liberties under state constitutions.<sup>272</sup> Brennan criticized what he characterized as a retreat by the United States Supreme Court from the protection of liberty under the U.S. Constitution, and encouraged state courts to counteract this movement by interpreting their state constitutions to provide greater protection for individual rights than the Supreme Court was then inclined to find under similar provisions of the national Constitution.<sup>273</sup> As state judges began to contemplate Brennan's message and, in some cases, to respond to it with action,<sup>274</sup> questions suddenly arose in a highly charged setting concerning how state courts should interpret state constitutions and, more specifically, in what circumstances it would be appropriate for them to reach results under the state constitution different from results reached by the United States Supreme Court under the United States Constitution.

Much has since been written on this topic,<sup>275</sup> offering a wide variety of different and often conflicting prescriptions for state

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270. 304 U.S. 64 (1938).

271. *See id.* at 78-80.

272. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

273. *Id.* at 490, 495-98.

274. Within a decade, state courts had decided more than four hundred cases construing state constitutions to provide greater protection for individual rights than the United States Constitution. *See* David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 222 (1988).

275. For a good overview, *see* TARR, *supra* note 147, at ch. 6.

constitutional adjudication. Some, for example, have argued that state courts ought to utilize a "lockstep" approach to state constitutional interpretation, in which the state constitution is construed whenever possible to have the same meaning as the United States Constitution.<sup>276</sup> Others have said that state constitutional interpretation should proceed "interstitially," in a two-step process that looks first to the United States Constitution for guidance and then turns to the state constitution only when the individual right in question is unprotected by the national document.<sup>277</sup> Many claim that state courts should utilize a "primacy" approach to state constitutional interpretation in which constitutional rulings by national and other state courts are consulted solely for their persuasive value, and the real weight of decision making is borne by the state constitutional text and history, the intentions of the state constitution's framers, and the values and character of the state polity.<sup>278</sup> Some go on to claim that the primacy approach, properly conceived, requires state courts to utilize primarily a textualist or originalist interpretational methodology that emphasizes fidelity to the language of the constitutional text and intentions of its drafters.<sup>279</sup>

The account of state judicial power I have given in this Article has obvious ramifications for the interpretation of state consti-

276. For example, the New Mexico Supreme Court deliberately followed a lockstep approach until 1997. See *State v. Gomez*, 932 P.2d 1 (N.M. 1997). Proponents of this approach generally see considerable value in uniformity between state and federal constitutional law, particularly in the criminal area. 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 13-15 (3d ed. 2000); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102-03 (2000). Lockstep remains the dominant approach in most areas of state constitutional law. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338-39 (2002).

277. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1330-31 (1982); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 718 (1983). This approach has been adopted by courts in New Jersey and Washington, among others. See *State v. Williams*, 459 A.2d 641 (N.J. 1983); *State v. Gunwall*, 720 P.2d 808 (Wash. 1986).

278. The most influential proponent of this position has been former Oregon Supreme Court Justice Hans Linde. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

279. See, e.g., TARR, *supra* note 147, at 194-99; Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431 (1987).

tutions. At the very least, it leads directly to the seemingly paradoxical conclusion that each of the many conflicting prescriptions for state constitutional interpretation listed in the preceding paragraph is simultaneously both drastically incomplete and partially correct.

### *B. State Constitutional Interpretation and Federalism Agency*

Let me briefly review my argument. I have claimed to this point that state courts are capable of serving as agents of federalism. Should they occupy such a role, state courts would stand alongside the state executive and legislative branches when necessary by deploying judicial power for the purpose of resisting national tyranny. The principal tool that state courts possess to resist national power is their superintendency of the state constitution—that is, their power to interpret its provisions. State courts can wield this power against the national government by interpreting the state constitution both to assure vigorous, effective resistance to national power by the state executive and legislative branches, and to provide more protection for individual rights than does the national Constitution. Thus, my account of state judicial power is “functional”<sup>280</sup> in that it conceives of state judicial power as serving a distinct purpose in a complex federal system of overlapping powers and responsibilities. I have defended this account of state judicial power against strict constructionist theoretical objections, and I have shown that the actual record of state courts in resisting national power, supplemented by any of a range of reasonable assumptions about institutional constraints on judicial power, provides a sound basis for a state polity to invest its courts with a degree of trust or distrust that might reasonably vary across a broad range. This degree of trust or distrust in turn prompts a state polity to charge its courts—or not to charge them, or to charge them only to some limited degree, as the case may be—with serving as agents of federalism.

A state polity’s choice about whether and to what degree to authorize its courts to serve as agents of federalism has important consequences for the interpretation of state constitutions. The more

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280. See Gardner, *supra* note 9 (laying out a “functional” theory of state constitutions).



a polity trusts state courts faithfully to protect liberty by resisting national tyranny, the more flexibility state courts are authorized to bring to the process of construing the state constitution. Conversely, the less a state polity trusts its courts to bring their independent judgment to bear on questions of state power and resistance to national authority, the more fastidiously state courts would be required to discern and obey popular choices made in the state constitution.

This relationship is easiest to see—or at least works out in the way that is most familiar from the national setting—when state polities distrust their courts. Here, managing constitutional change is reserved strictly to the people through the amendment process. State courts in these circumstances are forbidden to “update” the state constitution, or even to press its boundaries in the interest of adapting the document to meet present exigencies. All problems of constitutional inadequacy are referred in the first instance to the people for correction. Courts here are servants that operate under very tight supervision, forbidden to use much in the way of independent judgment to solve problems of state self-governance.

Courts operating under such a mandate would likely be confined to the use of strictly originalist and intentionalist methods of constitutional interpretation. Because such courts would be required to act with the utmost restraint and deference to the popular will as expressed in the state constitution, it would become imperative for courts to discern the precise instructions of the people. Interpretation in this mode thus would focus heavily on the text of the state constitution and the intentions of its drafters and ratifiers. Furthermore, the strictness of this kind of judicial agency would tend to render irrelevant the actions of bodies outside the state, including the national government. Because courts would have little or no independent authority to resist abuses of national power other than through strict compliance with specific instructions contained in the state constitution, they would have no need to keep apprised of the way in which national power were being used or abused in any given circumstances. To the extent that the people of a state intended to take advantage of the availability of state power as a potential counterweight to national tyranny, they would either grant the responsibility for using state power in this way to the executive or legislative branches, if they trusted

those branches more than they trusted their courts; or they would retain this authority for themselves, instructing the various organs of state government through constitutional amendment how precisely to respond to incursions of liberty originating at the national level. Should the state constitution provide an inadequate framework for responding effectively to national tyranny on some particular occasion, correction of the problem would have to await popular action.

In contrast, courts that have been authorized to serve as strong agents of federalism will have been given a special kind of institutional responsibility to oversee the state constitution for the purpose of assuring that it serves as an effective charter for the deployment of state power to resist invasions of liberty by the national government. Judges who possess this responsibility would then have some degree of freedom to consult their own views about how state power and effective state public policy can best be structured and deployed to serve the protection of liberty. Courts operating under such instructions would thus be authorized, in appropriate circumstances, to engage in a comparatively open, free-wheeling kind of constitutional interpretation<sup>281</sup> that might more closely resemble the process of state common-law adjudication than it would the strict originalism to which their distrusted counterparts would be confined.<sup>282</sup> The state polity would still retain ultimate responsibility for the content of the state constitution, but

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281. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1163 (1999); Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1669 (1988) (“[J]udges subject to periodic election may be justified in using relatively free wheeling methods of interpretation.”). Hershkoff argues:

Because state constitutional amendments are relatively ordinary events in a state’s political life, state court judges can demonstrate a greater willingness to experiment with legal norms, on the assumption that their judgments comprise only the opening statement in a public dialogue with the other branches of government and the people.

Hershkoff, *supra*, at 1163 (footnotes omitted).

282. Thus, Linde’s argument that “constitutions are not common law” is wrong at least some of the time, and possibly more often. Hans Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); David A. Strauss, *The Common Law Genius of the Warren Court* (U. Chi.-L. Sch. Public Law and Legal Theory Working Paper No. 25, 2002), available at <http://www.ssrn.com> (last visited Feb. 25, 2003).

this responsibility would in all likelihood be exercised infrequently, and invoked for the most part to correct judicial interpretations of the constitution that stray too far afield from the rough plan of state self-governance contemplated by the state polity.

The responsibility to serve as an agent of federalism, moreover, is not one that need be granted to courts in all-or-nothing terms. A state polity might trust its courts to some extent, but not completely, and might thus wish to grant them only limited discretion to serve as agents of federalism. This decision, too, would have ramifications for the kind of interpretation the state courts would bring to bear on the state constitution. Courts with some sort of intermediate mandate would not be confined to the strictest forms of interpretation. On the other hand, in utilizing more open-ended methods of interpretation that rely on their independent judgment they would be required to exercise a degree of caution and restraint commensurate with the limits of popular trust in their ability to serve as reliable agents of resistance to national power.

The main point is that there is a direct relationship between judicial function and the methods of constitutional interpretation appropriate to the judicial role. State courts that are charged with playing a strong role in the federal system by actively protecting liberty against national tyranny will find it appropriate to take one approach to interpreting the state constitution, an approach stressing some degree of reliance on independent judicial judgment and comparatively loose, nonoriginalist methods of interpretation. Courts that are not charged with playing such a role will find themselves constrained to take a different approach to constitutional interpretation, one employing stricter, more originalist methods of interpretation. Other courts may find themselves authorized to employ a mix of such interpretational techniques, or to employ them in some circumstances and not others, or with respect to certain provisions of the state constitution and not others.<sup>283</sup>

Because the appropriate methodology of constitutional interpretation depends upon the nature of the judicial function, and

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283. For an argument that appropriate methods of state constitutional interpretation can vary from provision to provision, and a rudimentary typology, see James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993).

because the function of the state judiciary in a federal system is not fixed but may be structured by the state polity in a great variety of equally appropriate ways, those who would prescribe for all state courts a single method of state constitutional interpretation are at most half right. As indicated earlier, some have argued that state constitutions are best approached using originalist or textualist methods of interpretation.<sup>284</sup> This prescription is itself only a particular instance of the widely made, broader claim that state constitutions must always be interpreted independently of national constitutional law.<sup>285</sup> Others claim that national constitutional rulings should ordinarily be taken as the starting point for state constitutional interpretation.<sup>286</sup> Yet any of these prescriptions may be appropriate for particular state courts in particular circumstances, and none can presumptively be appropriate for all state courts in all circumstances.

The primary determinant of interpretational methodology is the function assigned by the state polity to its courts in a federal system of divided and competing power. The nature of that decision is dictated neither by theoretical necessities, nor by some distinctive essence of local character or values,<sup>287</sup> but by entirely contingent considerations of popular preference, local history, and local experience. It follows that the search for a methodology of state constitutional interpretation must begin with the following question: What function have the people of the state in fact assigned to their courts? Have they authorized state courts to act as agents of federalism, and thus to employ looser, nonoriginalist

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284. See TARR, *supra* note 147, at 194-99; Titone, *supra* note 279.

285. See the cited articles by Linde, *supra* note 278. For other endorsements of the primacy approach, see for example, Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 7-9 (Bradley D. McGraw ed., 1985); FRIESEN, *supra* note 276, at 17-21; Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 962-63 (1982); Friedman, *supra* note 276; Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

286. See *supra* notes 277-78 and accompanying text.

287. See James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998) (arguing that purported differences in the character of southern state populations either do not exist, or do not meaningfully influence the content or interpretation of southern state constitutions).

methods of interpretation when appropriate to resist abuses of national authority? Have they denied courts this responsibility, thereby directing them to hew closely to popular constitutional decisions by using strict methods of interpretation? Or have they taken some intermediate position, authorizing their courts to act independently in certain limited circumstances, or with respect to a limited number of issues? The initial task of any state court contemplating its state constitution, then, is to tease from the document answers to these preliminary questions about the judicial function.<sup>288</sup>

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288. How precisely courts should go about this will be the subject of a future work.