

WHEN THE SUPREME COURT IS NOT SUPREME

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Draft

INTRODUCTION

The Supreme Court is not always supreme.

For much of this nation's history, this statement was true as a matter of law. Today, it is true in practice. By supremacy, I mean what most people mean when they talk about the Supreme Court: the authority to determine, for everyone else, and in particular for every other court, what the Constitution of the United States means and requires. The Court says that it is supreme in this sense, nearly everybody else agrees with the Court about this, and many people complain about it. Yet it is not true.

Instead, the authority to determine what the Constitution means has always been shared. The focus of this Article is on how the Supreme Court shares the authority with the state courts—I choose the state courts because it is universally assumed that, of all governmental actors, state courts are inferior to the Supreme Court on issues of federal constitutional law. There are, however, similar stories that can be told about how the Court shares authority with the lower federal courts and with the non-judicial branches of government. State courts, the Article shows, have always exercised a good deal of authority to determine, independently and definitively, the meaning of the Constitution. Until the early twentieth century, this authority was formalized in the statutory law that governed the Court's appellate jurisdiction. Today, though that law has changed, in practice, the state courts continue to hold and to exercise substantial authority on issues of federal constitutional law. To be sure, the Supreme Court can, and sometimes does, reverse a ruling of a state court on an issue of federal

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constitutional law and the state court is required to follow the Court's decision. Indeed, on some issues, the Court aggressively keeps the state courts (and the lower federal courts) in check. This Article does not challenge the supremacy of the Court in this sense. Rather, the claim made here is that there are areas of the law where state courts, as a practical matter, have the ability, whether they have noticed it or not, to determine what the Constitution means, with little or no oversight by the Supreme Court. In this sense, the Court is not supreme because authority is shared.

Several factors, explored closely in this Article, account for the modern sharing of authority between the Supreme Court and the state courts. In part, it results from some limitations on the Court's power and ability to review cases from the state courts. In part, the Court itself has simply given up the interpretive function to state judges. At times, state courts are authoritative because authority is hidden. As a result, while authority is shared, the divisions are not always easy to identify. Historically, the law drew clear lines between the authority of the state courts and the authority of the Supreme Court. Today, while the lines are there, they can appear faint, overlapping, and circuitous. It is no wonder we have had trouble noticing them.

Once we see that authority to interpret the federal Constitution is shared, the world of constitutional law and politics looks wholly different. Bloody battles over who serves on the Supreme Court seem excessive. Marching to the Court in support of this right or against that claim is less consequential. The modern fascination with the Court's seventy-odd decisions each year—instantly reported, dissected, critiqued, turned into symposia—appears an almost unhealthy obsession. Divining the future by microscopic inspection of the Justices' every written and spoken word becomes improbable. None of this is to deny that the decisions of the Supreme Court are important. Most are important; some are momentous. However, when authority is shared, we should worry less about the Court, and more about what is happening to constitutional law as it is developed and implemented in the state courts and in other venues.

In addition to exploring the ways in which the Supreme Court is not supreme, and the consequences that result, this Article offers a proposal. Historically, the authority of state courts was formalized. It makes sense, the Article argues, to formalize the authority state courts exercise today in practice. A sensible first step would be a formal rule that state courts, called upon to rule on federal constitutional claims against state government, should be permitted to deviate from the rulings of the Supreme Court and to do so without fear of correction

by that Court. The Article qualifies and limits this proposition in various ways. For example, state courts would be permitted to expand upon, but not to narrow, federal constitutional rights as construed by the Supreme Court, and state courts would have leeway in certain kinds of cases, but not others. Though there would still be some downsides that would need to be confronted, the basic idea is that the state courts would once again, as a formal matter, have some independent authority to interpret the federal Constitution.

The proposal offered here is more than an imaginative exercise in institutional design. Since John G. Roberts became Chief Justice, the Supreme Court has shown a keen interest in the appropriate roles of the state courts in developing federal constitutional law, and the Court has granted review in some important cases in this area. Against this general background, in a series of recent cases, Justice Stevens has called upon the new Roberts Court, in setting its discretionary docket, to refuse to hear cases against state government in which a state court has expanded upon the Court's own rulings on federal constitutional rights. Under Stevens' approach, examined closely in this Article, the Court, by denying certiorari to state government, would permit state courts to apply federal constitutional requirements more generously in their own states. Though the proposal advanced in this Article does not depend on the Court's implementation—Congress might, for instance, take the lead role—Stevens' suggestion provides a useful starting point for closing the modern gap between formal rules and practices.

The Court's decision this Term in *Danforth v. Minnesota*¹ is one step, albeit a small one, in this direction. The *Danforth* Court, in an opinion by Justice Stevens, held that state courts were entitled, in their own post-conviction proceedings, to give broader retroactive effect to new rules of federal constitutional criminal procedure announced by the Supreme Court than would be available to state inmates on federal habeas review under the restrictive standards of *Teague v. Lane*.² After *Danforth*, state courts can give state inmates the benefit of a constitutional rule—the case involved the application of *Crawford v. Washington*'s holding that the Confrontation Clause prohibits the admission of testimonial out-of-court statements unless

¹ 552 U.S. __ (2008).

² 489 U.S. 288, 307-13 (1989) (plurality opinion) (explaining that a new rule is applied retroactively to cases that were final when the rule was announced only if the rule places certain kinds of private conduct beyond the power of the government to proscribe or is a watershed rule that defines procedures implicit in the concept of ordered liberty).

the defendant has had a prior opportunity to cross-examine the speaker³—and, where warranted, overturn a conviction, even though the same inmate would not receive the benefit in a habeas proceeding in federal court.⁴ *Danforth* does not foretell the success of the proposal this Article makes. In his opinion in *Danforth*, Justice Stevens emphasized that the case involved not the substance of a federal constitutional right but only the remedy that is available for a violation of the right.⁵ Even if that distinction is ultimately untenable, as Chief Justice Roberts thought in his dissent,⁶ *Danforth* itself does not invite state courts to construe federal constitutional rights more generously than does the Supreme Court. Nonetheless, it is probably a safe bet that in delineating the respective roles of the state courts and the federal courts under the Constitution, the Court will, in short course, decide whether to take steps beyond *Danforth* and where those steps lead.

Part I traces how the Supreme Court and the state courts historically shared authority to determine the meaning of the federal Constitution. Parts II and III shows how in practice that authority continues to be shared today. Part IV offers the proposal for making formal state court authority, discusses the benefits of the change, and considers also some downsides.

I. THE SUPREMACY MYTH

Here is a familiar claim: In the judicial system of the United States, the Supreme Court decides what the provisions of the U.S. Constitution mean and require. The Supreme Court is, therefore,

³ 541 U.S. 36, 68-69. Under the *Teague* standard, the *Crawford* rule does not apply retroactively to cases that were final when *Crawford* was decided. *Wharton v. Bockting*, 549 U.S. __ (2007).

⁴ *Danforth*, 552 U.S. at __ (explaining that “the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*”).

⁵ *See id.* at __.

⁶ *See id.* at __ (“When this Court decides that a particular right shall not be applied retroactively, but a state court finds that it should, it is at least in part because of a different assessment by the state court of the nature of the underlying federal right—something on which the Constitution gives this Court final say.”) (Roberts, C.J., dissenting).

superior to the state courts (as well as to the lower federal courts). When state courts rule on federal constitutional claims, they must adhere closely to the precedents of the Supreme Court. A state court, even the highest court of the state, has no power to decide anew, or to settle definitively, an issue of federal constitutional law. On issues of federal constitutional law, every state court is inferior to the U.S. Supreme Court, which can reverse what the state courts have done. Indeed, it would be fair to conclude, state courts do not truly decide questions of federal constitutional law. Rather, state courts implement the prior answers the Supreme Court has given to those questions. That the Supreme Court is superior—supreme—to the state courts on issues of federal constitutional law is so obvious, so firmly established and widely recognized, such a central component of the Constitution ratified in 1789, that it barely needs stating.

However, the Supreme Court’s supremacy is a myth. For much of this nation’s history, on many issues of constitutional law, the Supreme Court has not been superior to the state courts. Rather, the Supreme Court and the state courts have shared authority over the federal Constitution. Historically, this was true as a formal matter. Today, it remains true in practice because, as a result of a tangle of substantive rules, procedural requirements, and sheer resources, the state courts determine, in many instances, the meaning of the Constitution. This Part examines how authority is shared. It considers first the historical relationship of the Supreme Court to the state courts on issues of federal constitutional law and then turns to modern practices.

A. Early Jurisdiction and Dockets

The 1789 Constitution provides that the “judicial Power of the United States shall extend to all Cases”⁷ arising under the Constitution and federal law, and vests that power in “one Supreme Court” and in “such inferior Courts as the Congress may from time to time ordain and establish.”⁸ Yet in the early national period, few people would have imagined that the Supreme Court was the sole authority on the meaning of the Constitution. With the so-called Madisonian compromise, the Constitution did not even bother establishing lower federal courts—state courts were assumed to be able to hear federal

⁷ U.S. CONST. art. III, § 2.

⁸ *Id.* art III, § 1.

cases.⁹ In the Judiciary Act of 1789,¹⁰ though Congress assigned the Supreme Court original jurisdiction matching very nearly the constitutional allocation,¹¹ it gave the Court only limited appellate powers. The Court had no authority to hear appeals of criminal cases from the lower federal courts the Act created;¹² civil cases could only be appealed from the lower federal courts if they met a \$2,000 amount in controversy requirement.¹³ Section 25 of the Act limited the circumstances under which the Court could review, by writ of error, the decisions of state courts on federal issues.¹⁴ The Court could review a decision of a state's highest court invalidating a federal statute, treaty or exercise of federal authority.¹⁵ The Court could also review state court decisions denying a title, right, privilege or exemption claimed by a party under the Constitution, a treaty, a federal statute or a federal commission.¹⁶ In cases in which a state law was challenged on federal constitutional grounds, the Supreme Court could review the state court decision if it rejected the constitutional claim and upheld the law—but not if the state court accepted the claim

⁹ See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124-25 (Max Farrand ed. 1966) (remarks of John Rutledge) (“State Tribunals . . . ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights.”). See generally Richard H. Fallon, Jr. et al., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6-8 (5th ed. 2003) (discussing the compromise). But see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 115-119 (arguing that the compromise did not have the significance to the founding generation that we attach to it today and that there was a widespread belief that the state courts could not hear all Article III cases, leading some to conclude that lower federal courts were in fact constitutionally required).

¹⁰ Act of Sept. 24, 1789, 1 Stat. 73.

¹¹ See § 13, 1 Stat. 73, 80-81 (setting out the cases in which the Court had original jurisdiction).

¹² However, the Supreme Court, and the lower federal courts, did have a power of habeas review with respect to prisoners held in federal custody. § 12, 1 Stat. 73, 79.

¹³ § 14, 1 Stat. 73, 81.

¹⁴ See § 25, 1 Stat. 73, 85-86 (setting out the circumstances in which the Court could review state court decisions).

¹⁵ See *id.*

¹⁶ *Id.*

and invalidated the state law.¹⁷ When, beginning in the 1820s, Congress considered whether to change the Court's authority to review state court decisions, the proposals were not to add state court cases invalidating state laws, but to abolish review altogether.¹⁸ The change was not made, and the basic distinction in the 1789 Act remained in place when the Judiciary Act was amended in 1867,¹⁹ and reenacted in 1873,²⁰ and 1911.²¹ Not until 1914 did the Supreme Court receive statutory authority to review state court decisions upholding federal rights against state government²² and even then review was in the Court's discretion by a writ of certiorari.²³ Until 1914, the Court simply denied jurisdiction in cases in which the state court had ruled against a state law and in favor of a federal right.²⁴ As a result, prior to 1914, "no state seeking to vindicate its sovereignty interests . . . obtained review on the merits of its own court's decisions in the Supreme Court."²⁵ As for the lower federal courts, the 1789 Act assigned them a jurisdiction that also fell short of the constitutional

¹⁷ *Id.* See Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 18-23 (2007) (discussing the operation of section 25 of the 1789 Judiciary Act).

¹⁸ See, e.g., H.R. REP. NO. 98, 21st Cong., 2d Sess. 1-11 (1831) (urging Congress to repeal section 25 of the 1789 Judiciary Act). See generally Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act, Part I*, 47 AM. L. REV. 1, 3-4 (1913) (reporting that there were at least ten bills introduced between 1821 and 1882 to deprive the Supreme Court of jurisdiction to review cases from the state courts).

¹⁹ Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385.

²⁰ Act of Dec. 1, 1873, ch. 11, § 709, 18 Stat. 1, 132.

²¹ Act of Mar. 3, 1911, ch. 231, § 237, 36 Stat. 1087, 1156.

²² Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

²³ Under the 1916 statute, and until 1988, there was mandatory review (by writ of error) where a state court had upheld a state law against a federal constitutional claim, but discretionary review (by writ of certiorari) where the state court had invalidated the state law. Act of Sept. 6, 1916, ch. 448, § 2, Pub. L. No. 258, 39 Stat. 726; see 28 U.S.C.A § 1257, Historical & Statutory Notes, Amendments (describing changes made by the 1988 law).

²⁴ See FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* 190 n.20 (1928) (collecting cases).

²⁵ Edward Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 913 (1997).

grant.²⁶ In particular, lower federal courts had no general federal question jurisdiction in civil cases, and so they were dependent upon Congress' piecemeal allocation of cases to them.²⁷ Apart from the short-lived Midnight Judges Act of 1801,²⁸ only in 1875 did Congress assign the lower federal courts authority to hear all cases arising under federal law.²⁹

The early dockets of the federal courts reflected their limited statutory authority. The Supreme Court, which until 1860 operated mostly out of the basement of the Capitol,³⁰ heard only a smattering of cases in its early years.³¹ The Court heard no cases in its first two years and then, from 1801 to 1829, it averaged about twenty-eight cases with signed opinions per year.³² Very few cases before the Court involved

²⁶ See Act of Sept. 24, 1789, §9, 1 Stat. 73, 77 (specifying the jurisdiction of the federal district courts); § 10, 1 Stat. 73, 77, 78-79 (specifying the original jurisdiction of the circuit courts); § 21-22, 1 Stat. 73, 83-84. (specifying the appellate jurisdiction of the circuit courts).

²⁷ See, e.g., Act of Feb. 4, 1815, ch. 31, §§ 7-8, 3 Stat. 195, 197-98 (assigning lower federal courts jurisdiction in cases involving enforcement of federal customs laws); Act of May 31, 1790, ch 15, § 1,1 Stat. 124, 124-25 (repealed 1802) (giving the lower federal courts jurisdiction in copyright infringement cases); Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1994) (giving the lower federal courts jurisdiction to hear alien tort claims). [RA: identify a few early statutes allocating jurisdiction]

²⁸ Among other things, the Act, passed by the Federalist Congress of 1801, conferred federal question jurisdiction on the federal courts. See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (repealed 1802) (giving the federal courts "cognizance" of all cases "arising under" the Constitution and federal law). The new Republican Congress repealed the law the next year. See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (repealing 1801 Act).

²⁹ See Act of March 3, 1875, § 1, 18 Stat. 470 (giving the federal circuit courts jurisdiction over all civil cases "arising under" federal law, subject only to an amount-in-controversy requirement of \$500).

³⁰ Supreme Court Historical Society, History of the Court: Homes of the Court, available at http://www.supremecourthistory.org/02_history/subs_sites/02_d.html

³¹ The Court heard no cases in its two 1802 Terms, which Congress had cancelled. See Act of Apr. 29, 1802, ch. 31, §§ 1-2, 2 Stat. 156 (providing for the Court to have one term annually, beginning in February). It also heard no cases in the 1811 Term, when, as a result of illness among the Court's members, it lacked a quorum, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 400 (1996) (discussing these events).

³² Averaging the number of cases per term provided for this period in LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 227 tbl. 3-2 (2007) gives an average of 27.76 cases. [Add data

issues of federal constitutional law. In the 1825 Term, for example, the Supreme Court decided no cases involving the Bill of Rights or the constitutionality of federal or state laws under the Commerce or Contracts Clauses; of the twenty-six cases that term, ten involved common law questions, and the remainder dealt with a hodgepodge of statutory, jurisdictional, maritime, and other matters.³³ As of 1840, the Court had found state laws unconstitutional in just nineteen cases.³⁴ Between 1803, when the Court decided *Marbury v. Madison*,³⁵ and 1857, the year of the decision in *Scott v. Sandford*,³⁶ the Court did not hold unconstitutional a single federal statute. Much of the time, the Justices were busy riding circuit in compliance with the 1789 Judiciary Act, which, instead of creating circuit court judgeships, staffed the circuit courts with one district court judge and two Supreme Court justices.³⁷

B. Early State Courts and the Federal Constitution

As a result of the limited jurisdiction of the federal courts, the early state courts decided what the federal Constitution meant. Chief Justice Marshall's assertion in *Marbury v. Madison*,³⁸ that the federal judiciary had power to review congressional legislation, is well-known, but state courts also enforced the federal Constitution's limitations on the powers of the federal government.³⁹ Under the 1789

about number of cases from the state courts reviewed to 1830 (17 from 1790-1815, see Wright)]

³³ See FRANKFURTER & LANDIS, *supra* note 24, at 302 tbl. I (reporting cases).

³⁴ See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 181 tbl. 2-16 (2007) (listing cases).

³⁵ 5 U.S. (1 Cranch) 137 (1803).

³⁶ 60 U.S. (19 How.) 393 (1857).

³⁷ Act of Sept. 24, 1789, ch. 20, § 3, 1 Stat. 73, 73; *id.* § 4, 1 Stat. at 74-75. See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1764-71 (2003) (describing the ardors of riding circuit).

³⁸ 5 U.S. (1 Cranch.) 137 (1803).

³⁹ See, e.g., *Patrie v. Murray*, 43 Barb. 323 (N.Y. Sup. Ct. 1864) (holding a federal removal statute unconstitutional); *Griffin v. Wilcox*, 21 Ind. 370 (1863) (holding unconstitutional a federal statute prohibiting actions for wrongful imprisonment); *Ferris v. Coover*, 11 Cal. 175, 178-79 (1858) (holding constitutional section 25 of the 1789 Judiciary Act); *Thomas Sims's Case*, 61 Mass. 285, 310 (1851) (holding that the 1850 federal Fugitive Slave Act is constitutional);

Judiciary Act, only if a state court invalidated a federal law was the decision subject to review in the Supreme Court.⁴⁰

With the federal courts lacking federal question jurisdiction, state courts also enforced the Contracts Clause⁴¹ and other provisions of the federal Constitution that limited state governments.⁴² Supreme Court review of these state court decisions was available if the state court rejected a federal constitutional challenge to a state law.⁴³ However, there was no review of state courts decisions that invoked the federal Constitution to invalidate state laws.⁴⁴ The 1789 Judiciary Act, then, gave the state courts some space to interpret and apply the federal Constitution, without fear of correction by the Supreme Court.

Accordingly, state courts concluded they only needed to follow prior rulings of the United States Supreme Court on federal constitutional issues if the state court decision was subject to later review.⁴⁵ In evaluating the constitutionality of state laws, the state

Commonwealth v. Griffith, 19 Mass. 11, 20 (1823) (rejecting an argument that a federal fugitive slave law, by allowing seizure of escaped slaves without a warrant, violates the fourth amendment); *Wetherbee v. Johnson*, 14 Mass. 412, 421 (1817) (holding that a federal statute allowing for removal of cases from state court after final judgment violated the Seventh Amendment).

⁴⁰ See § 25, 1 Stat. 73, 85-86 (providing for Supreme Court review of state court decisions “where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity”).

⁴¹ U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

⁴² See, e.g., *State v. Fullerton*, 7 Rob. 219, 224 (La. 1844) (holding that a Louisiana tax on passengers arriving in New Orleans from out of state did not interfere with Congress’ Commerce Clause power). On occasion, federal courts, though they lacked federal question jurisdiction until 1875, heard claims against states in diversity cases. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (applying the the Contracts Clause of Article I, §10, in a diversity case). See generally Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89-99 (1997) (tracing the Supreme Court’s expansive reading of diversity jurisdiction in Contracts Clause cases).

⁴³ See § 25, 1 Stat. 73, 85-86.

⁴⁴ See *id.*

⁴⁵ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), upheld the power of the Supreme Court to review state court decisions under section 25 of the 1789 Judiciary Act. However, state courts sometimes resisted following the Court’s rulings even in cases in which the state court decision was subject to review. For example, Justice Benning of the Supreme Court of Georgia took the view in one case that “[t]he Supreme Court of Georgia is co-equal and co-ordinate with the Supreme

courts could not deny or narrow protections the Supreme Court had recognized under the United States Constitution—that would trigger review—but state courts could impose more stringent constitutional requirements on state government than the Supreme Court elected to impose. For example, the Supreme Court of Ohio stated:

[T]he limited and qualified character of the appellate jurisdiction, conferred by the 25th section of the [J]udiciary [A]ct, does not countenance the idea ... that Congress had in view a uniformity of decisions upon questions arising under the [C]onstitution and laws of the United States, and that the Supreme Court was the common arbiter for the decision of such questions.⁴⁶

In dozens of cases, state courts articulated the difference between cases in which they were and were not bound to follow the United States Supreme Court on issues of federal constitutional law.⁴⁷ State

Court of the U.S.; and therefore, the latter cannot give the former an order, or make for it a precedent.” *Padelford, Fay & Co. v. Mayor of Savannah*, 14 Ga. 438 (1854) (holding, contrary to the Supreme Court’s ruling in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), that a state sales tax on imported goods did not violate the Commerce Clause).

⁴⁶ *Skelly v. Jefferson Branch of the State Bank of Ohio*, 9 Ohio St. 606, 614 (1859), *rev’d*, 66 U.S. (1 Black) 436 (1861). In *Skelly*, the Ohio court got into trouble because it took the position that if the Supreme Court had invalidated a state law, a state court, concluding that the law was constitutional, could uphold the law because otherwise the Supreme Court, as a result of section 25, would never have an opportunity to correct its own prior ruling. *See* 9 Ohio St. at 613-14. Whether the Ohio court thought this was truly a general principle is not certain because the case involved a Contracts Clause claim and the state court may have thought there was a special role for state judges on issues of contract law. Nonetheless, the Ohio court departed from prior Supreme Court rulings and held that a state incorporation law was not a contract for purposes of the Constitution’s Contract Clause. *See id.* at 626-27. That ruling against a federal constitutional claim, triggered review and the Supreme Court reversed. 66 U.S. (1 Black) at 449-50.

⁴⁷ *See, e.g., Linn v. President of the State Bank of Ill.*, 2 Ill. (1 Scam.) 87, 89 (1833) (holding that bills issued by the Bank of Illinois were unconstitutional bills of credit and stating that “the Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question the validity of a statute ... on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity” and, therefore, “[w]hen the Supreme Court of the United States have decided that a State law violates the Constitution of the United States, the judges of

judges also took the view that they needed to be particularly careful in exercising the independence the Judiciary Act gave them.⁴⁸

Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*⁴⁹ is conventionally described as affirming the Court's supremacy over state courts on questions of federal law.⁵⁰ However, viewing *Martin* against the precise background limitations of section 25 of the Judiciary Act suggests a more modest understanding of the case. *Martin* involved a decision of the Virginia Court of Appeals denying Thomas Martin title he claimed by operation of a U.S. treaty with Great Britain, to land the state seized from his loyalist uncle

the respective States have no right to overrule or impugn such decision" but must "simply ... ascertain what the Supreme Court of the United States has decided" (internal quotation marks omitted); *Braynard v. Marshall*, 25 Mass. (8 Pick.) 194, 196-97 (1829 (explaining that Supreme Court decisions on the Contract Clause of the Constitution are "binding upon this Court" where a contrary holding "may be carried to [the Supreme Court] by writ of error, and our judgment be reversed; it being a question, of which, by section 25 of the [J]udiciary [A]ct of the United States ... that court has jurisdiction"); *Bailey v. Fitzgerald*, 56 Miss. 578, 586-88 (1879) (recognizing, in a Contracts Clause case, that the state court was obligated to follow Supreme Court precedent where the Supreme Court could review the decision under the Judiciary Act provision allowing for review of a state ruling upholding the validity of a state statute against a federal constitutional challenge); *Susquehanna Canal Co. v. Commonwealth*, 72 Pa. 72, 78 (1872) (stating, in a Contracts Clause case, that "[w]e are not bound by the decisions of our Supreme Court, except in cases arising under the Constitution of the United States, or where the Federal judiciary has superior jurisdiction. Should these courts hold that . . . [the challenged statute] impairs the obligations of the contract ... our judiciary must give way"); *see also* *Thurston v. Fisher*, 9 Serg. & Rawle 288, 293 (Pa. 1823) (writing, in a case involving an interpretation of a statute of limitations, that "all the decisions of [the United States Supreme Court] are entitled to great respect; but unless in cases where it has appellate jurisdiction, and may revise and correct the decisions of the state courts, its opinions are not conclusive").

⁴⁸ For example, in 1825, Justice John Gibson of the Pennsylvania Supreme Court urged that, because the 1789 Judiciary Act did not allow the United States Supreme Court to review state court decisions invalidating state laws on federal constitutional grounds, state courts should be especially careful in striking down state legislation as violating the Federal Constitution. *Eakin v. Raub*, 12 Serg. & Rawle 330, 335-57 (Pa. 1825) (Gibson, J., dissenting).

⁴⁹ 14 U.S. 304 (1816).

⁵⁰ *See, e.g.*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 615 (Kermit L. Hall ed., 2d ed. 2005) (describing Story's opinion as "a landmark in the history of federal judicial supremacy" because it "insisted that the power to interpret the Constitution had to rest with one ultimate source of authority").

during the Revolutionary War.⁵¹ That decision therefore fell within the Supreme Court's appellate jurisdiction under section 25 of the Judiciary Act and on review, in the first appeal in the case and with an opinion by Justice Story, the Supreme Court reversed, holding the land belonged to Thomas Martin pursuant to the treaty, and entering judgment in his favor.⁵² However, the Virginia Court of Appeals refused to obey that ruling, held anew that Martin lacked title to the land, and, further, that section 25, which authorized review in the case, was unconstitutional.⁵³ Story's subsequent opinion in *Martin*, then, came not merely upon review of a decision of a state court in a case falling within the scope of section 25, but in the face of a specific state court refusal to comply with what the Court had already directed in a case properly before it. The context, one Story notes at the outset of his opinion,⁵⁴ is crucial to understanding *Martin's* reach: in a case from a state court properly before the Supreme Court pursuant to section 25, the Supreme Court is superior to the state court that rendered the decision, and the state court is required to comply with the Supreme Court's rulings.⁵⁵

Likewise, while commentators emphasize Story's concern in *Martin* with ensuring the uniformity of federal law,⁵⁶ that reading is also exaggerated. Story's discussion of uniformity in *Martin* comes in his speculations about the reasons the "enlightened convention which formed the [C]onstitution"⁵⁷ assigned the Supreme Court its appellate powers. One "motive," Story suggests, that "might induce the grant of appellate power" over state court decisions, is "the importance and

⁵¹ *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 618-27 (1812).

⁵² *Id.* at 628.

⁵³ *See* 14 U.S. at 323 (reporting the state court decision).

⁵⁴ *See id.* at 323 ("This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court"); *see also id.* at 366 (Johnson, J.) ("In the case before us, the collision has been, on our part, wholly unsolicited.").

⁵⁵ *See id.* at 351 ("[T]he court are of the opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the [J]udiciary [A]ct, which authorizes the exercise of this jurisdiction in the specified cases . . . is supported by the letter and spirit of the [C]onstitution."); *id.* at 353 ("The case . . . falls directly within the terms of the [A]ct.").

⁵⁶ *See, e.g.,* Hall, *supra* note 50 at 615 ("Without Story's decision, the Supremacy Clause . . . would have lost much of its salience, since the states would not have been bound to conform their laws to a national constitutional standard.").

⁵⁷ 14 U.S. at 348.

even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the [C]onstitution,” given the “public mischiefs” that could result if “the laws, the treaties, and the [C]onstitution . . . differ[ed] in different states.”⁵⁸ Though uniformity accounts for the constitutional grant, Story must have understood that, given the limitations of section 25, there would not be uniformity on federal constitutional issues. This, then, perhaps explains why Story suggests a quite specific kind of uniformity: a common floor of federal constitutional rights throughout the country. “The [C]onstitution,” he says, “was designed for the common and equal benefit of all the people of the United States.”⁵⁹ Supreme Court review ensured that a state court did not deprive a party “of all the security which the [C]onstitution intended in aid of his rights.”⁶⁰ State court rulings might, then, vary, but not so as to deny constitutional rights.

This, then, leads to the most remarkable form of state court authority. The early state courts, hearing challenges to state laws, developed a sophisticated body of constitutional law derived from the federal Bill of Rights. Notwithstanding the U.S. Supreme Court’s refusal, in 1833, in *Barron v. Baltimore*, to apply the Fifth Amendment to state government,⁶¹ in a series of cases the early state courts invoked provisions of the federal Bill of Rights, particularly the Second, Fourth, Fifth, and Sixth Amendments, to invalidate state laws and otherwise constrain state government.⁶² Although as a matter of

⁵⁸ *Id.* at 347-48. *See also* *Cohens v. Virginia*, 19 U.S. 264, 415-16 (1821) (similar).

⁵⁹ 14 U.S. at 348.

⁶⁰ *Id.* at 349.

⁶¹ 32 U.S. (7 Pet.) 243 (1833) (dismissing for lack of jurisdiction a Fifth Amendment Takings Clause claim against the City of Baltimore).

⁶² *See, e.g.*, *Young v. McKenzie*, 3 Ga. 31, 45 (1847) (invoking the Fifth Amendment Takings Clause to require the state to compensate a property owner); *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that while the state legislature could prohibit the carrying of concealed weapons, a law generally prohibiting possession of weapons violated the Second Amendment); *Bonsell v. United States*, 1 Greene 111, 115 (Iowa 1848) (applying the Sixth Amendment’s requirement that a defendant be informed of the nature and cause of the accusation to state court proceedings); *Larhet v. Forgay*, 2 La. Ann. 524, 525 (1847) (affirming a civil jury award for a warrantless search of a cigar shop and reasoning that the search violated the Fourth Amendment prohibition on unreasonable searches and seizures); *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820) (applying the Fifth Amendment Double Jeopardy Clause to state court proceedings).

federal constitutional law enforced by the federal courts, the Bill applied only to the national government, the state courts understood the Bill to set out general constitutional principles applicable to state legislatures and executives alike—even when no provision of the applicable state constitution imposed any such constraint on state government.⁶³ The jurisdictional limits of the 1789 Judiciary Act protected these state court decisions applying the Bill of Rights from review by the U.S. Supreme Court.⁶⁴ In other words, state courts could apply more generous constitutional protections against state government than the U.S. Supreme Court was willing to impose, without fear of review.

C. The Shift to Formal Supremacy

As a formal matter, the authority to decide what the Constitution means is no longer shared. Instead, the Supreme Court determines the meaning of the Constitution, its decisions are binding on the state courts (and the lower federal courts), and it has the ability to correct any state court deviations from its rulings. Thus, while under the 1789 Judiciary Act, the Court could only review the holding of a state supreme court rejecting a federal constitutional claim made against state government, today a statute allows the Court to hear any decision by a state supreme court presenting a federal issue.⁶⁵ The Court's formerly limited jurisdiction permitted state courts, in reviewing state laws, to expand federal constitutional rights beyond those recognized by the federal judiciary; the modern Court's plenary jurisdiction means that any inconsistent state court decision—expanding or contracting federal rulings—is subject to correction.

So, too, the Court's incorporation of most of the protections of the Bill of Rights against the states has, formally, displaced the autonomy of the state courts. Incorporation, coupled with modern federal question jurisdiction, means plaintiffs can now bring claims in federal court against state government for violations of the Bill of Rights. In addition, because the protections of the Bill of Rights apply equally—"with full force"⁶⁶—to the states as to the federal

⁶³ See Mazzone, *supra* note 17, at 23-55 (collecting and analyzing state court decisions invoking the Bill of Rights against state government).

⁶⁴ Act of Sept. 24, 1789, § 25, ch. 20, 1 Stat. 73.

⁶⁵ 28 U.S.C. § 1257 (a) (2000).

⁶⁶ *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

government,⁶⁷ state courts are no longer supposed to interpret the Bill independently, or to derive general principles of constitutional law.⁶⁸ Instead, state courts are deemed bound by whatever the U.S. Supreme Court says the Bill of Rights requires—no less and no more.⁶⁹ For example, if the Court holds that the death penalty does not violate the Eighth Amendment, a state court is not free to hold that the death penalty is, as a matter of federal constitutional law, unconstitutionally cruel and unusual punishment.⁷⁰ “[A] state court can neither add to nor subtract from the mandates of the United States Constitution”⁷¹ as it is interpreted by the Court. Against this general pattern, the Warren Court played a specific role in diminishing state court authority, with expanded readings of the provisions of the Bill of Rights, especially of those provisions protecting criminal defendants, and aggressive incorporation of those rights against the states,⁷² backed up by expansive understanding of federal jurisdiction.⁷³ Though the Burger

⁶⁷ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (“We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States.”). The only provisions of the Bill of Rights the Supreme Court has not incorporated against the states are the Second Amendment, the Third Amendment, the Fifth Amendment grand jury requirement and the Seventh Amendment civil jury requirement.

⁶⁸ See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments.”).

⁶⁹ See, e.g., *State v. Gomez*, 163 S.W.3d 632, 650 (Tenn. 2005) (“Like all Tennessee courts, this Court is bound by the United States Supreme Court’s interpretation of the United States Constitution”); *People v. Kin Kan*, 78 N.Y.2d 54, 59 (N.Y. 1991) (“All courts are, of course, bound by the United States Supreme Court’s interpretations of . . . the Federal Constitution”).

⁷⁰ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989) (affirming state court conviction and holding death penalty imposed on juveniles does not violate Eighth Amendment), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005); *Gregg v. Georgia*, 428 U.S. 153 (1976) (affirming state court conviction and holding death penalty not a per se violation of the Eighth Amendment).

⁷¹ *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

⁷² On these Warren Court developments, see generally DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* (2003); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

⁷³ See Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 957 (1991) (“Many legal scholars believe that the Warren Court increased access to federal courts to give an advantage to the individual who claims a violation of her rights and the Burger-Rehnquist Courts have restricted access to federal courts to cut

Court and the Rehnquist Court pruned some of the Warren Court's innovations,⁷⁴ the overall legacy is state government deemed bound by expansive constitutional rules as articulated and enforced by the Supreme Court. Early state courts worked independently with the federal Constitution. Modern state courts are meant to be "faithful agents of the Supreme Court in applying federal law."⁷⁵

D. The Persistence of Shared Authority

Though as a formal matter, the Supreme Court is authoritative, and has the last word on the meaning of the Constitution, in practice, the Court is often not supreme at all. Instead, state courts are responsible for determining the meaning and requirements of the federal Constitution, with little or no likelihood of review by the Supreme Court.

Whether, and to what extent, the state courts actually decide constitutional issues in ways that depart from Supreme Court precedent is, of course, a separate question. A state court, even if its decision is not subject to correction by the Supreme Court, might nonetheless adhere to what the Supreme Court has said the Constitution requires. The state court might take the position that the Supreme Court should be followed even if there is no or little likelihood of review. The state court might agree with what the Supreme Court has said or be uninterested in offering a new interpretation. The state court might rely on Supreme Court precedent in order to deflect criticism from the state's own residents. The state court might not understand that, as a practical matter, its ruling will not

back on those rights.") (footnote omitted); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 234-35 (1988) (discussing how the Warren Court expanded habeas corpus for state prisoners and the scope of relief under 42 U.S.C. § 1983, limited the circumstances in which federal courts should abstain and minimized the preclusive effect of state court judgments).

⁷⁴ See David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 101 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995); Chemerinsky, *supra* note 73, at 235 (discussing how the Burger Court had greater confidence in state processes and so narrowed the scope of federal jurisdiction).

⁷⁵ Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 363 (2002).

be subject to correction. It is not my purpose here to determine the extent to which, and the ways in which, state courts are inclined to depart from Supreme Court precedent. However, work by other commentators sheds some light. There is a rich debate by commentators, concerned with the effects of the Court's very small docket, over the degree to which the state courts (and lower federal courts) in practice adhere to the Supreme Court's precedents.⁷⁶ In addition, in his important article, Professor Bloom has shown that on some questions, state courts have been able to get away with actively defying the Supreme Court.⁷⁷ Further work along these lines will be needed to sort out the actual effects of the authority state courts enjoy as a practical matter.

a. The Constitution as State Law

⁷⁶ See, e.g., Sara C. Benesh & Wendy L. Martinek, *State Court Decision Making in Confession Cases*, 23 JUSTICE SYS. J. 109 (2002) (analyzing 661 state court confession cases and concluding that state courts generally complied with federal supreme court precedent); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1219, 1241 (2004) (writing that “no one plausibly can argue that Supreme Court review” suffices to “address federal interests” implicated in state court cases and that “disuniformity and assuring the supremacy of federal law are serious problems . . . in light of the Supreme Court’s limited capacity to superintend the fifty state court systems.”); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35-36 (2005) (estimating that the Supreme Court reviewed 0.12% of the potentially reviewable state and federal decisions reached in 2003 and concluding that “the extraordinary growth in the ratio of lower court to Supreme Court decisions” means that “it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations . . . [and] [i]nstead, it must perforce act legislatively.”); David W. Romero & Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 LAW & SOC. REV. 809, 819 (2003) (comparing federal and state court responses to the Supreme Court’s decision in *Brown* and concluding that “dramatic changes occurred, but only at the federal level”); Solimine, *supra* note 75, at 359 (“Whether under an expanded or shrunken docket . . . the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function.”). The Supreme Court disclaims a general supervisory power over state courts. See *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (“It is beyond dispute that we do not hold a supervisory power over the courts of the several States.”); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (“Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.”).

⁷⁷ Fred Bloom, *State Courts Unbound*, __ Cornell L. Rev. __ (2008).

Some constitutional questions turn on issues of state law, on which state courts are authoritative. Whether a contract exists for purposes of the Contracts Clause of Article I⁷⁸ is an issue of state law.⁷⁹ The Fourteenth Amendment prohibitions on depriving persons of liberty or property without due process of law depend upon property or liberty interests created by state law.⁸⁰ Whether a state proceeding is criminal for purposes of the Self-Incrimination Clause of the Fifth Amendment is “first of all a question of statutory construction.”⁸¹ The Double Jeopardy Clause’s prohibition on being “subject for the same offence to be twice put in jeopardy” depends upon a state legislature’s definition of each offense.⁸² Whether there is a right to counsel under

⁷⁸ U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”).

⁷⁹ [Add cites]

⁸⁰ *Cleveland Bd. Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (holding that because state law created a property interest in a teacher’s continued employment, that interest could not be terminated except in accordance with due process); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (“The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law.”); *Vitek v. Jones*, 445 U.S. 480, 490-91 n.6 (1980) (“While the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” (quotation omitted)); *Perry v. Sindermann*, 408 U.S. 593, 602 (1977) (explaining, in a case involving a teacher’s due process challenge to the state’s decision not to rehire him, that “[if] it is the law of Texas that a teacher in the respondent’s position has no contractual or other claim to job tenure, the respondent’s [due process] claim would be defeated.”); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules”) (holding that the Constitution does not require an opportunity for a hearing before the nonrenewal of a non-tenured teacher’s contract without a further showing that the teacher had a property interest in continued employment). Though the Court has also recognized that there are limitations on what kinds of state-created interests qualify for protection under the Due Process Clause. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 (2005) (rejecting a claim that the police’s failure to enforce a restraining order was a violation of due process because the state did not create a property interest in having the order enforced, and noting that “it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.”).

⁸¹ *Allen v. Illinois*, 478 U.S. 364, 368 (1986) (rejecting challenge to state court determination that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal).

⁸² *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (explaining that determining whether two offenses are the same requires asking whether each offense “requires proof of an additional fact that the other does not.”).

the Sixth Amendment depends on whether a state has made the offense at issue punishable by incarceration.⁸³ In Fourth Amendment cases, the Court has taken account of state laws in assessing what constitutes an unreasonable search or seizure.⁸⁴

Application of the Takings Clause to the states depends on the state law property regime. In the context of takings, the Supreme Court has recognized that there exists a unique relationship between federal constitutional law and state law.⁸⁵ A plaintiff's claims that a state has violated the federal Constitution by taking property without just compensation depends upon the plaintiff having a right recognized under state law—the law that defines and protects property interests.⁸⁶ “The baseline against which any regulation is measured is . . . derived from state law: if background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property.”⁸⁷ Adjudication of a takings claim against state government necessarily depends upon the state courts. A federal court asked to decide a takings claim against state government must look to state property law as construed by the state court; the Supreme Court, if it

⁸³ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁸⁴ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 331-35, 355-60 (2001) (relying upon state laws of arrest to hold that the Fourth Amendment does not prohibit arresting for an offense that only carries a fine); *Tennessee v. Garner*, 471 U.S. 1, 17-21 (1985) (canvassing state statutes and practices in striking down a state statute allowing the police to use deadly force on fleeing suspects); *United States v. Watson*, 423 U.S. 411, 422-23 (1976) (invoking state law practices in determining that a warrantless arrest for a crime committed in an officer's presence does not violate the Fourth Amendment).

⁸⁵ To be sure, these reasons might support giving state courts authority both to contract and expand the Court's takings cases. [Check this: What if individual loses—how do those cases currently come out—isn't that San Remo?—we wouldn't want state courts to cut back would we?—isn't there also a difference here b/c the every right itself is dependent on state law so that it's not the same as cutting back on a right because the right itself has shifted according to the state law at issue—need to deal with this]

⁸⁶ See, e.g., *Philips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law”) (quotation omitted) (holding that interest earned on client trust funds held by lawyers in IOLTA accounts is the property of the client for purposes of the Takings Clause). See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

⁸⁷ Sterk, at 288.

reviews a state court ruling also follows the state court interpretation of state property law. Moreover, landowners bringing Takings Claims against state government typically invoke the full array of tools state courts have developed to constrain state and local government.⁸⁸ As a result, even when the Court has reviewed a Takings Clause claim rendered by a state court, it has tended to defer to what the state court has done. As Professor Sterk notes, the U.S. Supreme Court has never invalidated a state or local government regulation under the Penn Central balancing test, and so “[t]he effect, if not the expressed intent, of the Court’s Penn Central jurisprudence has been to delegate resolution of takings claims to the state supreme courts.”⁸⁹

True, the Supreme Court has on occasion reviewed state courts’ determinations of antecedent state law questions where there are federal constitutional issues at stake.⁹⁰ These cases are noteworthy because they are so unusual.⁹¹ As Professor Young reminds us, the relevant data set is not the reported decisions in which the Court decides to construe state law issues, but all of the cases in which it exercises no review at all:

⁸⁸ See Sterk at 291 (discussing how state courts can invalidate land use regulation claims based on inadequate statutory authority, state preemption principles and state constitutional provisions and review land use decisions to determine whether they are arbitrary, unreasonable or not supported by substantial evidence).

⁸⁹ Sterk, at ___.

⁹⁰ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (reviewing state court interpretation of state election law); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (reviewing a state court’s determination, contrary to precedent, that a state trespass law applied to black sit-in demonstrators); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466-67 (1958) (reviewing a state court ruling on an issue of state procedural law in a case involving a contempt judgment entered against the NAACP); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (reviewing a state court decision as to whether state law created a contract for purposes of the contracts clause of Article I); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch.) 603, 618-28 (1813) (disagreeing with the Virginia state court that a 1782 state law extinguished the property interests of Denny Fairfax, such that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 treaty with Great Britain).

⁹¹ See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1193 (2005) (“State law questions are antecedent to federal ones in a vast range of cases. . . . And yet the Supreme Court refuses to accept state court interpretations of state law as binding in only a small fraction of cases.”).

[W]hen the Court determines that a state law ground blocks review of a federal issue, the ordinary result is an unexplained denial of certiorari rather than an opinion . . . affirming the plausibility of the state court’s interpretation of state law. . . . [B]ecause the Court only takes the cases in which it has decided not to respect the antecedent state law ground, simply reading the reported decisions like *Fairfax’s Devisee* or *Brand* or *Bush v. Gore* could create the impression that the Court routinely reverses state courts on state law questions. But that is hardly the case.⁹²

Many of the cases in which the Court has reviewed state court rulings on state law issues have involved special concerns with the adequacy or fairness of state proceedings.⁹³ And even in such cases, the Court has accorded some deference to the state courts.⁹⁴

(b) Facts and Laws

Though we tend to think of constitutional provisions as a matter of constitutional law, many constitutional decisions turn on factual determinations. Many such factual determinations, when made by state

⁹² *Id.* at 1193 n.210.

⁹³ See *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (declining “[t]o attach definitive weight to the pronouncement of a state court . . . when the very question is whether the court has actually departed from the statutory meaning”); *Bouie*, 378 U.S. at 362 (“We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause”); *Patterson*, 357 U.S. at 457-58 (“Novelty in procedural requirements cannot be permitted to thwart review in this Court.”). *Fairfax’s Devisee* arose at a time of state hostility to the Court and to the claims of British creditors. See generally Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003).

⁹⁴ In *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944), the Court adopted a fair support standard, under which “if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.” *Id.* (quoting *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930)). It has not, however, applied this standard consistently. See, e.g., *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring) (explaining the need for the Court to “undertake an independent, if still deferential, analysis of state law”).

courts, are reviewed, if at all, under a highly deferential standard.⁹⁵ In the field of criminal procedure, many issues turn on highly specific determinations of fact and applications of general standards to particularized circumstances.⁹⁶ So, too, the Fourteenth Amendment prohibits not a denial of the equal protection of the laws, but only a denial that is purposeful, an issue that requires a context-specific assessment of why the state did what it did.⁹⁷ Whether a state has violated the dormant commerce clause involves factual determinations about the benefits of the challenged state program and its effects on interstate commerce.⁹⁸ The purpose of a state law is important to determining many issues of federal constitutional law, including whether the statute violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, or the Dormant Commerce Clause. The Court's general approach is to defer to the state court's understanding of a state law's purpose.⁹⁹ In some

⁹⁵ Though the Court has at times reviewed de novo "constitutional facts," facts that determine the outcome of claims of individual rights. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 696-98 (1996) (holding that determinations as to probable cause and reasonable suspicion are reviewed de novo); *Miller v. Fenton*, 474 U.S. 104, 109-11 (1985) (holding that the voluntariness of a confession is reviewed de novo); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) (holding that in defamation cases "actual malice" is reviewed de novo); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (holding that there is de novo review of facts in obscenity cases); For example, in the First Amendment context, whether allegedly obscene material contains serious value is a constitutional fact.

⁹⁶ *See, e.g.*, [add descriptions of cases]

⁹⁷ *See City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment"); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

⁹⁸ *See, e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁹⁹ *See, e.g.*, *See Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (accepting state court finding, in a Fifth Amendment Takings case, that a city development plan did not have the "illegitimate purpose" of "benefit[ing] a particular class of identifiable individuals."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("We must, of course, accept the state court's view of the purpose of its own law") (accepting a state court's analysis that the purpose of a state constitutional provision was to circumvent federal constitutional standards for eligibility for federal office and affirming the state court's invalidation of the provision); *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 (1987) (accepting state trial court's findings that opening exercise in public schools was a religious ceremony and was intended by the State to be so and therefore violated the Establishment Clause).

cases, the Court has rejected a state court's finding of purpose. But, again, in many such cases, the Court has expressed concern with the fairness or sufficiency of state proceedings.¹⁰⁰

(c) Off the Radar

Many state court decisions in cases involving federal constitutional issues do not attract sufficient attention to subject them to correction. State courts can obscure rulings in elaborate factual determinations,¹⁰¹ in determinations of mixed questions of law and fact,¹⁰² and by providing multiple reasons in support of the ultimate disposition of a case.¹⁰³ Many state court decisions are not published or otherwise reported; rulings of state appellate courts may take the form of summary orders that render difficult further scrutiny of the actual basis for the outcome.¹⁰⁴ Even if the state court rules incorrectly on a federal constitutional issue, the error might be deemed harmless and therefore not alter the result.¹⁰⁵

¹⁰⁰ See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that although the state court had found a statute requiring the posting of the Ten Commandments in public schools had an avowed secular purpose, this was insufficient under the Establishment Clause where the statute had a pre-eminent religious purpose); cf. *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”). In some cases, the Court has overturned a state appellate court’s decision to reject the state trial court’s finding of purpose. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Com’n*, 488 U.S. 336, 341, 346 (1989) (reversing state supreme court ruling that reversed the trial court’s finding that tax assessors had engaged in intentional and systematic discrimination in violation of the Equal Protection Clause). See also *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) [check this—is Court substituting it’s own purposes for those found by the state courts or is it deferring to state *trial* court—where do the purposes come from?]

¹⁰¹ [RA]

¹⁰² [RA]

¹⁰³ [RA]

¹⁰⁴ See EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURTS STATISTICS PROJECT 45 (Robert C. LaFountain et al. eds 2007), available at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html (presenting data for 2005 on state appellate courts’ rates of disposition without opinion).

¹⁰⁵ See, e.g., [RA: collect some cases re standard and examples]

(d) Criminal Cases

State courts bear primary responsibility for applying the provisions of the federal Constitution that protect the rights of criminal defendants. State courts hear far more criminal cases than do the federal courts. In 2006, 20.8 million criminal cases were filed in the state courts.¹⁰⁶ Every one of these criminal case implicates federal constitutional rights. In every state criminal prosecution, the state court must ensure that there is no violation of the defendant's federal constitutional rights, including the rights against unreasonable searches and seizures, to confront witnesses, to a speedy trial, to due process, and (where applicable) to the assistance of counsel, are not violated.

The Supreme Court's small docket means that few state criminal cases are reviewed by the U.S. Supreme Court. Yet this is only the tip of a much bigger iceberg. The only state criminal cases that are subject to review by the Court are those in which a defendant has been convicted at trial and has exhausted the state appellate processes. Most criminal cases are not resolved by trial; most criminal convictions come about through guilty pleas, often pursuant to plea bargains under which the defendant waives any right of appeal.¹⁰⁷ Many criminal defendants who are convicted do not appeal their convictions,¹⁰⁸ nor seek habeas review in federal court.¹⁰⁹

So, too, if the defendant has been acquitted, the Double Jeopardy Clause prevents the state from appealing, and the Supreme Court from reviewing, the acquittal. This is true even if the case involves important issues of federal constitutional law. The state court might have ruled on federal constitutional issues in ways that departed from the Court's precedents and in ways that favored the defendant—excluding evidence, for example, or suppressing a confession—but there is no review of those rulings following an acquittal.

An erroneous ruling is also not likely to be corrected by the Supreme Court at the time it is made. The Supreme Court generally only reviews the final judgment of a state's highest court—there is no

¹⁰⁶ EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURTS STATISTICS PROJECT 45 (Robert C. LaFountain et al. eds 2007), available at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

¹⁰⁷ [RA: get data] [DOJ/BJS has it]

¹⁰⁸ See *id.* at 71 (reporting that in 2005, 82,553 criminal appeals were filed in state appellate courts) (follow link to Excel data).

¹⁰⁹ [RA: get figure]

statutory mechanism for federal interlocutory review of state court decisions.¹¹⁰ The Court has recognized four situations where there is sufficient finality, to allow review, even though there are additional proceedings on the merits in state court, but these are of limited availability.¹¹¹ One of the four is where the state's highest court has ruled on a federal issue, and the only opportunity for the Supreme Court to review that ruling is before remand to the lower state courts.¹¹² In a handful of criminal cases, the Court has invoked this concern and reviewed rulings by state courts in criminal cases prior to trial. The most recent example is in *Kansas v. Marsh*.¹¹³ The case involved a defendant convicted by a jury in Kansas state court of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary; the jury sentenced the defendant to death on the capital murder charge and to prison terms for the other three crimes.¹¹⁴ On appeal, the Kansas Supreme Court held the Kansas death penalty statute facially unconstitutional because it required a death sentence where aggravating and mitigating circumstances were in

¹¹⁰ 28 U.S.C. § 1257(a) (2006) (limiting Supreme Court review to “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987) (“This Court is without jurisdiction to review an interlocutory judgment.”). *See also* *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (explaining that “the state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.”) (quotation omitted).

¹¹¹ *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-480 (1975). These are: (1) Where there are further state proceedings but where “the federal issue is conclusive or the outcome of the further proceedings preordained.” *Id.* at 479. This arises when the state court has resolved the federal issue and the remaining state issues involve mere formalities, rather than the adjudication of a factual or legal dispute, and so the end result is assured. *See id.* (2) Where “the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.” *Id.* at 480. This means, in other words, that further state proceedings will not render the federal issue moot. (3) “Where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.” *Id.* at 481. (4) Where there has been a final ruling on the federal issue in the state courts and review is necessary to prevent the “ero[sion of] federal policy.” *Id.* at 483.

¹¹² *See id.* at 481.

¹¹³ 126 S. Ct. 2516 (2006).

¹¹⁴ *Id.* at 2520.

equipoise.¹¹⁵ The Kansas Supreme Court also found that the trial court committed reversible error by excluding circumstantial evidence of third-party guilt with respect to the capital murder and aggravated arson charges.¹¹⁶ The Kansas Supreme Court therefore affirmed the conviction and sentence for aggravated burglary and premeditated murder, and reversed and remanded for new trial the convictions for capital murder and aggravated arson.¹¹⁷ The Supreme Court granted review. Writing for the Court, Justice Thomas explained why review prior to the disposition of the case on remand was proper:

Although Marsh will be retried on the capital murder and aggravated arson charges, the Kansas Supreme Court's determination that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its death penalty law later in this case. If Marsh is acquitted of capital murder, double jeopardy and state law will preclude the State from appealing. If he is reconvicted, the State will be prohibited under the Kansas Supreme Court's decision from seeking the death penalty, and there would be no opportunity for the State to seek further review of that prohibition.¹¹⁸

By "state law," Thomas referred to a Kansas statute setting out the circumstances in which the prosecution could appeal a trial court's decision to the Kansas appellate courts; according to Thomas, none of the circumstances provided for in the statute would permit the state to seek review of the invalidation of the death penalty statute.¹¹⁹

¹¹⁵ *Id.* at 2521.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2521.

¹¹⁹ *See id.* at 2521. Whether Thomas' assessment is correct is not entirely clear. On remand, the jury could find the defendant guilty of capital murder. The prosecutor could ask for the death penalty—which the sentencing court would deny in accordance with the state court ruling. The prosecutor could then seek review of that denial. *See Johnson v. California*, 541 U.S. 428, 430-31 (2004) (per curiam) (dismissing for lack of jurisdiction a case in which the Supreme Court of California reversed the Court of Appeal's decision reversing the petitioner's conviction on *Batson* grounds, because if the Court of Appeal affirms the judgment of conviction,

Marsh, then, presented the unusual confluence of the state’s highest court vacating the sentence while ordering a new trial on other grounds and a state law that (as Thomas read it) limited the ability of the prosecutor to appeal.¹²⁰ So, too, in a small number of other criminal cases, many of which also involve unusual procedural histories, the Court has reviewed state court rulings on federal issues prior to the end of trial.¹²¹ However, these cases are sufficiently uncommon that this route to review, one that commentators find “questionable,”¹²² is not likely to be reliable.

Moreover, trials account for the resolution of only a tiny portion of criminal cases. Most criminal prosecutions are resolved through a guilty plea, often as a result of a plea bargain.¹²³ Those

“the petitioner could again seek review of his *Batson* claim in the Supreme Court of California—albeit unsuccessfully—and then seek certiorari on that claim from this Court.”) [find out what sentence he got on remand]

¹²⁰ Cf. *Florida v. Thomas*, 532 U.S. 774, 780-81 (2001) (dismissing writ of certiorari for lack of jurisdiction where state law allows the state to appeal a ruling by the trial court excluding evidence so long as the appeal is made prior to trial)

¹²¹ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 49 (1987) (holding that there was a final judgment where the state supreme court held that the Sixth Amendment gave the defendant a right to examine records concerning the victim maintained by Children and Youth Services that the state sought to keep confidential, because “unless we review that decision, the harm that the Commonwealth seeks to avoid—the disclosure of the entire confidential file—will occur regardless of the result on remand.”); *Florida v. Meyers*, 466 U.S. 380, 381 n.1 (1984) (per curiam) (holding that the state appellate court’s decision ordering a new trial because of a Fourth Amendment violation was a final judgment because “if the State prevails at the trial, the issue will be mooted; and if the State loses, governing state law will prohibit it from presenting the federal claim for review” (citations omitted)); *New York v. Quarles*, 467 U.S. 649, n.1 (1984) (holding that a suppression ruling, prior to trial, was a final judgment because “should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal.”); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983) (holding that the Court has jurisdiction to review a state court ruling prior to trial on a Fifth Amendment issue, and ordering a hearing, because “if the state ultimately prevails at trial, the federal issue will be mooted; and if the state loses at trial, governing state law, prevents it from again presenting the federal claim for review.”) (citations omitted); *California v. Stewart*, 384 U.S. 436, 498, n.71 (1966) (holding that there was a final judgment because after state supreme court ordered a new trial, “[i]n the event respondent was successful in obtaining an acquittal on retrial . . . under California law the State would have no appeal.”). **[RA: see if other cases; check secondary literature on this issue also]**

¹²² ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 693 (2007).

¹²³ [RA]

cases—because a condition of the plea is typically an agreement not to appeal—are not reviewed by the Supreme Court. Yet those cases raise issues of federal constitutional law decided by state courts. After the prosecution has been initiated, the state court may have ruled on the admissibility of physical evidence, for example, or determined which witnesses can be called and the things they can be asked. Once the guilty plea is entered, those rulings are not subject to review. So, too, state magistrate judges routinely apply the federal Constitution in issuing warrants—to search for and seize evidence, to arrest suspects, to tap phones—before prosecution even begins. Those rulings are not subject to review if, ultimately, there is no prosecution, or if the case is resolved by a plea bargain and guilty plea or other settlement.

We imagine that the Supreme Court decides the scope of the rights the Constitution gives criminal defendants, and that state courts implement those decisions—subject to review if they stray from what the Court has said is required. This image could not be more wrong. Many rulings by state courts on federal constitutional issues are not subject to any kind of review—state courts operate beyond the range of the Court’s purview.

(e) Preclusion

Section 1983 provides a vehicle for seeking redress of federal constitutional violations by state governmental actors.¹²⁴ Though state plaintiffs are not required to exhaust state court remedies before bringing a section 1983 claim in federal court, the Supreme Court has held that state court proceedings are preclusive of subsequent section 1983 claims brought in federal court. In *Allen v. McCurry*, the Court held a state court ruling in a criminal case had collateral estoppel effect in a later section 1983 action in federal court.¹²⁵ The case involved a criminal defendant who raised a Fourth Amendment objection at trial to the admission of evidence that he said was obtained pursuant to an unlawful search; the state court rejected the defendant’s argument and he was convicted; he later filed a section 1983 suit against the officers who conducted the search.¹²⁶ The Court held that the state court

¹²⁴ 42 U.S.C. § 1983.

¹²⁵ *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980) (holding that collateral estoppels precludes a section 1983 claim based on a Fourth Amendment violation following the state court proceeding).

¹²⁶ *See id.* at 90-93.

determination that the search was lawful precluded re-litigation of the issue in a section 1983 action in federal court.¹²⁷ In *Migra v. Warren City School District*, the Court further held that res judicata applies to prevent plaintiffs in section 1983 suits from raising claims that could have been litigated in a prior state court action.¹²⁸ The case involved a fired school board employee who sued in state court and won on state law contract claims, and who then brought a section 1983 claim in federal court based on the First Amendment.¹²⁹ The Court held that because the plaintiff's section 1983 claim was based on the same set of facts as her lawsuit based on state contract law, and therefore could have been brought at the same time in state court, res judicata barred the claim.¹³⁰

A section 1983 plaintiff might elect to begin in federal court and thereby avoid the preclusive effect of a state court ruling. However, this is not likely to be a viable option for criminal defendants, as in *McCurry*.¹³¹ For state civil plaintiffs, as in *Migra*, there is a separate problem. In *Pennhurst*, the Court held that the Eleventh Amendment prohibits federal courts from hearing pendent state law claims against state officers.¹³² Once *Pennhurst* is combined with *Migra*, a plaintiff with both state and federal claims against a state officer might choose to split the claims, but with the risk that a state court will decide the state claims first, precluding the federal

¹²⁷ *Id.* at 97-98 (explaining that the language of section 1983 evinces no congressional intent to depart from common law rules of preclusion or to abrogate the full faith and credit statute, 28 U.S.C. § 1738). Note that the question under section 1738 is whether a state court would give preclusive effect—if not, the federal court need not do so either.

¹²⁸ *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). *See also* *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (state court ruling that employee's discharge not based on national origin or religion precludes litigation of same issue in federal Title VII action). **[These are different though from San Remo—b/c in state court you had a hearing—perhaps make the point in a footnote re special kind of preclusion rule in state.]**

¹²⁹ *See Migra*, 465 U.S. at ___.

¹³⁰ *See id.* at ___.

¹³¹ In addition, the defendant in *McCurry* could not have raised the Fourth Amendment claim in a federal habeas petition. *See Stone v. Powell*, 428 U.S. 465, 482 (1976) (holding that where the state has provided a full and fair opportunity to litigate a Fourth Amendment exclusionary claim, the claim cannot be brought in a habeas petition).

¹³² *Pennhurst State Sch. & Hospital Sys. v. Halderman*, 465 U.S. 89 (1984).

court from deciding the federal claims.¹³³ To be sure, there may be the possibility of direct review by the U.S. Supreme Court of a state court ruling on a federal constitutional issue—but not, as in *Migra*, if the claim was never decided by a state court and a dispute that includes federal constitutional allegations is resolved on state law grounds.¹³⁴

(f) Summary

III. THE AUTHORITY OF STATE COURTS

The operation of statutory and doctrinal rules gives state courts special authority in two areas of federal constitutional law: the Fifth Amendment Takings Clause, and the criminal procedural protections of the Fourth, Fifth, and Sixth Amendments.

A. Takings

State courts today enjoy vast authority in cases involving the Takings Clause of the Fifth Amendment. An unusual mix of ripeness and preclusion doctrines prevents most Fifth Amendment takings claims against state government agencies from being heard in any federal court at all. The emergence of state court authority begins with the Supreme Court's 1985 decision in *Williamson County*.¹³⁵ The Court held that because the Fifth Amendment prohibits state government from taking property only if the state does not provide just compensation, a claim that a government regulation of property effects an unconstitutional taking is not ripe unless the property owner has sought and failed to obtain compensation from the state agency responsible for enforcing the regulation through existing state procedures including state court procedures.¹³⁶ *Williamson County*

¹³³ See Chemerinsky, *supra* note ___, at 592 (discussing this problem).

¹³⁴ It is also important to note that state proceedings only have preclusive effect if there was a “full and fair opportunity” to present the federal claim. *McCurry*, 449 U.S. at 101.

¹³⁵ *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

¹³⁶ *Id.* at 194-95.

involved a landowner who in a suit brought under section 1983 won a jury award in federal district court against a local government for taking his property by application of local land use regulations.¹³⁷ The Sixth Circuit upheld the jury award,¹³⁸ but the Supreme Court reversed,¹³⁹ holding the landowner's claim was not ripe, for two reasons. For one, the Court held, because the landowner had not sought a variance that may have been available under state law, local government had not "reached a final decision regarding the application of the regulations to the property at issue."¹⁴⁰ Requiring a final decision, the Court explained, was essential to determining the economic impact of the challenged regulation.¹⁴¹ In addition, the claim was not ripe because the landowner had not made use of judicial procedures available in state court, in this case an inverse condemnation action, to obtain compensation.¹⁴² Because, the Court reasoned, the Takings Clause prohibits not takings, but takings without compensation, until the landowner had made use of the state court procedure, and had actually been denied compensation, the landowner could not claim a Takings Clause violation.¹⁴³ While other section 1983 claims do not require exhaustion of state court remedies, takings claims require the plaintiff to have made use of and been denied state avenues for relief.¹⁴⁴

Decided on ripeness grounds, *Williamson County* did not deal with the obvious additional problem: if the landowner loses in state court, will the claim then be precluded in federal court under the federal full faith and credit statute?¹⁴⁵ In the wake of *Williamson*

¹³⁷ *Id.* at 182-83.

¹³⁸ *Id.* at 183-84.

¹³⁹ *Id.* at 200.

¹⁴⁰ *Id.* at 186.

¹⁴¹ *Id.* at 191.

¹⁴² *Id.*

¹⁴³ *Id.* at 191.

¹⁴⁴ *Id.* at 192 (explaining that "[t]he question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.").

¹⁴⁵ The full faith and credit statute provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." 28 U.S.C. § 1738 (2006). "This statute has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue

County, property owners invoked the concept of “England reservations”¹⁴⁶ to preserve their rights to litigate their claims in federal court. The Second Circuit, in *Santini v. Connecticut Hazardous Waste Management Service*, endorsed the use of England reservations in takings cases.¹⁴⁷ With other federal courts taking different positions on the availability of England reservations, the Supreme Court granted review in *San Remo Hotel v. City and County of San Francisco*.¹⁴⁸

To appreciate the significance of the Court’s decision in *San Remo*, it is helpful to understand the procedural history of the litigation. The San Remo Hotel, in completing a report required by the City of San Francisco in 1979, mistakenly reported that all of its units were residential.¹⁴⁹ As a result, the City zoned the hotel as a residential hotel, subject to fees if the hotel owners later sought to convert the building to a tourist hotel.¹⁵⁰ The owners discovered the error in 1983, but by then the period to appeal the City’s zoning classification had ended.¹⁵¹ In 1990, the City imposed new restrictions on converting residential units and increased the “in lieu” fees required for conversion.¹⁵² When the San Remo Hotel subsequently sought to convert all of its rooms to tourist rooms, the City Planning

preclusion.” 545 U.S. at 336. The Court has explained the difference between the two in the following way:

Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Id. at 336 n.16 (quotation and citation omitted).

¹⁴⁶ See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964) (holding, in a case involving a Fourteenth Amendment claim against a state board of medical examiners, that a plaintiff who brings a federal claim in federal court and, by application of abstention doctrine, who is required first to litigate state law issues in state court, may reserve the right to return to federal court on the federal issues after the state court’s decision).

¹⁴⁷ 342 F.3d 118, 130 (2003).

¹⁴⁸ 545 U.S. at 337.

¹⁴⁹ *Id.* at 328-29.

¹⁵⁰ *Id.* at 329.

¹⁵¹ *Id.* at 329, n.1.

¹⁵² *Id.* at 329.

Commission required it to pay an in lieu fee of \$567,000.¹⁵³ The hotel filed a lawsuit in federal district court, asserting, among other claims, facial and as applied Takings Clause challenges to the ordinance requiring payment of conversion fees.¹⁵⁴ The district court dismissed the facial challenge as untimely under the relevant statute of limitations.¹⁵⁵ The court also dismissed the as applied claim as unripe under *Williamson County* because the plaintiffs had failed to pursue an inverse condemnation action in state court and therefore had not yet been denied just compensation.¹⁵⁶ On appeal, the plaintiffs invoked *Pullman* abstention,¹⁵⁷ and asked the Ninth Circuit to abstain from deciding their federal claims on the ground that a return to state court could moot the federal questions in the case.¹⁵⁸ The Ninth Circuit agreed to abstain on the facial challenge, which, the court reasoned, was ripe as soon as the 1990 ordinance was enacted.¹⁵⁹ However, the circuit court affirmed the district court's dismissal of the plaintiffs' as-applied claim as unripe.¹⁶⁰ The court noted that in order to retain their right to return later to federal court, the hotel owners should "make an appropriate reservation in state court" under *England*.¹⁶¹

Proceeding, then, in state court, the hotel owners reserved their right to return to federal court.¹⁶² However, in the state court litigation, the hotel owners advanced claims that extended beyond the claims on which the federal court had abstained and they framed their state constitutional claim in terms of the U.S. Supreme Court's federal takings jurisprudence.¹⁶³ When the case eventually reached the

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 330.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 498-99 (1941) (holding that federal courts may abstain from ruling on a federal constitutional issue in a case where the state's highest court has not given the challenged state statute a definitive interpretation and the state court's construction of the statute may resolve the constitutional issue).

¹⁵⁸ 545 U.S. at 330.

¹⁵⁹ *Id.* at 331.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 331.

¹⁶² *Id.*

¹⁶³ *Id.*

California Supreme Court, it held that there had been no violation of the state Constitution and it upheld the ordinance on its face and as applied to the hotel owners.¹⁶⁴ The California Supreme Court noted that the hotel owners had reserved their federal causes of action, and that they had sought no relief in state court for any violation of the federal Constitution.¹⁶⁵ At the same time, the California Supreme Court elected to analyze the state constitution takings claim “under the relevant decisions of both this court and the United States Supreme Court,”¹⁶⁶ because in prior decisions, the state court had construed the federal and state taking clauses congruently.¹⁶⁷

Following this ruling, the hotel owners reactivated the complaint they had filed prior to seeking *Pullman* abstention and they returned to federal district court.¹⁶⁸ The district court now held that the hotel owners’ facial claim was barred by the statute of limitations and by rules of issue preclusion.¹⁶⁹ As to the latter, the district court invoked the federal full faith and credit statute, which requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under state law.¹⁷⁰ Because California courts had interpreted the state takings law coextensively with federal law, the federal claim constituted the same claim that had already been decided in state court; under California preclusion standards, the plaintiffs were barred from litigating anew the claim in federal court.¹⁷¹ The claim therefore had to be dismissed.¹⁷² The Ninth Circuit, holding that California takings law is coextensive with federal takings law, and invoking rules of issue preclusion, affirmed.¹⁷³

The Supreme Court granted review to decide a single issue: “[W]hether . . . [to] create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a

¹⁶⁴ *Id.* at 333-34.

¹⁶⁵ *Id.* at 333.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 334-35.

¹⁶⁹ *Id.* at 335.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”¹⁷⁴ The hotel owners argued that, in light of the ripeness requirement of *Williamson County*, in order to permit federal takings claims to be decided on the merits in federal court, federal courts should apply an exception to the full faith and credit statute and review de novo a federal takings claims reserved under *England*, without regard to the decision of the state court.¹⁷⁵

In an opinion by Justice Stevens affirming the Ninth Circuit’s decision, the Court rejected the hotel owners’ argument.¹⁷⁶ The Court held that federal courts are not permitted to ignore the full faith and credit statute in order to give takings plaintiffs a federal forum.¹⁷⁷ An exception to the statute, the Court stated, will only be recognized if created by Congress; here Congress has not expressed any intent to exempt federal takings claims from the effect of the statute.¹⁷⁸ Rejecting the plaintiffs’ assumption that they had a right to have their federal claims resolved by a federal court, Stevens said: “We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court.”¹⁷⁹ This, Stevens noted, was true even if the plaintiff was required to proceed in state court by operation of a statute or rules of abstention.¹⁸⁰ According to the Court, “[t]he relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.”¹⁸¹ As to *England*, it was aimed at cases “fundamentally distinct” from the hotel owners’ takings claim.¹⁸² The thrust of *England* was that reservation was appropriate where the antecedent state law issue was distinct from the reserved

¹⁷⁴ *Id.* at 337.

¹⁷⁵ *Id.* at 338.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 342.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 339.

federal issue.¹⁸³ “‘Typical’ *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner.”¹⁸⁴ Accordingly, *Pullman* abstention serves not to give state courts “an opportunity to adjudicate an issue that is functionally identical to the federal question,” but to allow for a state law ruling that will make the federal issue moot.¹⁸⁵

In addition, the Court explained, *England* reservations are conditioned on plaintiffs “tak[ing] no action to broaden the scope of the state court’s review beyond decision of the antecedent state-law issue.”¹⁸⁶ In this case, the hotel owners had advanced broad takings arguments in state court. Because the Ninth Circuit invoked *Pullman* abstention after determining that a ripe federal question existed as to the hotel owners’ facial takings challenge, they were entitled to insulate from preclusive effect that issue while they returned to state court.¹⁸⁷ However, by presenting in the state court action both facial and as-applied takings challenges, the hotel owners had asked the state court to resolve the very federal issue they had sought to reserve.¹⁸⁸ *England* reservations are not valid under those circumstances.¹⁸⁹ Moreover, the hotel owners were not required to ripen in state court their facial claim and could have presented it directly in federal court.¹⁹⁰ The as-applied claims were unripe under *Williamson County* and, therefore, properly dismissed by the district court; because those claims were never properly before the district court, the hotel owners could not expect to be able to relitigate them in full if the claims were advanced in the state court proceeding.¹⁹¹

The upshot of *Williamson County* and *San Remo* is that state court adjudication of a federal takings claim can simultaneously ripen

¹⁸³ *Id.*

¹⁸⁴ *Id.* (footnote omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 340.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 341.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

and bar the claim from litigation in federal court.¹⁹² Though, Stevens recognized, it might seem “unfair to give preclusive effect to state-court proceedings that are not chosen but are instead required in order to ripen federal claims,” that result is what the statute requires.¹⁹³ Moreover, Stevens explained, state courts were a better forum for resolving Takings Claims: “State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”¹⁹⁴

In a separate concurring opinion in *San Remo*, Chief Justice Rehnquist, joined by three other Justices, wrote that in a future case, the Court should reconsider the rule of *Williamson County* that a plaintiff asserting a Fifth Amendment takings claim must first seek compensation in state court.¹⁹⁵ In particular, Rehnquist observed, the fact that state courts were competent to enforce federal rights did not “explain why federal takings claims should be singled out to be confined in state court.”¹⁹⁶ So far, the Court has declined to hear petitions seeking reversal of *Williamson County*.¹⁹⁷

¹⁹² *Id.* at 351 (Rehnquist, C.J., concurring) (“*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment’s just compensation guarantee.”). As Professor Sterk notes, the *San Remo* majority did not distinguish issue preclusion, the basis on which the Ninth Circuit had ruled, from claim preclusion. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 254, 272-73 (2004). Because the issues resolved by a state court might differ from the issues in a federal takings claim, issue preclusion alone might not bar a future takings claim from being brought in federal court. See *id.* at 254, 273-76. However, Professor Sterk reasons, the Court’s broad construction of claim preclusion principles and deference to state preclusion rules in accordance with § 1738 will inevitably close any gaps left open by issue preclusion. See *id.* at 254, 271-72, 276-84.

¹⁹³ 545 U.S. at 347-48.

¹⁹⁴ *Id.* at 347.

¹⁹⁵ *Id.* at 348, 352 (Rehnquist, C.J., concurring).

¹⁹⁶ *Id.* at 351. Moreover, Rehnquist observed, to the extent state courts themselves apply the *Williamson County* requirement, refusing to hear a federal takings claim until the property owner is denied compensation through all available state court procedures, litigants might be prevented from asserting the federal claim even in state court. *Id.* at 351 n.2 (collecting examples of state court decisions).

¹⁹⁷ [RA: cite to the recent denials of cert]

The *San Remo* Court emphasized that the reach of *Williamson County* itself was limited. In accordance with *Yee v. City of Escondido*,¹⁹⁸ Stevens explained, the hotel owners were not required to ripen their facial claim, the claim that the ordinance was invalid for failure to substantially advance a legitimate state interest.¹⁹⁹ Because the facial challenge did not depend on the extent a property owner has been deprived of the economic use of the property or on the extent to which the owner has been compensated,²⁰⁰ the plaintiffs could have brought that claim directly in federal court.²⁰¹ The hotel owners also could have reserved their facial claim while they pursued the as applied claim; what they could not do was seek a state court ruling on the claim they purported to reserve.²⁰² State courts, in deciding, by application of *Williamson County*, whether a plaintiff was entitled to compensation under state law, could also properly decide any claim that failure to provide compensation would be an as applied federal takings violation.²⁰³

San Remo's suggestion that property owners remained free to proceed immediately in federal court with their facial challenge soon ran into a different impediment. In *Lingle v. Chevron U.S.A., Inc.*, the Court held that (whatever its past suggestions) the claim that a regulation failed to substantially advance a legitimate state interest did not make out a cognizable claim under the Takings Clause.²⁰⁴ The Takings Clause, *Lingle* held, did not allow courts to review the need for state land-use regulations or the effectiveness of the regulatory

¹⁹⁸ See 503 U.S. 519, 533-34 (1992) (explaining that, where petitioners have not sought and been denied compensation in state proceedings, their claim that an ordinance, as applied to their property, effects a regulatory taking is not ripe, but that a facial challenge to the ordinance, in which the petitioners claim that the ordinance does not substantially advance a legitimate state interest no matter how it is applied, is ripe because it does not depend on the extent to which the petitioners are deprived of the economic use of their particular pieces of property or the extent to which the particular petitioners are compensated.).

¹⁹⁹ 545 U.S. at 345-46.

²⁰⁰ 503 U.S. at 534.

²⁰¹ 545 U.S. at 345-46.

²⁰² *Id.* at 346.

²⁰³ *Id.* at 346.

²⁰⁴ 544 U.S. 528, 544-45 (2005).

scheme.²⁰⁵ Such a claim, if brought in federal court, must be dismissed.²⁰⁶

Combined, then, the cases appear to foreclose takings claims against state government from being litigated in federal court. *Williamson County*, like most Takings Clause claims against state government, was a regulatory takings case, as to which, under the *Penn Central* test, economic impact is an essential consideration.²⁰⁷ Claims involving permanent physical occupation of property and other physical takings (which involve as applied challenges) do not require a plaintiff to show economic impact, the concern of *Williamson County's* first ripeness element.²⁰⁸ However, federal courts have applied *Williamson County's* second ripeness requirement to physical takings cases and required that the property owner seek and be denied compensation in state proceedings.²⁰⁹ After *Lingle*, it is unclear just what kind of a claim would be cognizable as a facial takings claim and exempt from *Williamson County's* ripeness requirement (as suggested by *San Remo*). The cases reflect the understanding that because state courts “routinely decide cases involving interpretation of state and local land use laws, and apply several state law doctrines to oversee the administrations of these systems,”²¹⁰ they have “far more intimate relation to the land use regulation process than do federal courts.”²¹¹

Finally, land use regulations can also be challenged as violations of substantive due process under the Fourteenth Amendment.²¹² *Lingle* makes clear that in considering due process

²⁰⁵ *Id.*

²⁰⁶ *Id.* Though, Justice Kennedy, in a concurring opinion noted that “today’s decision does not foreclose the possibility that a regulation might be so arbitrary as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry.” *Id.* at 548 (Kennedy, J., concurring).

²⁰⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (identifying the economic impact on the claimant as the first factor in determining whether a regulatory takings has occurred).

²⁰⁸ *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

²⁰⁹ *See, e.g., Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F. 2d 87, 91-92 (1st Cir. 2003).

²¹⁰ J. Peter Byrne, *Due Process Land Use Claims After Lingle* 12 (Feb. 2007).

²¹¹ *Id.*

²¹² *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (rejecting a facial challenge to zoning but explaining that particular

claims involving land use, courts must “defer[] to legislative judgments about the need for, and likely effectiveness of, regulatory actions.”²¹³ Federal courts have tended to resist due process challenges to land use regulations.²¹⁴ Some federal courts have ruled that while land is clearly property protected under the Due Process clause, there is no property interest in being free from land use regulatory schemes.²¹⁵ However, state courts have been more willing to rely on due process to limit land use regulatory powers,²¹⁶ and state courts have developed a variety of tools for that purpose.²¹⁷

B. Criminal Procedure

Most criminal cases are prosecuted in state courts. Though every state court criminal prosecution raises issues of federal

applications of the zoning power that are “arbitrary and unreasonable” would violate due process).

²¹³ *Lingle*, 544 U.S. at 545. *See also* *City of Cuyahoga v. Buckeye Community Hope Foundation*, 538 U.S. 188, 193 (2003) (rejecting a due process challenge to city’s refusal to issue building permits where the plaintiff had not shown that the city’s action was “egregious or arbitrary government conduct.”).

²¹⁴ *See, e.g.,* *UA Theater Circuit v. Warrington*, 316 F.3d 392 (3d Cir. 2003) (requiring plaintiff to show decision by regulatory officials “shock[s] the conscience.”); *Coniston Corp v. Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988) (Posner, J.) (“No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions.”).

²¹⁵ *See, e.g.,* *Minnetonka Moorings, Inc. v. City of Sherwood*, 367 F. Supp. 1251, 1257 (D. Minn. 2005) (finding that “a valid property interest exists [only] when a municipality has no discretion in the grant or denial of a permit for proposed land use.”).

²¹⁶ *See* *Byrne*, *supra* note 210, at 12-13, 15 (arguing that in the absence of stronger state legislative controls, state court review under due process serves an essential check on local regulatory powers, and that because property law is state law, and local government and land use law is state statutory or administrative law, state courts are “far better locations to conduct this judicial oversight than federal courts.”).

²¹⁷ *See id.* at 19-22 (reporting that state courts, in the name of protecting the public interest, have developed sophisticated tools to deal with outcomes that suggest the political process has not proceeded fairly, including doctrines requiring careful judicial scrutiny of spot zoning (amending a zoning classification of a single property at the behest of the owner); assessments of zoning laws that impose costs on neighboring jurisdictions; heightened review of exclusionary zoning practices; and other mechanisms to account for the impact of local decisions on a region or a state as a whole). **[check: whether the cases he cites are state DP cases or federal DP cases]**

constitutional law, the Supreme Court reviews very few state criminal convictions. The lower federal courts, hearing habeas petitions, are potentially an important source of federal constitutional decisions.²¹⁸ However, Congress and the Courts have increased procedural obstacles to federal habeas review, so that state petitioners face increased impediments to any kind of federal review. As a practical matter, state courts have the last word in most criminal cases.

a. The Limits of Habeas Review

The federal habeas statute, 28 U.S.C. § 2254, permits a defendant convicted in state court and held in state custody to challenge the conviction or sentence in federal court on federal constitutional grounds.²¹⁹ The Supreme Court has held that, because of the special purpose of federal habeas proceedings to protect federal constitutional rights, rules of collateral estoppel and res judicata do not prevent a habeas petitioner from raising a federal constitutional claim that has been litigated and ruled upon in state court.²²⁰ However, as a result of Supreme Court decisions beginning in the 1970s, and of Title I of the federal Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), there are numerous restrictions on federal habeas review of state court convictions. As a result, state prisoners, while presenting claims of federal constitutional violations, may be denied any kind of federal review of their claims.

State prisoners are given a limited time period in which to ask a federal court to hear their claims. Under AEDPA, habeas petitions must ordinarily be filed within one year of the date the conviction becomes final.²²¹ (The period is tolled while an appeal or habeas

²¹⁸ Federal courts have not always played this role. Only in 1867 did federal courts receive a general authority to review habeas petitions from state prisoners. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (giving the federal courts “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States”).

²¹⁹ 28 U.S.C. § 2254(a) (2006). 28 U.S.C. § 2255 provides an analogous right to federal prisoners.

²²⁰ *Brown v. Allen*, 344 U.S. 443, 458 (1953).

²²¹ 28 U.S.C. §§ 2244(d)(1) & 2255 (2006). *See* *Clay v. United States*, 537 U.S. 522 (2003). The statute of limitations runs from the later of three different dates if any is later than the normal finality date: the date an impediment to filing cause by the government was removed; the date on which a new rule relied upon by the petition was announced by the Supreme Court if the new rule has been made

application filed in state court is pending.)²²² Petitioners seeking to appeal a district court’s denial of a habeas petitions must ordinarily file the notice of appeal within thirty days of the entry of final judgment.²²³ Filing deadlines are jurisdictional: a failure to comply will ordinarily mean the case must be dismissed.²²⁴

State prisoners seeking federal habeas review must also have exhausted all available state court remedies with respect to every claim raised in the federal petition.²²⁵ According to the federal habeas statute, a petitioner has not exhausted state remedies if the petitioner has “a right under the law of the State to raise, by any available procedure the question presented.”²²⁶ Exhaustion requires the state prisoner to have “fairly presented” the legal and factual bases of all claims to the state court.²²⁷ The claims must be presented as a federal constitutional claim; framing the claim as a state constitutional claim is inadequate.²²⁸ The state prisoner must raise the claim on any appeal as of right to the intermediate court of the state, and on any available discretionary appeal to the state’s highest court.²²⁹ A district court is entitled to deny a mixed petition—a petition containing exhausted and

retroactive; or the date on which the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. §§ 2244(d)(1)(A)-(D) & 2255 (2006).

²²² 28 U.S.C. § 2244(d)(2) (2006). The Court has also suggested “equitable tolling” might be appropriate in unusual cases. *See* *Duncan v. Walker*, 533 U.S. 167, 181 (2001).

²²³ 28 U. S. C. § 2107(a) (2006); FED. R. APP. P. 4 (a) (1) (A). A district court can, in some circumstances, reopen the filing period for fourteen days from the district court’s order to reopen. 28 U.S.C. § 2107(c) (2006); FED. R. APP. P. 4 (a) (6).

²²⁴ *Bowles v. Russell*, ___ U.S. ___, ___ (2007) (holding that appellate court lacked jurisdiction where district court, in granting habeas petitioner’s application to reopen gave petitioner seventeen days to file a notice of appeal and the petitioner filed the notice within sixteen days, because the appeal was filed beyond the fourteen days provided for under the statute and implementing rule). **[add case re: 1-year period as jurisdictional]**

²²⁵ 28 U.S.C. § 2254 (b)(1) & (c) (2006).

²²⁶ 28 U.S.C. § 2254(c) (2006). The state can waive the exhaustion requirement. 28 U.S.C. § 2254(b)(3) (2006).

²²⁷ *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

²²⁸ *Id.* at 32-33.

²²⁹ *O’Sullivan v. Boerckel*, 526 U.S. 833, 845 (1999); *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989).

unexhausted claims—on the merits,²³⁰ though the ordinary procedure is to dismiss a mixed petition without prejudice.²³¹ Even so, mixed petitions present a further trap for the unwary petitioner: unless the district court exercises the limited discretion the Supreme Court has recognized to hold a mixed petition in abeyance in order to permit exhaustion of the unexhausted claims,²³² by the time the petitioner returns to federal court, the statute of limitations, which is not tolled during the period the mixed petition is in federal court, may well have expired.²³³ A habeas petitioner must also ordinarily have complied with state procedural rules requiring that a claim be asserted in state court, normally by an objection at trial.²³⁴ If, under state law, failure to raise the claim resulted in forfeiture of the claim, the petitioner cannot assert the claim in federal court except in two circumstances: Under the Court's rule in *Wainwright v. Sykes*, the petitioner must show cause and prejudice for the procedural default²³⁵ or show that, but for the error alleged in the claim, the petitioner would not have been convicted.²³⁶

²³⁰ 28 U.S.C. § 2254 (b)(2) (2006).

²³¹ 22 U.S.C. § 2254 (b)(3) (2006). *See* *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

²³² *See* *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (“Stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.”).

²³³ *See* *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

²³⁴ *Wainwright v. Sykes*, 433 U.S. 72, 85-90 (1977).

²³⁵ *Id.* at 90-91. *See also* *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (holding that negligence by an attorney is not cause for a procedural default unless the negligence rises to the level of ineffective assistance of counsel).

²³⁶ *See* *United States v. Frady*, 456 U.S. 152, 168-73 (1982) (discussing requirements of actual prejudice). The Supreme Court has held that a petitioner who defaulted in state court can proceed on the federal petition if forfeiture would result in a miscarriage of justice because of the petitioner’s “actual innocence.” *Schlup v. Delo*, 513 U.S. 298, 320-24 (1995). Actual innocence exists where the petitioner can demonstrate that “in light of new evidence, it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt; this showing may be based on relevant evidence either excluded or unavailable at trial.” *Id.* at 327. The exception also exists if in death penalty cases, the petitioner can demonstrate by clear and convincing evidence that but for the constitutional error no reasonable juror would have found the petitioner eligible for the death penalty under state law (so that the defendant is innocent of death). *Sawyer v. Whitney*, 505 U.S. 333, 340-41 (1992).

AEDPA sharply curtails the possibility of multiple habeas petitions. District courts are required to dismiss any claim presented in a second or successive habeas corpus application under § 2254 that was presented in a prior federal petition.²³⁷ As to claims not raised in a prior habeas petition, AEDPA allows such claims only where the petition relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or the petition raises a claim based on newly discovered evidence establishing that but for the constitutional error the defendant would have been acquitted.²³⁸

Assuming the state prisoner complies with all of these rules and gets the petition to federal court, the federal court does not exercise plenary review of the state court conviction. Instead, AEDPA requires the federal court to defer in important respects to the state court's decisions, both on the law and the facts. Habeas relief may not be granted for mere error. Instead, with respect to any claim adjudicated by the state court on the merits, relief must be denied unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."²³⁹ In other words, the habeas statute permits state courts to be incorrect: they can apply Supreme Court precedent incorrectly—just not in a way that is also unreasonable. Further, habeas petitioners do not normally benefit from the Court's announcement of new constitutional rules after the conviction became final.²⁴⁰ On one hand, the Court has a broad

²³⁷ 28 U.S.C. § 2244(b)(1) (2006). *See also* Slack v. McDaniel, 529 U.S. 473, 478 (2000) (holding that a prisoner who raises a claim prematurely in an original petition may raise the claim again in a subsequent petition when it becomes ripe without running afoul of AEDPA's ban on successive petitions).

²³⁸ 28 U.S.C. § 2244(b)(2) (2006).

²³⁹ 28 U.S.C. § 2254(d)(1) & (2) (2006). *See* Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (construing this provision). Note also that the Supreme Court has rejected the idea that AEDPA supersedes *Teague v. Lane*. Instead, the Court has made clear, AEDPA and *Teague* are separate requirements and a court must examine both. *See* Horn v. Banks, 536 U.S. 266, 270-72 (2002) (per curiam).

²⁴⁰ Schiro v. Summerlin, 542 U.S. 348, 351 (2004). Cases subject to direct review by the Supreme Court, however, are governed by new rules. *Id.*

definition of what constitutes a “new rule.”²⁴¹ On the other hand, the Court allows for retroactive application of a new rule in just two instances: (i) where a new substantive rule places certain kinds of private conduct beyond the power of the government to proscribe; and (ii) where a new procedural rule defines procedures implicit in the concept of ordered liberty.²⁴² A new rule satisfies the second exception if it is a “watershed” rule that implicates fundamental fairness and the accuracy of the criminal proceeding,²⁴³ such that without the rule “the likelihood of an accurate conviction is seriously diminished.”²⁴⁴ The only new rule the Court has recognized to fall within this exception is the right to trial counsel established by *Gideon v. Wainwright*.²⁴⁵ The Court has also stated that it is unlikely there are any new watershed rules yet to be announced.²⁴⁶

Further, a state court’s factual findings are also “presumed correct” and the petitioner has the burden to rebut this presumption by clear and convincing evidence.²⁴⁷ AEDPA also sharply limits a petitioner’s ability to present evidence in the habeas petition that was not presented to the state court.²⁴⁸ In order to appeal a district court’s denial of a habeas petition, in addition to complying with the 30-day

²⁴¹ *Teague* explains:

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.

Teague v. Lane, 489 U.S. 288, 301 (1989).

²⁴² *Id.* at 307-10.

²⁴³ *Id.* at 311.

²⁴⁴ *Id.* at 313.

²⁴⁵ 372 U.S. 335 (1963); see *Beard v. Banks*, 542 U.S. 406, 417 (2004) (identifying *Gideon* as a watershed rule).

²⁴⁶ *Schiro*, 541 U.S. at 352.

²⁴⁷ 28 U.S.C. § 2254(d)(2) (2006).

²⁴⁸ See 28 U.S.C. § 2254(e)(2) (2006) (barring a hearing on a claim as to which the applicant has failed to develop a factual basis in state court unless the claim relies on a new rule of constitutional law the Supreme Court has made retroactively applicable; or on facts that could not have been previously discovered through due diligence and that would establish that but for the constitutional error no reasonable fact finder would have found guilt).

notice rule governing federal appeals,²⁴⁹ the petitioner must obtain a certificate of appealability from the district court or, if the district court denies the request, from the court of appeals.²⁵⁰ Such a certificate only issues if the petitioner makes a “substantial showing” of a denial of a constitutional right with respect to each claim sought to be appealed.²⁵¹ There is no right to counsel in any stage of habeas proceedings.²⁵²

These various limitations prevent significant numbers of habeas claims from being decided on the merits by federal courts. One study of a randomly selected sample of federal habeas petitions filed during 2003 and 2004 found that 42% of petitions in non-capital cases and 28% of the petitions in capital cases were dismissed without the court reaching the merits.²⁵³ In just one out of 341 petitions in the study did the petitioner receive relief; this figure represented a decrease from the pre-AEDPA rate of relief in one out of 100 petitions.²⁵⁴ Another study of death penalty cases found that prior to the 1996 law, forty percent of state capital prisoners who filed federal habeas petitions had their convictions or sentences overturned; the figure dropped to twelve percent during the period 2000 to 2006, and it continues to fall.²⁵⁵

b. Independent and Adequate State Law Grounds

²⁴⁹ FED. R. APP. P. 4(a).

²⁵⁰ 28 U.S.C. § 2253(c)(2) (2006). If the circuit court denies the certificate, the petitioner can file a petition for certiorari with the Supreme Court from the denial. *Hohn v. United States*, 524 U.S. 236, 253 (1998).

²⁵¹ 28 U.S.C. § 2253(c)(3) (2006). This codifies the standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983). See *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003). The standard requires the petitioner to show that the claim would be “debatable” among “reasonable jurists.” *Id.* at 337-38.

²⁵² *Murray v. Giarratano*, 492 U.S. 1, 6-7 (1989); see also *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987) (holding that there is no right to counsel in state post-conviction proceedings).

²⁵³ Nancy J. King et al., Executive Summary: Habeas Litigation in the U.S. District Courts 9 (2007).

²⁵⁴ *Id.* at 9.

²⁵⁵ See David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, in CAPITAL PUNISHMENT: THE NEXT GENERATION OF EMPIRICAL RESEARCH — (forthcoming, 2008).

The Supreme Court does not review state court decisions that are based on a state law ground that would sustain the judgment. Under the independent and adequate state ground doctrine, “where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, . . . [the Court’s] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”²⁵⁶ The doctrine applies to state criminal cases on direct review to the Court²⁵⁷ and to habeas petitions filed by state prisoners in federal district court.²⁵⁸ With respect to direct review of state court decisions, the doctrine derives from the Court’s jurisdiction under Article III.²⁵⁹

Importantly for our purposes, the doctrine rule “applies whether the state law ground is substantive or procedural.”²⁶⁰ The Court’s application of the independent and adequate state ground doctrine to state procedural rules results in many federal constitutional claims being decided conclusively in state court.

To appreciate fully the impact of the relevant cases, it is necessary first to consider the clear statement requirement of the

²⁵⁶ *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

²⁵⁷ *See, e.g., Caldwell v. Mississippi*, 427 U.S. 320 (1985).

²⁵⁸ *See, e.g., Harris v. Reed*, 495 U.S. 255 (1989).

²⁵⁹ *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The independent and adequate state law ground doctrine therefore traces to *Murdock v. City of Memphis* in which the Court held it lacked authority to review state court decisions on issues of state law. 187 U.S. (20 Wall.) 590, 630-33 (1875).

²⁶⁰ *Coleman*, 501 U.S. at 729. *See, e.g., Parker v. North Carolina*, 397 U.S. 790, 798 (1970) (holding that a state law rule deeming a federal constitutional challenge to the composition of the grand jury waived unless raised prior to the entry of a guilty plea was an independent and adequate state law ground to prevent the Court’s consideration of the issue). There are some limits on the procedural rules that the Court deems sufficiently adequate to fall within the doctrine. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 376 (2002) (holding that under the circumstances of the case, a state law requirement that motions for continuance be un writing and accompanied by an affidavit was not adequate to deprive the Court of jurisdiction and explaining that “[t]here are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate”); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964) (“Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”); *Reece v. Georgia*, 350 U.S. 85, 89-90 (1955) (holding that a state law ground is not adequate if it denies due process).

Court's 1983 decision in *Michigan v. Long*,²⁶¹ which determines whether a state law ground is independent and adequate. In *Long*, the Michigan Supreme Court had reversed a criminal defendant's conviction for possession of marijuana, holding that the police violated the Fourth Amendment when they conducted a protective search of the passenger compartment of the defendant's vehicle, and that the marijuana the police found therein had to be suppressed.²⁶² The state sought and obtained review of the decision in the U.S. Supreme Court. The defendant, as respondent, argued that the Court lacked jurisdiction over the case because the state court holding rested on an independent and adequate state ground, the Michigan Constitution, which, the defendant argued, gave greater protection from searches and seizures than did the Fourth Amendment.²⁶³ Writing for the *Long* Court, Justice O'Connor held that jurisdiction was proper because, while the Michigan Supreme Court had referred in two places to its own state constitution, it otherwise "relied exclusively on federal law."²⁶⁴ O'Connor held that in order for the Court to deny jurisdiction on the ground that a state court decision rested on an independent and adequate state law ground, the state court must make clear in its opinion its independent reliance upon state law. O'Connor wrote:

When . . . a state court decision fairly appears to rest primarily on federal law . . . and when the adequacy and independence of any possible state law claim is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so.²⁶⁵

In other words, the Court would resolve ambiguity in favor of jurisdiction. At the same time, the Court would not "assume" that there are no independent and adequate state grounds if a state court makes clear it used federal case law only to provide "guidance," and that

²⁶¹ 463 U.S. 1032 (1983).

²⁶² *Id.* at 1035-37.

²⁶³ *Id.* at 1037-38.

²⁶⁴ *Id.* at 1038 (footnote omitted).

²⁶⁵ *Id.* at 1040-41.

there are “bona fide separate, adequate, and independent grounds” under state law for the decision reached.²⁶⁶ This approach, O’Connor claimed, displayed “respect for state courts,”²⁶⁷ by “avoid[ing] the unsatisfactory and intrusive practice of requiring state courts [later] to clarify their decisions to the satisfaction of this Court.”²⁶⁸ Turning to the merits of the case, O’Connor held that the Michigan court had erred and that the Fourth Amendment did not require suppression of the evidence found during the search of the defendant’s vehicle.²⁶⁹

Long involved a substantive state law ground. The Court applied the *Long* standard to a state law procedural ground on direct review in 1985 in *Caldwell v. Mississippi*.²⁷⁰ Four years later, in *Harris v. Reed*, the Court held the standard applied also to state procedural grounds in federal habeas petitions.²⁷¹ *Harris* involved a defendant convicted in murder in the Circuit Court of Cook County, Illinois.²⁷² On direct appeal, the defendant challenged only the sufficiency of the evidence at trial and the Appellate Court of Illinois affirmed.²⁷³ The defendant then filed a petition for post-conviction relief in the Illinois Circuit Court, alleging the ineffective assistance of trial counsel, in violation of the Sixth Amendment.²⁷⁴ The Illinois Circuit Court dismissed the petition.²⁷⁵ In affirming, the Illinois Appellate Court invoked the state law principle that issues that could have been presented on direct appeal but were not are considered waived.²⁷⁶ Here, all but one of the defendant’s claims of ineffective

²⁶⁶ *Id.* at 1041.

²⁶⁷ *Id.* at 1040.

²⁶⁸ *Id.* at 1041.

²⁶⁹ *Id.* at 1045-51.

²⁷⁰ *Caldwell*, 427 U.S. at 327 (applying, in a capital sentencing case on direct review, the plain statement standard of *Long* and concluding that the defendant’s failure to object at the sentencing hearing to the prosecutor’s comments was not an independent and adequate state law ground because the state supreme court did not rely on the failure in affirming the sentence).

²⁷¹ 495 U.S. 255 (1989).

²⁷² *Id.* at 257.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 258.

assistance of counsel could have been raised on direct appeal.²⁷⁷ (The one claim the court distinguished involving an alleged failure to present alibi witness.)²⁷⁸ Nevertheless, the Illinois Appellate Court went on to consider, and denied on the merits, all of the defendant's arguments.²⁷⁹ The defendant did not seek review in the Supreme Court of Illinois but instead filed a petition for a writ of habeas corpus in the United States District Court, again on the basis of ineffective assistance of counsel.²⁸⁰ The district court began its analysis by finding that *Sykes* did not apply to prevent consideration of the habeas petition.²⁸¹ Because the Illinois Appellate Court had not actually held any portion of the petitioner's ineffective assistance claim waived, there was no procedural default under *Sykes*.²⁸² On that point, the district court noted that the Illinois Appellate Court had explicitly stated that the alibi issue was not waived; with respect to the other allegations the Appellate Court had ignored the waiver and addressed the claim on the merits.²⁸³ Under those circumstances, the district court concluded, it was entitled to consider the claim in its entirety. After an evidentiary hearing, the district court dismissed the petition on the merits.²⁸⁴ On appeal, the United States Court of Appeals for the Seventh Circuit thought that the ruling of the Illinois Appellate Court, though ambiguous, indicated that apart from the claim about presenting alibi witnesses, the petitioner had waived the claim—the Appellate Court reached the merits of the claim only as an alternate holding.²⁸⁵ The Court of Appeals therefore held the petition was procedurally barred and on that ground affirmed the judgment of the district court.²⁸⁶

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 258-59.

²⁸⁵ *Id.* at 259.

²⁸⁶ *Id.* The court addressed neither the alibi witness issue nor whether the waiver could be excused under the exceptions *Sykes* allows where the petitioner has shown cause and prejudice for the default or a miscarriage of justice.

Writing for the Court in *Harris*, Justice Blackmun emphasized that the procedural default rule of *Sykes* derives from the adequate and independent state ground doctrine.²⁸⁷ That doctrine, Blackmun explained, applies whether a state ground that sustains a holding is substantive or procedural.²⁸⁸ In either case, any ambiguities in a state court opinion are resolved by the plain statement rule of *Long*.²⁸⁹ Accordingly, to prevent habeas review, “[t]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. . . . Ambiguities in that regard must be resolved by the *Long* standard.”²⁹⁰ Further, Blackmun noted, the *Long* rule applies in cases on direct review from the state’s highest court to the Supreme Court and to federal habeas review of state court convictions.²⁹¹

These strands wove together to create some clear rules about when state prisoners had procedurally defaulted their federal claims. *Sykes* and its progeny could bar the claim. “[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause . . . and prejudice . . . or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice.”²⁹² “Conversely, a federal claimant’s procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default.”²⁹³ And, in accordance with *Long*, “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.”²⁹⁴ To avoid habeas review, therefore, the state court must act with the same clarity needed to avoid direct review.²⁹⁵ Under this approach, Blackmun noted, “a state court need not fear reaching the merits of a

²⁸⁷ *Id.* at 260.

²⁸⁸ *Id.* at 261.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 261-62 (quotation and internal marks omitted).

²⁹¹ *Id.* at 262.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 263.

²⁹⁵ *Id.* at 264.

federal claim in an *alternative* holding,²⁹⁶ because a plainly stated state procedural bar will insulate the decision from review.²⁹⁷ Applying these rules, Blackmun found the Illinois Appellate Court, despite its references to the state procedural bar, did not satisfy the plain statement requirement of *Long*.²⁹⁸ Therefore, the district court could properly consider the habeas petition.²⁹⁹ The judgment of the Court of Appeals was reversed.³⁰⁰

We should pause to consider the implications of all of this. In *Long*, the existence of an independent and adequate substantive state law ground, clearly articulated in the state court opinion, precluded review of the state court holding. Specifically, the state government could not ask the Court to review the state court decision that it had acted unlawfully because even if the Supreme Court thought there was no federal constitutional violation, the state court's ruling on substantive state law grounds sustained the judgment. On the other hand, a party who lost a claim against state government in state court could seek review (on the federal constitutional ruling) in the Supreme Court. If the Supreme Court thought the state violated the federal Constitution, no substantive state law ground, however clearly articulated, could sustain the state court decision.

Once a state law procedural ground is independent and adequate, these outcomes are reversed. A state law procedural bar prevents the Supreme Court on direct review or a federal habeas court from hearing a state prisoner's claim that the state has violated the federal Constitution. Even if the federal courts were to find a constitutional violation, the state procedural law (assuming the requirements are *Long* are met) would sustain the conviction. Under *Long*, a litigant might have neither a state court nor a federal court consider the constitutional claim.³⁰¹ Moreover, the independent and

²⁹⁶ *Id.* at 264 n.10.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 266.

²⁹⁹ *Id.*

³⁰⁰ *Id.* See also *Teague*, 489 U.S. at 298-99 (explaining that the *Harris* rule applies where the state court has had an opportunity to address the claim later raised in a habeas petition but does not apply where, because of procedural default, the claim was never presented to the state court).

³⁰¹ Emphasizing principles of comity and finality in criminal cases, the Court has stated:

adequate state ground doctrine allows state courts to interpret federal constitutional provisions as broadly or narrowly as they wish—so long as there is also a state law basis for the decision that is both adequate independent and adequate the Supreme Court does not correct the state court’s ruling on federal constitutional grounds.

In a separate opinion in *Caldwell*, O’Connor emphasized that while *Long* properly applied to state procedural default rules, federal courts could still inquire into the availability of state court remedies to determine whether the claims presented in a habeas petition had been properly exhausted in state court.³⁰² In particular, if a federal habeas petitioner raises a claim that has never been presented in any state forum, the federal court can assess the scope of state default rules and determine whether the claim has been procedurally defaulted under state law, such that a state court remedy is unavailable.³⁰³ In other words, if the claim has not been presented to the state court, there is no requirement that the state court have issued a plain statement of a procedural bar.³⁰⁴

This brings us to O’Connor’s opinion for the Court in *Coleman v. Thompson*.³⁰⁵ *Coleman* involved a Virginia defendant convicted of rape and capital murder and sentenced to death.³⁰⁶ After losing his appeal, the defendant filed a state habeas petition asserting ineffective assistance of counsel and other federal constitutional violations at his

The Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of a crime is afforded a trial free of constitutional error. . . . Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered only if the defendant shows cause for the default and actual prejudice resulting therefrom. . . . We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, . . . or on the State’s interest in enforcement of its procedural rule.

Teague, 489 U.S. at 308 (quotation omitted).

³⁰² 427 U.S. at 268 (O’Connor, J., concurring).

³⁰³ *Id.* at 269.

³⁰⁴ *Id.*

³⁰⁵ 501 U.S. 722 (1991).

³⁰⁶ *Id.* at 727.

trial and sentencing.³⁰⁷ The state habeas court ruled against the defendant, and he appealed that ruling to the Virginia Supreme Court.³⁰⁸ The state moved to dismiss the appeal on the sole ground that the defendant had not filed a notice of appeal within thirty days of the judgment being appealed, and, therefore the appeal was untimely under the relevant procedural rule of the Virginia Supreme Court.³⁰⁹ The Virginia Supreme Court did not immediately rule on the motion to dismiss; each side filed additional briefs on that motion as well as on the merits of the defendant's constitutional claims.³¹⁰ Eventually, the Virginia Supreme Court issued a three-sentence ruling that referred to the motion to dismiss and the attendant briefs, and stated that "upon consideration thereof," the motion to dismiss was granted, and the appeal dismissed.³¹¹ The defendant then filed a habeas petition in federal court that included seven claims made in the state habeas proceeding along with four additional claims.³¹² The district court held that, in accordance with the Virginia Supreme Court's ruling, the defendant had defaulted on the seven claims; the district court then went on to rule against the defendant on the merits of all eleven claims.³¹³ The Fourth Circuit affirmed.³¹⁴ With respect to the claims filed in the state petition, the Fourth Circuit stated that the Virginia Supreme Court's order met the "plain statement" requirement of *Harris* for a procedural default, and that the defendant had not met the cause and prejudice requirement of *Sykes* to allow the federal court to consider the defaulted claims.³¹⁵

O'Connor agreed that the state procedural bar prohibited consideration of the claims presented in the state habeas petition.³¹⁶ "This is a case about federalism," O'Connor announced. "It concerns the respect that federal courts owe the States and the States' procedural

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 728.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 728-29.

³¹⁵ *Id.* at 729.

³¹⁶ *Id.* at 726.

rules.”³¹⁷ After reviewing the Court’s precedents involving independent and adequate state grounds and their application to the habeas context, O’Connor rejected the petitioner’s argument that, under *Harris*, his claims were properly presented in the federal petition.³¹⁸ True, O’Connor explained, *Harris* says that a federal court will conclusively presume there is no independent and adequate state ground when the state decision fairly appears to rest primarily on federal law or to be interwoven with federal law and the adequacy and independence of the state law ground is not clear from the face of the opinion.³¹⁹ However, that presumption only applies when the “fairly appears” predicate exists—where the federal court has reason to question whether there is an independent and adequate state law ground.³²⁰ The presumption did not apply more broadly, to all cases in which a federal habeas petitioner had presented federal claims to a state court.³²¹ Adopting that broader rule “would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. Any efficiency gained by applying a conclusive presumption . . . is simply not worth the cost in the loss of respect for the State that such a rule would entail.”³²² In this case, *Harris*, and its presumption in favor of review, did not apply. Whatever the ambiguities of the Virginia Supreme Court’s order (i.e. by stating that “upon consideration” of the filed papers), it did not “fairly appear” to rest on federal law or to be interwoven with federal law.³²³ Instead, the Virginia Supreme Court had granted the Commonwealth’s motion to dismiss the defendant’s appeal; that motion was based on the defendant’s failure to meet the Virginia time requirement; the basis for dismissal was, therefore, the procedural default.³²⁴ Shoring up the Court’s precedents on the consequences of state law procedural default, O’Connor announced a simple rule governed:

³¹⁷ *Id.*

³¹⁸ *Id.* at 735.

³¹⁹ *Id.* at 736.

³²⁰ *Id.* at 736.

³²¹ *Id.*

³²² *Id.* at 738.

³²³ *Id.* at 740.

³²⁴ *Id.*

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.³²⁵

Here, the petitioner had not met this test, and the claims were therefore barred.³²⁶

O'Connor's opinion cast (recast, even) several lines of precedent as based in principles of federalism. First, O'Connor noted, the reason for applying the independent and adequate state ground doctrine to federal habeas cases was "somewhat different" than for applying the doctrine in cases presented to the Court on direct review.³²⁷ In the context of direct review, she stated, the Court reviews the state court *judgment*: if resolution of the federal issue will not affect that judgment, there is "nothing for the Court to do."³²⁸ By contrast, in habeas cases, the federal district court does not review the state court judgment, but "the lawfulness of the petitioner's custody

³²⁵ *Id.* at 750. The specific consequence of this holding was to dispel any residual application of *Fay v. Noia*, 372 U.S. 391 (1963). Like *Coleman*, *Noia* involved a criminal defendant who failed to appeal his state court conviction and then sought habeas review in federal court. The *Noia* Court held that the procedural default did not bar federal habeas review unless the petitioner had deliberately bypassed state procedures by intentionally forgoing an opportunity for state review. *Id.* at 438-39. Though *Sykes* and other subsequent cases culminating in *Harris* applied instead a cause and prejudice standard, none overruled *Noia*, and the cases seemed to leave open the possibility that the deliberate bypass rule still applied when an entire appeal had been defaulted. See *Coleman*, 501 U.S. at 749-50 (reviewing the precedents in this area). *Coleman* makes clear that the cause and prejudice applies to all defaulted claims. See *id.* at 750 (noting that *Noia* "was based on a conception of federal/state relations that undervalued the importance of state procedural rules"). Note also that the Court has also held that a "state procedural ground is not adequate unless the procedural rule is strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quotation omitted).

³²⁶ *Coleman*, 501 U.S. at 752-57.

³²⁷ *Id.* at 730.

³²⁸ *Id.*

simpliciter.”³²⁹ Nonetheless, O’Connor explained, “a state prisoner is in custody pursuant to a judgment.”³³⁰ Accordingly, “[w]hen a federal habeas court releases a prisoner held pursuant to a . . . judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as . . . if this Court had reversed the state judgment on direct review.”³³¹ By ordering release, “the habeas court ignores the State’s legitimate reasons for holding the prisoner.”³³² Accordingly, in the habeas context, the application of the independent and adequate state ground doctrine is “grounded in concerns of comity and federalism.”³³³ Were the doctrine inapplicable, “a federal district court would be able to do in habeas what this Court could not do on direct review” and give “state prisoners habeas whose custody was supported by independent and adequate state grounds an end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws.”³³⁴ So, too, O’Connor explained, the independent and adequate state ground law reinforces the federalism concerns that underlie the exhaustion requirement in habeas proceedings. It would, O’Connor explained, be “unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.”³³⁵ While this approach meant that no court decides whether a defendant’s constitutional rights have been violated, federalism required such a result. “Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.”³³⁶ To be sure, “[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.”³³⁷ But, “in the

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 731.

³³⁵ *Id.* (quotation omitted).

³³⁶ *Id.* at 732.

³³⁷ *Id.*

absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases."³³⁸

Turning to *Caldwell* and *Harris*, O'Connor wrote that the *Caldwell* Court had appropriately extended to criminal cases on direct review *Long's* "partial solution to th[e] problem" of determining whether a state court judgment rests on an independent and adequate state law ground.³³⁹ *Harris*, a habeas case, presented a "situation . . . nearly identical to that in *Long* and *Caldwell*: a state court decision that fairly appeared to rest primarily on federal law in a context in which a federal court has an obligation to determine if the state court decision rested on an independent and adequate state ground."³⁴⁰ "Faced with a common problem, we adopted a common solution."³⁴¹ Accordingly,

After *Harris*, federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." [*Long*, 463 U.S. at 1040-1041.] In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an

³³⁸ *Id.* More recently, the Court, in an opinion by Justice Scalia distinguishing the cases O'Connor collapsed together, has explained that, in contrast to cases on direct review, the independent and adequate state ground doctrine is not jurisdictional. See *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (explaining that application of the independent and adequate state ground doctrine in the habeas context is based upon federalism and comity).

³³⁹ 501 U.S. at 732.

³⁴⁰ *Id.* at 734.

³⁴¹ *Id.* (quotation omitted).

independent and adequate state ground, a federal court may address the petition.³⁴²

Quite apart from these procedural mechanisms, a separate rule prevents one kind of claim from being brought in a habeas petition. In *Stone v. Powell*, the Supreme Court held, interpreting section 2254, that Fourth Amendment claims, involving exclusion of evidence as a result of an unlawful search or seizure, once raised and decided in state court cannot be heard again in the federal habeas proceeding when the state has provided an opportunity for a full and fair hearing.³⁴³ The Court in *Stone* explained that the reason for a separate rule for exclusion of evidence under the Fourth Amendment is that the purpose of the exclusionary rule is to deter unlawful police conduct and that any marginal benefit in that respect from a federal habeas ruling did not justify the costs of the exclusionary rule, including allowing guilty defendants to go free.³⁴⁴ In addition, collateral estoppel works to prevent a subsequent section 1983 claim based on the Fourth Amendment violation.³⁴⁵ The Court has not extended the *Stone* exception beyond the context of exclusion under the Fourth Amendment.³⁴⁶ AEDPA left the Court's holding in *Stone* in place.³⁴⁷

³⁴² *Id.* at 734-35. In a footnote at the end of this statement, O'Connor, citing her concurring opinion in *Harris*, noted that the rule does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present the claims would find them procedural barred. "In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.* at 735, n.1. See also *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (holding that to deal with the problem that state court orders often lack an explanation of the basis for the decision, the following presumption applies: "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

³⁴³ 428 U.S. 465, 494 (1976). The Fourth Amendment exclusionary rule is, therefore, an exception to the rule of *Brown v. Allen*, 344 U.S. 443, 458 (1953). See *supra* text accompanying note 220.

³⁴⁴ 428 U.S. at 490-91.

³⁴⁵ *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980) (holding that state rules of collateral estoppel apply to preclude relitigation of a Fourth Amendment issue where the state court provided a full and fair opportunity for the issue to be heard).

³⁴⁶ See, e.g., *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (holding that the *Stone* rule did not extend to a state prisoner's claim that his confession was obtained in violation of *Miranda*).

Though *Stone* left open the possibility of habeas review where the state did not provide an opportunity for a full and fair hearing, the Supreme Court has not heard a single Fourth Amendment exclusionary claim on habeas review since *Stone*.

C. Summary

Most takings claims against state government are resolved in state court, with the role of the federal courts limited to Supreme Court review of state court decisions. So, too, as a result of limitations on federal habeas review, state courts operate with a large degree of autonomy in applying the criminal procedural protections of the federal Constitution.

IV. (RE)FORMALIZING STATE COURT AUTHORITY

The preceding Parts of this Article have shown that, as a practical matter, state courts today have considerable authority to interpret and apply the federal Constitution. This Part argues that this state court authority should be formally recognized. There are a variety of ways in which this could be done. A sensible first step would be a formal rule that, stated in most general terms, state courts, called upon to rule on federal constitutional claims against state government, are permitted to expand upon, but not to narrow, federal constitutional rights as construed by the Supreme Court. This change would be consistent with the historical practices described in Part I of the Article. It also picks up on the proposal Justice Stevens has made with respect to how the Court exercises discretionary review. The discussion begins with Justice Stevens' proposal, considers its benefits and risks, and suggests some refinements.

A. Justice Stevens' Docket

In three cases decided at the end of the Court's 2005 term, most notably *Kansas v. Marsh*,³⁴⁸ Justice Stevens pushed strongly for the Court to end its practice of reviewing state court cases upholding

³⁴⁷ See *Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002) (interpreting AEDPA to preserve *Stone*).

³⁴⁸ 126 S. Ct. 2516 (June 26, 2006). See also *Washington v. Recuenco*, 126 S. Ct. 2546 (June 26, 2006); *Brigham City v. Stuart*, 126 S. Ct. 1943 (May 22, 2006).

claims of federal constitutional rights, and Stevens vigorously debated the merits of his proposal with Justice Scalia. In these three cases from the 2005 term, Stevens revived and extended a proposal he first made two decades previous in his dissenting opinions in *Michigan v. Long*³⁴⁹ and *California v. Ramos*.³⁵⁰ It therefore makes sense to begin with those two cases.

a. Long and Ramos

In his dissent in *Long*, Justice Stevens considered the “jurisprudential questions presented [in the case] . . . far more important than the . . . Fourth Amendment [issue].”³⁵¹ In his view, several factors combined to counsel against exercising jurisdiction to hear the case: the Court’s traditional presumption that when a state court invokes state law it is an independent basis for the state court’s decision, respect for state courts, and the scarceness of federal judicial resources.³⁵² Moreover, as a general matter, Stevens reasoned, the Supreme Court should allow “other decisional bodies to have the last word in legal interpretation until it is truly *necessary* for the Court to intervene.”³⁵³ According to Stevens, “cases in which a state court has upheld a citizen’s assertion of a right under both federal and state law,” and in which “[t]he complaining party is an officer of the state itself who asks us to rule that the state court interpreted federal rights too broadly and ‘overprotected’ the citizen,” are of “no inherent concern” to the Court.³⁵⁴ Therefore, Stevens reasoned, the Supreme Court should exercise its jurisdiction principally in one direction: “in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.”³⁵⁵ Stevens thought this approach was consistent with the Court’s traditions³⁵⁶ and it would overcome “a docket swollen

³⁴⁹ 463 U.S. 1032 (1983).

³⁵⁰ 463 U.S. 992 (1983).

³⁵¹ *Id.* at 1065 (Stevens, J., dissenting).

³⁵² *Id.* at 1066-67.

³⁵³ *Id.* at 1067 (emphasis added).

³⁵⁴ *Id.* at 1068.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 1069 (writing that “[u]ntil recently we had virtually no interest in cases of this type.”).

with requests by states to reverse judgments that their courts have rendered in favor of their citizens.”³⁵⁷

On the same day the Court decided *Long*, Justice O’Connor also wrote the majority opinion in *California v. Ramos*.³⁵⁸ *Ramos* reversed a state court’s holding that the Eighth Amendment prohibited an instruction to a capital sentencing jury that, in reaching their decision, the jurors could take account of the governor’s power to commute a life sentence (implying that the jury did not really have the ultimate responsibility).³⁵⁹ In his dissent, Stevens argued the Court should not have granted review: “no rule of law required the Court to hear this case”³⁶⁰ and the California court’s decision, though based on the federal Constitution, had no impact on other states.³⁶¹ According to Stevens, “[n]othing more than an interest in facilitating the imposition of the death penalty in California justified this Court’s exercise of its discretion to review the judgment of the California Supreme Court,” and this interest was insufficient to grant review.³⁶² The issue in the case, involving an application of the Eighth Amendment in the defendant’s favor, was “plainly a matter that is best left to the

³⁵⁷ *Id.* at 3492. Although *Long* is the first case in which Stevens set out this view in detail, it was foreshadowed in earlier cases. See *South Dakota v. Neville*, 459 U.S. 553, 566 (1982) (Stevens, J., dissenting) (describing the majority’s reversal of a state court’s exclusion of blood alcohol evidence as advisory because a state constitutional provision supported the state court judgment); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 477-89 (1981) (Stevens, J., dissenting) (criticizing the majority’s review of and departure from a state court’s interpretation of the state legislative record to determine whether a statute violates the dormant commerce clause); *Idaho Dep’t Employment v. Smith*, 434 U.S. 100, 103-05 (1977) (Stevens, J., dissenting in part) (“Even though there was error in the Idaho Supreme Court’s use of the Fourteenth Amendment ... that error is [in]sufficient justification for the exercise of this Court’s discretionary jurisdiction. . . . [T]his Court’s . . . efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the state than in vindicating individual rights.”); *Pennsylvania v. Mimms*, 434 U.S. 106, 116-17 (1977) (Stevens, J., dissenting) (arguing that the Court should not have reviewed a state court reversal, on Fourth Amendment grounds, of a defendant’s conviction where the defendant had already served his sentence, the state court had “afforded him greater protection than is required by the Federal Constitution,” the state court could reach the same result on state constitutional grounds, and any error by the state court affected only that state).

³⁵⁸ 463 U.S. 992 (1983).

³⁵⁹ 463 U.S. 992, 1002-1010 (1983).

³⁶⁰ *Id.* at 1029 (Stevens, J., dissenting).

³⁶¹ *Id.* at 1031.

³⁶² *Id.*

States.”³⁶³ Indeed, even if the state court erred, Stevens argued, there would still be no reason for the Court to review the decision.³⁶⁴ Stevens also took particular issue with O’Connor’s assertion in her majority opinion in *Ramos* that the Court “sit[s] as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.”³⁶⁵ If this were true, Stevens contended, the Court would have allowed “the wisdom of state *judges* to prevail in California.”³⁶⁶

Though Stevens’ dissents in *Long* and *Ramos* did not attract a single other vote (O’Connor called his argument “novel”),³⁶⁷ in the ensuing years, he continued to argue that the Court should exercise greater restraint before reviewing state court decisions.³⁶⁸ In *Florida v. Meyers*, Stevens, joined by Marshall and Brennan, dissented from a per curiam decision overturning a state court’s reversal of a defendant’s conviction on Fourth Amendment grounds.³⁶⁹ Given the Court’s limited resources, Stevens argued, it should not act as “supervisors of the administration of justice in the state judicial systems,” thereby encouraging prosecutors to seek review in “relatively routine cases.”³⁷⁰ Stevens urged the Court to be “ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor” because “[t]he Framers surely feared the

³⁶³ *Id.*

³⁶⁴ *Id.* at 1030 (writing that “If it were true that this [jury] instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given—not a reason for giving it.”).

³⁶⁵ *Id.* at 1030 (quoting *Long*, 463 U.S. at 1014).

³⁶⁶ 463 U.S. at 1031 (emphasis added).

³⁶⁷ *Id.* at 1042 n.8.

³⁶⁸ In addition to the cases discussed in the text, see *Montana v. Hall*, 481 U.S. 400, 411 (1987) (Stevens, J., dissenting) (arguing against review of a state court decision prohibiting retrial of a defendant where, in its double jeopardy analysis the state court cited state constitutional law and where the court’s judgment rested on the alternative ground that the defendant respondent was convicted of an offense that did not exist when he committed the acts in question); *Delaware v. Van Arsdall*, 475 U.S. 673, 695 (1986) (Stevens, J., dissenting) (objecting to hearing cases that “operate[] to expand this Court’s review of state remedies that overcompensate for violations of federal constitutional rights”).

³⁶⁹ 466 U.S. 380, 382 (1984) (Stevens, J., dissenting).

³⁷⁰ *Id.* at 385.

latter more than the former.³⁷¹ In *Ponte v. Real*, the Court held that the Supreme Judicial Court of Massachusetts erred when it ruled that a prison disciplinary hearing that cancelled a prisoner's good behavior credits violated Fourteenth Amendment due process because there was no record of why the disciplinary board had refused to allow the prisoner to call witnesses.³⁷² Stevens thought the Court should not have granted review in the first place. That the state court had gone further than Supreme Court case law required was, in Stevens' view, a "manifestly insufficient reason for adding this argument to our docket."³⁷³ State courts should, Stevens thought, be free to extend the Court's rulings "in the light of local conditions;"³⁷⁴ the case presented no violation of an individual right;³⁷⁵ and the issue was not of national significance,³⁷⁶ but merely "a controversy between the Supreme Judicial Court of Massachusetts and that State's prison officials."³⁷⁷

So, too, in *California v. Carney*,³⁷⁸ Stevens dissented from the Court's reversal of a decision of the California Supreme Court extending to a mobile home the full Fourth Amendment protections that apply to a regular home, including the requirement that, absent exigent circumstances, the police obtain a warrant before conducting a search of the premises.³⁷⁹ Stevens argued that the Court's review of the state court decision undermined the role of the state courts in the constitutional system, increased the Court's workload with little payoff,³⁸⁰ and turned the Court into the "High Magistrate for every warrantless search and seizure."³⁸¹ There was, Stevens thought, nothing wrong with a state court making a "modest extension of our Fourth Amendment precedents"³⁸² in a manner that did not involve a

³⁷¹ *Id.* at 385-86.

³⁷² 471 U.S. 491 (1985).

³⁷³ *Id.* at 501 (Stevens, J., concurring in part).

³⁷⁴ *Id.* at 502.

³⁷⁵ *Id.* at 502 n.3.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 502 (footnote omitted).

³⁷⁸ 471 U.S. 386 (1985).

³⁷⁹ *Id.* at 393-94.

³⁸⁰ *See id.* at 396 (Stevens, J., dissenting).

³⁸¹ *Id.* at 396 (Stevens, J., dissenting) (footnote omitted).

³⁸² *Id.* at 397.

citizen being deprived of a constitutional right.³⁸³ By reaching out to correct the California court's decision, the Supreme Court had shut down the contributions state courts make to the development of federal constitutional law: "Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles."³⁸⁴ In *Connecticut v. Barrett*,³⁸⁵ in which the Court overturned a state court decision finding a violation of the Sixth Amendment right to counsel,³⁸⁶ Stevens, joined by Justice Marshall, would have dismissed the writ of certiorari as improvidently granted because the Court should not hear a case merely because "one State Supreme Court [has] arguably granted more protection to a citizen accused of crime than the Federal Constitution requires."³⁸⁷

In considering *Long* and *Ramos* and the subsequent cases discussed in this section, it is important to recognize that Stevens did not necessarily embrace a wholesale prohibition on the Court reviewing any state court case upholding a federal constitutional claim against state government. Stevens' approach in *Long* was tied closely to the fact that the case involved a close call about whether or not there was an adequate and independent state ground for the state court's holding.³⁸⁸ In *Carney*, where the state court decision was based entirely on federal law, Stevens also did not entirely foreclose review entirely: "Of course," he wrote, "we may not abdicate our responsibility to clarify the law in this field."³⁸⁹ The problem in the case was that the Court had acted prematurely because "[t]o identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law."³⁹⁰

³⁸³ *Id.* at 398.

³⁸⁴ *Id.* at 399.

³⁸⁵ 479 U.S. 523 (1987).

³⁸⁶ *Id.* at 528-29.

³⁸⁷ *Id.* at 536 (Stevens, J., dissenting).

³⁸⁸ See also *Pennsylvania v. Labron*, 518 U.S. 938, 950 (1996) (Stevens, J., dissenting) (dissenting from the Court's reversal of a state court's ruling on an automobile search and explaining that "in light of my understanding of this Court's primary role—to protect the rights of the individual that are embodied in the Federal Constitution—the decision to . . . reverse state decisions resting tenuously at best on federal grounds is imprudent") (quotation omitted).

³⁸⁹ *Carney*, 471 U.S. at 399.

³⁹⁰ *Id.* at 400 (footnote omitted).

Also instructive is Stevens' view in *Massachusetts v. Upton*.³⁹¹ There, the Court in a *per curiam* opinion, reversed a decision of the Supreme Judicial Court of Massachusetts that failed to abide by a holding from the Supreme Court's previous term—that under the Fourth Amendment a court that reviews whether there was probable cause for a magistrate judge to issue a warrant must apply a totality of the circumstances test and determine only whether there is substantial evidence in the record to support the magistrate's decision.³⁹² Justice Stevens concurred and he wrote separately to explain why *Upton* did not fall within his *Long*-dissent theory for denying review.³⁹³ The Massachusetts court, Stevens noted, had specifically refused to consider whether the search at issue violated the state constitution, and the court indicated that it would only reach that question if it turned out that the court's approach under the federal Constitution proved incorrect.³⁹⁴ Under these circumstances, Stevens wrote, the Massachusetts court had committed "an error of more fundamental character" than simply applying the Fourth Amendment too generously.³⁹⁵ Maintaining the "proper balance between the respective jurisdictions of state and federal courts"³⁹⁶ is, Stevens wrote, "a two-way street."³⁹⁷ While the Court should not "encroach[] . . . into territory . . . reserved for state judges,"³⁹⁸ so too, "state judges . . . [should not] unnecessarily invite this Court to undertake review of state-court judgments."³⁹⁹ Here, the state court "unwisely and unnecessarily invited . . . review"⁴⁰⁰ and in doing so it demonstrated "a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts."⁴⁰¹ By refusing to analyze the issue in the case under the state constitution, and instead "strain[ing] to

³⁹¹ 466 U.S. 727 (1984).

³⁹² *Id.* at 728-35 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

³⁹³ *Id.* at 735 (Stevens, J., concurring).

³⁹⁴ *Id.* at 735-36 & n.1.

³⁹⁵ *Id.* at 735.

³⁹⁶ *Id.* at 736.

³⁹⁷ *Id.* at 736-737.

³⁹⁸ *Id.* at 736.

³⁹⁹ *Id.* at 737.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

rest its judgment on federal constitutional grounds,”⁴⁰² the state court “ignored . . . [the] fundamental premise of our constitutional system,”⁴⁰³ that “[t]he States . . . remain the primary guardian of the liberty of the people.”⁴⁰⁴ The state court’s “ill-advised entry into the federal domain” demanded correction.⁴⁰⁵ There were, then, limits to Stevens’ view that the Court should deny review of state court decisions in favor of federal constitutional rights.

b. The 2005 Term

This brings us to the Court’s October 2005 term, the first full term of the Roberts Court. In three cases, and with renewed energy, Justice Stevens made his argument to the Court that it should exercise greater restraint in reviewing state court decisions. The most significant of these three cases is *Kansas v. Marsh*.⁴⁰⁶ *Marsh* involved a defendant convicted in state court of capital murder and sentenced to death.⁴⁰⁷ On appeal, the Kansas Supreme Court held that the state’s capital sentencing statute violated the Eighth Amendment.⁴⁰⁸ The statute required the death penalty if the jury found there were aggravating circumstances that were not outweighed by mitigating circumstances—the death penalty therefore applied where the aggravating and mitigating circumstances were in equipoise.⁴⁰⁹ In his opinion for the Court, Justice Thomas first held that the state court decision was not based on an adequate and independent state law ground and therefore jurisdiction was proper.⁴¹⁰ Turning to the merits, Thomas reversed the state court, holding that the Kansas statute was indistinguishable from the death penalty statute the Court had upheld

⁴⁰² *Id.* at 738.

⁴⁰³ *Id.* at 739.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ 126 S. Ct. 2516 (2006).

⁴⁰⁷ *Id.* at 2520-21.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 2522.

in *Walton v. Arizona*⁴¹¹ and that the statute was also constitutional under other Supreme Court case law.⁴¹²

In his dissent in *Marsh*, in addition to disputing the majority's view that *Walton* governed, Stevens argued that the Court's grant of certiorari was "a misuse of our discretion."⁴¹³ Whereas *Walton* involved a petition brought by a convicted capital defendant, thereby "enabl[ing] us to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution," in *Marsh*, "the State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required."⁴¹⁴ According to Stevens, there was simply no reason under these circumstances for the Court to hear the Kansas case. Instead, "[a] policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind."⁴¹⁵ Stevens noted that the decision to grant review paralleled *Ramos*,⁴¹⁶ about which he now said: "[T]he Court [in *Ramos*] reversed the judgment of the state court, concluding—somewhat ironically—that 'the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.'"⁴¹⁷ The irony Stevens had in mind was, of course, that one branch of the state, the state judiciary, had already decided this issue, and now the Supreme Court was interfering with that decision. In other words, the Court professed to be protecting the state, but it ended up reversing what the state (court) had decided. "What harm," Stevens asked in *Marsh*, as he had in *Ramos*, "would have been done to the administration of justice by state courts if the Kansas court had been left undisturbed in its determination?"⁴¹⁸ As in *Ramos*, there was no "rule of law" that required the Court to grant review, and no other state

⁴¹¹ *Id.* at 2522-24 (citing *Walton v. Arizona*, 497 U.S. 639 (1990) (upholding Arizona statute that required the judge to impose death upon finding aggravating factors if there were no mitigating circumstances sufficiently substantial to call for leniency)).

⁴¹² 126 S. Ct. at 2524-27.

⁴¹³ *Id.* at 2539 (Stevens, J., dissenting).

⁴¹⁴ *Id.* at 2540.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 2540.

⁴¹⁷ *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 1014 (1983)).

⁴¹⁸ *Id.* (quotation and internal marks omitted).

was bound by the holding of a single state court.⁴¹⁹ “Nothing more,” Stevens concluded, “than an interest in facilitating the imposition of the death penalty in Kansas justified this Court’s exercise of its discretion to review the judgment of the Kansas Supreme Court.”⁴²⁰

Justice Scalia, who joined Thomas majority opinion in *Marsh*, wrote a separate concurrence in which he disputed Stevens’ view that, in Scalia’s words, “when a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it.”⁴²¹ Scalia agreed with Stevens that no legal rule required the Court to review the case; this, however, was true of the Court’s docket in general.⁴²² Stevens was also correct that the state court decision in favor of the defendant was limited to Kansas, but again, Scalia noted, this characterizes every state court decision the Court confronts.⁴²³ Scalia disagreed with Stevens’ claim that the Court had no interest (besides facilitating death sentences) in hearing the case: “Our principal responsibility . . . and a primary basis for the Constitution’s allowing us to be accorded jurisdiction to review state-court decisions . . . is to ensure the integrity and uniformity of federal law.”⁴²⁴ Scalia further disputed Stevens’ claim that there was anything ironic about a court committed to the interests of the states reversing a state court case on a federal constitutional matter. He wrote:

The dissent’s assertion . . . rests on a misguided view of federalism and, worse still, of a republican form of government. Only that can explain the dissent’s suggestion that . . . reversal of a state-court determination somehow undermine[s] state authority. . . . When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy. But when state courts

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* at 2531.

⁴²² *Id.* at 2529-30 (Scalia, J., concurring).

⁴²³ *Id.* at 2530.

⁴²⁴ *Id.* (footnote omitted).

erroneously invalidate such actions, because they believe federal law requires it—and *especially* when they do so because they believe the Federal *Constitution* requires it—review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it.⁴²⁵

According to Scalia, Supreme Court review of erroneous state court decisions on federal constitutional issues was needed because, without it, state courts would never be accountable for their errors. “When a federal constitutional interdict against the duly expressed will of the people of a State is erroneously pronounced by a State’s highest court, no authority in the State—not even a referendum agreed to by all its citizens—can undo the error.”⁴²⁶ Stevens’ unwillingness to review state court decisions invalidating state laws, therefore, “display[ed] not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves.”⁴²⁷ By contrast, if the Court corrects a state court’s errors on federal laws, “we return power to the State, and to its people.”⁴²⁸

Scalia also thought that Stevens mischaracterized the role of the Court. According to Scalia, not only must the Court safeguard the interests of individual criminal defendants, it must also protect the operations of a state legislature—because state legislative processes involve (adopting a formulation by Justice Black) “the right of each man to participate in the self-government of his society.”⁴²⁹ Finally, Scalia complained, Stevens’ approach would “change the uniform ‘law of the land’ into a crazy quilt,” and, by favoring criminal defendants, undermine the impartiality of judges.⁴³⁰ While, Scalia noted, it might be “appropriate” for Congress to “place . . . a thumb upon our power to review,” in the absence of any federal statute limiting jurisdiction, the

⁴²⁵ *Id.* at 2531.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.* (quoting *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting)).

⁴³⁰ 126 S. Ct. at 2531 (Scalia, J., concurring)

Court should grant review without regard to the party asserting the federal error.⁴³¹

Stevens and Scalia also disagreed about how the 1789 Judiciary Act bore on this problem. According to Stevens, if uniformity were important, it is hard to explain why the 1789 Act did not give the Court authority to review all state court decisions on federal constitutional issues.⁴³² “Not until 1914,” Stevens noted, “did we have jurisdiction over decisions from state courts which arguably overprotected federal constitutional rights at the expense of state laws.”⁴³³ Moreover, Stevens observed, even when review in the Court was by writ of certiorari, until 1988, criminal defendants had a right to appeal state decisions upholding the validity of state statutes against federal constitutional challenges.⁴³⁴ Therefore, “during the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law.”⁴³⁵ Scalia countered that the limitation in the Judiciary Act was “unsurprising and immaterial” in light of the overall structure of the 1789 Constitution.⁴³⁶ He wrote:

⁴³¹ *Id.* In response to these points, Stevens argued that a defendant seeking review presents the “separate federal issue in ensuring that no person be convicted or sentenced in violation of the Federal Constitution—an interest entirely absent when the State is the petitioner.” *Id.* at 2540 n.1 (Stevens, J., dissenting). In deciding whether to grant review this interest should be considered, and its consideration does not make the Court partial. *Id.* Stevens also thought Scalia had not explained adequately why the Court needed to ensure the integrity and uniformity of federal law. *Id.*

Scalia’s point that the statute does not draw the distinction has little traction. The Court already controls its docket—it is not required to hear a case in which a state has lost in state court. Moreover, the Court has not in a long time acted as though its function is to do justice in individual cases by correcting errors by the lower courts. See William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *Yale L.J.* 1, 2 (1925) (“The function of the Supreme Court is . . . not the remedying of a particular litigant’s wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest.”).

⁴³² 126 S. Ct. at 2540 n.1 (Stevens, J., dissenting).

⁴³³ *Id.* (citing Act of Dec. 23, 1914, ch. 2, 38 Stat. 790) (additional citation omitted).

⁴³⁴ *Id.* (citing 28 U.S.C. § 1257 (1982 ed.)).

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 2530 n.1 (Scalia, J., concurring).

The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States, *see* [*Barron v. Baltimore*].) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds.⁴³⁷

More generally, Scalia thought, “[t]he early history of our jurisdiction assuredly does not support the dissent’s awarding of special preference to the constitutional rights of criminal defendants.”⁴³⁸ Indeed, there was historical evidence cutting the other way: “[e]ven with respect to federal defendants (who did enjoy the protections of the Bill of Rights), during the first 100 years of the Court’s existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond.”⁴³⁹ “In any case,” Scalia concluded, “present law is plain” and defendants and state government are “in precisely the same position,” each entitled to petition for review of adverse state court decisions.⁴⁴⁰

In addition to *Marsh*, Stevens made his argument for a limitation on the Court’s exercise of jurisdiction in two other cases from the 2005 term. They require only brief mention. In *Brigham City v. Stuart*,⁴⁴¹ Chief Justice Roberts held for a unanimous court that the Utah Supreme Court erred in holding that the Fourth Amendment required exclusion of evidence the police found after entering a home, without a warrant, in response to an altercation.⁴⁴² Roberts held that the police do not need a warrant when they have an objectively

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.* (quotation omitted).

⁴⁴⁰ *Id.*

⁴⁴¹ 126 S. Ct. 1943 (2006).

⁴⁴² *Id.* at 1949.

reasonable basis for believing an occupant is seriously injured or imminently threatened with such injury.⁴⁴³ Stevens wrote a separate concurring opinion in which he called the case “an odd flyspeck,”⁴⁴⁴ governed by “well-settled rules of federal law.”⁴⁴⁵ He wrote:

[T]he only difficult question is which of the following is the most peculiar: (1) that the Utah trial judge, the intermediate state appellate court, and the Utah Supreme Court all found a Fourth Amendment violation on these facts; (2) that the prosecution chose to pursue this matter all the way to the United States Supreme Court; or (3) that this Court voted to grant the petition for a writ of certiorari.⁴⁴⁶

Stevens noted that the Utah Supreme Court had admonished the defendant for failing to challenge the search under the state constitution and the court specifically invited future litigants to bring a state constitutional challenge.⁴⁴⁷ Stevens concluded that this case history suggests that the state court will simply reinstate its exclusionary rule, under the state constitution.⁴⁴⁸ Accordingly, the Supreme Court’s own ruling will have no practical effect in Utah. Stevens added that even if his prediction about what the state court will do proves wrong, there was still no reason for the Court to grant review.⁴⁴⁹ “Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.”⁴⁵⁰ The state, on this view, included the state court; the greater protection might be based on a state court’s expanded reading of the federal Constitution.

⁴⁴³ *Id.* at 1946.

⁴⁴⁴ *Id.* at 1949 (Stevens, J., concurring).

⁴⁴⁵ *Id.* at 1950.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 1950.

⁴⁴⁸ *Id.*

⁴⁴⁹ *See id.*

⁴⁵⁰ *Id.*

On the same day the Court decided *Marsh*, it also decided *Washington v. Recuenco*, with a majority opinion by Justice Thomas.⁴⁵¹ In *Recuenco*, the Supreme Court of Washington vacated a defendant's sentence on an assault conviction after the sentencing court, in violation of *Blakely v. Washington*,⁴⁵² reached its own factual findings to impose a three-year enhancement for the defendant's use of a firearm.⁴⁵³ The Washington Supreme Court held that *Blakely* violations can never be harmless; therefore, the sentence had to be vacated.⁴⁵⁴ In reversing, Justice Thomas held that the failure to submit a sentencing factor to the jury in accordance with *Blakely* is not a structural error, and, therefore, is subject to harmless error analysis.⁴⁵⁵ In his dissenting opinion in *Recuenco*, Stevens argued that review of the Washington decision was improper, because, as in *Stuart* and *Marsh*, "this is a case in which the Court has granted review in order to make sure that a State's highest court has not granted any greater protection than the bare minimum required by the Federal Constitution."⁴⁵⁶ The Court's review was particularly inappropriate, Stevens wrote, because on remand, the Washington Supreme Court (as Thomas himself acknowledged) might simply reinstate its prior judgment, on the ground that, under state law, the *Blakely* error in the defendant's case was not harmless, or, again, under state law, that the proper remedy for *Blakely* errors is to vacate the sentence.⁴⁵⁷

c. Summary

Justice Stevens has invited the Court to limit its review of state court cases upholding federal constitutional rights against state government. In Stevens' view, the Court's interest in correcting state

⁴⁵¹ 126 S. Ct. 2546 (2006).

⁴⁵² 542 U.S. 296, 313-14 (2004) (holding as violating the Sixth Amendment right to a jury trial state sentencing law allowing judge to impose sentence beyond standard range upon finding aggravating factors). *See also* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

⁴⁵³ 126 S. Ct. at 2549-50.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 2553.

⁴⁵⁶ *Id.* at 2553 (Stevens, J., dissenting).

⁴⁵⁷ *Id.* at 2554.

decisions that expand federal constitutional rights is insufficient to expend the Court's scarce resources. In addition, Stevens argues, the Court should be more respectful of state judicial processes. For reasons already suggested, and for some more still to come, Stevens' own proposal, despite sometimes broad statements, is likely limited in its scope. In particular, Stevens probably does not foresee the Court's renouncing, in all circumstances, the power to review state court decisions invalidating state laws or state action on federal constitutional grounds. There will be time later to return to those limits and to ask whether Stevens himself goes far enough. But that is getting ahead of things. For now, let us understand Stevens' proposal as a formal rule against Supreme Court review of state court decisions upholding federal constitutional rights. Stevens has presented and defended his proposal; Justice Scalia, in his opinion in *Marsh*, has raised objections. It is time to assess things more systematically on the merits.

B. The Costs of Unitary Authority

State courts and federal courts once shared, as a formal matter, responsibility for interpreting the federal Constitution. Today, the authority to decide what the Constitution means is the prerogative of the Supreme Court—state courts must follow what its determinations. The costs and benefits of this change can be assessed along multiple dimensions, the subject of this section.

a. Protection of Rights

It is hard to deny that individual rights are, overall, more secure, with the incorporation of the Bill of Rights against the states; with courts, especially federal courts, holding state government accountable for violating the Bill of Rights; and with Congress empowered to enforce the Fourteenth Amendment's requirements. Consolidation, then, is a positive development, because it provides a federal remedy when state government violates rights, without leaving aggrieved citizens at the mercy of the state courts.

Still, even with constitutional rights better secured overall in the modern era, some rights are probably less protected than they might be. In settling constitutional rights for the entire nation, the U.S. Supreme Court typically proceeds with unique caution. Studies show,

for example, that, the Court is not often ahead of political changes.⁴⁵⁸ While recent work on the Rehnquist Court indicates it was more likely to correct “liberal errors” than “conservative errors” by the state courts,⁴⁵⁹ the Court’s generally cautious approach is likely independent of whether the justices are conservative rather than liberal. Within the range of results they find satisfactory, Supreme Court justices across the spectrum can be expected to opt for narrow rather than broad outcomes. The justices understand that they are setting rules for a diverse nation, that those rules impose costs on state and local government,⁴⁶⁰ and that it is normally better to postpone deciding more than is necessary for the satisfactory disposition of the case at hand.⁴⁶¹

A formal rule that state courts could expand constitutional rights would create a setting in which constitutional rules can be more carefully tailored to local circumstances. In applying the federal Bill of Rights, state courts would be free to take into account whether and how local conditions require more expansive protections than the Supreme Court, when it sets rules for the nation as a whole, is inclined to enforce. For example, in a state with a long history of abusive searches and seizures by the police, the state courts can insist the police follow more stringent procedural requirements under the Fourth Amendment and impose more severe remedies if the police violate the rules. If a state has a religious minority that has experienced

⁴⁵⁸ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 338 (1991) (arguing that the Supreme Court’s decisions in the areas of segregated schooling, reproductive freedom, and women’s rights were at most a recognition of the ways in which society was already evolving and concluding that “courts can almost never be effective producers of significant social reform”).

⁴⁵⁹ John C. Kilwein & Richard A. Brisbin, Jr., *U.S. Supreme Court Review of State High Court Decisions: From the Warren through the Rehnquist Courts*, 89 *JUDICATURE* 146, 183 (2005) (reporting that the Warren and Burger Courts were more likely to correct “conservative errors” and the Rehnquist Court more likely to correct “liberal errors” by state courts and concluding that, as a result, “at the beginning of the twenty-first century, criminal defendants, minorities, seekers of expressive freedom, and unions might find less relief than they might have secured from state courts three decades earlier.”).

⁴⁶⁰ See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 *TEX. L. REV.* 1025 (1985) (“Due to the size and diversity of the country, the Court must limit its decisions to constitutional norms capable of achievement nationwide.”).

⁴⁶¹ See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001).

disadvantages, the state court can apply First Amendment protections that exceed what the Supreme Court may have adopted. In deciding whether a state's punishment is cruel and unusual under the Eighth Amendment, a state court can look to the views and sensibilities of the state's residents. In a state with persistent racial or other biases in its criminal system, either at the investigatory state (for example, the police stop Black motorists more often than White motorists), the prosecutorial stage (for example, Blacks more likely to be prosecuted for drug possession than Whites), or the adjudication stage (for example, racially skewed jury pools), the state court could impose stronger safeguards to protect constitutional rights. At the same time, the U.S. Supreme Court would set minimum standards of protection for the nation as a whole, such that interpretations and applications of the Constitution in the state courts would never drop below a national floor.

b. Federalism

Arguably, a formal rule that the Supreme Court is authoritative on issues of federal constitutional law is inconsistent with federalism. Consolidation displaces the role of state courts, a part of state government, in the federalist scheme. Though they apply federal law, state courts are not lower federal courts—any more than the state legislatures are sub-units of Congress,⁴⁶² or the state governors are agents of the federal executive branch.⁴⁶³ The historical practice of allowing state courts leeway to interpret independently the federal Constitution recognized the importance of state courts in our constitutional design.

Whether doing something inconsistent with federalism is good or bad is a separate question. There are, however, reasons to think that in this case the change has drawbacks. Federalism places value on allowing localized government to develop and implement rules that best suit their own conditions. In the antebellum era, state courts were free to apply federal constitutional protections more stringently in light of local conditions and needs. The U.S. Supreme Court, with power to

⁴⁶² See *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of the federal Low-Level Radioactive Waste Policy Amendments Act because the Constitution prohibits commandeering state legislatures).

⁴⁶³ See *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act because the Constitution prohibits commandeering state executive officials to enforce federal law).

review a denial of a federal constitutional right, set a national floor, but state courts were free to impose stronger constraints on state government. Today, state courts are no longer free to take into account whether and how local conditions require more expansive protections than the Supreme Court is inclined to enforce. For example, although a state may have a long history of abusive searches and seizures by the police, the state court cannot today insist the police follow more stringent procedural requirements under the Fourth Amendment and impose more severe remedies if the police violate the rules. If a state has a religious minority that has experienced disadvantages, the state court cannot apply First Amendment protections that exceed what the Supreme Court has adopted. In deciding whether a state's punishment is cruel and unusual under the Eighth Amendment, a state court cannot look to the views and sensibilities of that state's own residents and invalidate laws the Supreme Court would uphold.

Arguably, local variation is not a good thing when it comes to implementing federal law, particularly federal constitutional law.⁴⁶⁴ From a modern perspective, a deficiency of the early courts was that individual federal constitutional rights varied around the country—turning uniform law into what Justice Scalia referred to in *Marsh* as a “crazy quilt.”⁴⁶⁵ Today, a single body of federal constitutional law, generated by the U.S. Supreme Court through power to review all state court decisions on federal constitutional issues, means that citizens do not live with different federal constitutional rights depending on the decisions of their state courts.⁴⁶⁶ Uniformity within each state is also promoted when, rather than generating their own rules, federal

⁴⁶⁴ See, e.g., THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”). Modern commentators emphasize uniformity as a value of the ratifying era. See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1218 (2004) (“Although the Convention split on the necessity of establishing lower federal courts (resolved by giving Congress the power to decide), there was widespread agreement on the need for a federal Supreme Court to ensure the supremacy and uniformity of federal law.”) (footnotes omitted).

⁴⁶⁵ *Marsh*, 126 S. Ct. at 2531 (Scalia, J., concurring).

⁴⁶⁶ See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 911 (1984) (“Although the uniformity-assuring function of the Court does not strike me as a constitutionally mandated one, as a matter of policy, our system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.”).

diversity courts today determine how a case would be adjudicated in state court.⁴⁶⁷ We will return to the issue of uniformity below.⁴⁶⁸ For now, it suffices to flag the issue.

Federalism does not value local authority merely for its own sake, but for more general benefits. Allowing state courts to adopt more expansive readings of constitutional rights generates information about how rights might be structured in various ways and the effects of different choices. There are, therefore, gains to the system as a whole: Approaches and outcomes in one state can be watched by other states, and federal courts can also draw upon the lessons of localized experimentation.⁴⁶⁹ Consolidation of judicial decision-making undermines the benefits of experimentation that are a feature of American federalism. Professors Solimine and Walker summarize the problem:

[T]he Supreme Court cannot pick and choose among the states. . . . It cannot say, “Mississippi, why can’t you behave like Massachusetts in your handling of tainted evidence?” Or, “Florida, go check with Oregon on giving people adequate representation at trial.” It must, instead, proclaim a national rule and then require all the states to observe it. States are thus marginalized: That is, they must tinker with policies, if they wish to, at the margins. . . . With the end of experimentation comes the end of creativity and responsibility.⁴⁷⁰

⁴⁶⁷ See *Erie*, 304 U.S. at 75 (explaining that the defect of applying general law in diversity cases was that “in attempting to promote uniformity of law throughout the United States it prevented uniformity in the administration of the law of the state.”).

⁴⁶⁸ See *infra* Part ____.

⁴⁶⁹ See, e.g., Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505 n.6 (1987) (“[D]isuniformity created by various judges applying federal law . . . inform[s] and enrich[es] the uniform interpretation ultimately supplied by the Supreme Court.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1252 (1978) (“A number of ‘reforms’ in criminal procedure imposed as a matter of federal constitutional law by the Warren Court were already established as a matter of state law in a significant number of states.”) (footnote omitted).

⁴⁷⁰ MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 24-25 (1999).

In addition to curtailing the benefits of localized experimentation, our modern practice, in which the Supreme Court has formal authority to review and correct state court decisions upholding federal constitutional rights against state government, represents an unusual interference in the structure of state government. Our current system permits one branch of state government, the executive, acting in the name of the state, to enlist the help of federal judges to overturn a decision of another branch of state government, the judiciary. As Professor Hartnett observes, “deciding such cases at the request of state officers . . . changes the balance between the branches of state government,”⁴⁷¹ and this occurs without even a “plain statement of assent by the state authorizing some of its officers to seek review of a decision by other of its officers in the Supreme Court.”⁴⁷² The criticism does not challenge the ability of *individuals* to seek review of state court decisions (or to contest in federal court the decisions and activities of the other branches of state government). Rather, it is directed at the ability of one state official to come before the Supreme Court, as an aggrieved party, and challenge what another state official has done.⁴⁷³ We would surely find it strange if a state judge, in the name of state government, were to ask a federal court to tell the state legislature to repeal a statute, or to tell the state executive to stop enforcing it—and stranger still if the state judge were to make the request to the Congress or the President. Yet we take for granted that a state executive official can challenge the decisions of a state judge in federal court. Allowing state courts to interpret broadly federal constitutional protections, without being yanked back into place by the Supreme Court, would likely promote greater regard for the state courts as an element of state government.⁴⁷⁴

⁴⁷¹ Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy*, 75 TEX. L. REV. 907, 968 (1997).

⁴⁷² *Id.* at 970 (footnote omitted).

⁴⁷³ See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 456 (1995) (noting how in the modern period the “distinction between public power and private right” has been obscured, with government power becoming “roughly equivalent” to the liberty interests of individuals, and therefore a basis to seek redress in the courts of another sovereign).

⁴⁷⁴ See Thomas H. Lee, *Counter-majoritarian Federalism*, 74 FORDHAM L. REV. 2123, 2123 (2006) (describing and calling “counter-majoritarian federalism” Justice Stevens’ focus in *Long* and subsequent cases on the autonomy of state judges, as opposed to state legislators.).

c. State Law Effects

Consolidation has also likely weakened *state* constitutional law as developed and applied by the state courts. Requiring state courts to enforce the Bill of Rights as defined and policed by the Supreme Court has left state constitutional law in the modern era relatively undeveloped. This is for two related reasons. First, the incorporation of federal constitutional protections has displaced state constitutional law as the principal source of individual rights.⁴⁷⁵ Second, rather than decide independently what provisions of state constitutions mean, modern state courts have tended to hew to the Supreme Court's understandings of analogous provisions in the federal Constitution.⁴⁷⁶ Though some state courts have shown independence in applying some state constitutional provisions,⁴⁷⁷ as Michael Solimine reports, "systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. . . . [T]he majority of state courts, on most issues engage in an analysis in lockstep with their federal counterparts."⁴⁷⁸ Not only

⁴⁷⁵ See, e.g., Althouse, *supra* note 469, at 1490 (writing that "[a]s long as state courts were engaged in absorbing these new standards [incorporated by the Fourteenth Amendment], they left analogous provisions in state constitutions unexplored.").

⁴⁷⁶ See, e.g., Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 322 (1996) (describing as "disturbingly inadequate" the approach to search and seizure of the New York courts under the state constitution); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (reporting that in the "clear majority of cases" state courts in interpreting state constitutions follow federal constitutional doctrine).

⁴⁷⁷ See Mazzone, *supra* note 17, at 76-79 (collecting cases).

⁴⁷⁸ Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002) (collecting studies). See also Patricia Fahlbusch & Daniel Gonzalez, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 UNIV. MIAMI L. REV. 159 (1987) (reporting no increased reliance on state court grounds after *Long*); Felicia A. Rosenfeld, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1049-50 (1988) (reporting that most state courts do not properly use the standards of *Long*).

have state courts lost a voice under the federal Constitution—they are out of practice speaking under their state constitutions as well.⁴⁷⁹

In light of a growing recognition of these concerns, there is expanding interest in enhancing the constitutional roles of entities besides the Supreme Court. Commentators have explored and debated the potential of state constitutions for protecting individual rights,⁴⁸⁰ the possibilities of dual enforcement of federal constitutional norms by federal and state courts;⁴⁸¹ and the prospect of the non-judicial branches of government interpreting and enforcing constitutional provisions,⁴⁸² particularly when the courts do not fully enforce constitutional norms.⁴⁸³ These programs all seek to create a site of

⁴⁷⁹ See, e.g., Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1481 & n.4 (1990) (writing that a hurdle for Texas courts to begin reading the protections for criminal defendants in the state constitution more expansively is that “for more than 100 years the Texas criminal courts have interpreted the state and federal constitutions identically,” and collecting cases).

⁴⁸⁰ Justice Brennan, for example, thought that in the post-Warren Court period, state constitutions existed as important sources for protecting individual liberty. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions and Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). By contrast, Professor Gardner takes a more pessimistic view of the possibilities of state constitutions. See Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (writing that “state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements”).

⁴⁸¹ “In the dual enforcement of constitutional norms in the United States, state governmental institutions, and particularly state courts, are entrusted with adjudicating federal constitutional and statutory rights.” Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1457 (2005). See generally Symposium, *Dual Enforcement of Constitutional Norms*, 46 WM. & MARY L. REV. 1219 (2005). Invoking the concept of parity, scholars have vigorously debated whether federal and state courts are equally well suited to enforcing federal constitutional rights. See, e.g., SOLIMINE & WALKER, *supra* note 470, at 34-62 (arguing that empirical evidence shows that federal rights are as likely to be protected in state court as in federal court); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts do not protect federal constitutional rights as forcefully as do federal courts).

⁴⁸² See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing against the courts having a monopoly on constitutional law and in favor of giving the Constitution to Congress to interpret and protect).

⁴⁸³ Lawrence Sager argues that there exist valid yet underenforced constitutional norms: institutional constraints prevent the federal courts from enforcing otherwise valid and enforceable constitutional rights to their fullest extent. See Sager, *supra*

constitutional decision-making that will stand strong and apart from the Supreme Court and its understanding of the federal Constitution. However, none of these other approaches takes sufficient account of the modern consolidation of four bodies of constitutional law into just two—until *this* development and its implications are fully understood, reform remains doubtful. In particular, efforts to encourage state courts to work independently in deciding state constitutional law issues are likely to fail in a context in which state courts, deciding federal constitutional issues, follow so closely in step with the U.S. Supreme Court.

A formal rule that state courts have independence to expand constitutional rights is also likely good for the development of state constitutional law. Pushing state courts out of the shadow of the U.S. Supreme Court and giving them independence to interpret and apply the federal Constitution is also likely to encourage state courts to be creative and innovative when it comes to interpreting their own state constitutions. When state courts are permitted to depart from Supreme Court doctrine in interpreting federal constitutional issues, they are less likely to act as copycats when it comes to crafting state constitutional law. Independence under the federal Constitution will encourage independence under state constitutions as well.

d. Legitimacy

Modern developments can also be measured in terms of institutional effects and in particular on perceptions about the legitimacy of the judicial system. Today, because federal constitutional rights are, ultimately, dependent upon the rulings of a single court, the U.S. Supreme Court, and it reviews a very small number of cases, the stakes in any decision by that Court are exceedingly high. A ruling by the Court sets the standards for the entire nation—there might not be another opportunity to revisit an issue for many decades. In this context, it is no surprise that modern confirmation battles are ferocious: there is so much at stake. Were federal constitutional rights less in the hands of the Court (or, as is sometimes the case, a single justice) some energy would shift away from this single institution.

note 469, at 1213-28. It therefore falls on both Congress and the state courts to enforce these rights more completely. *See id.* at 1242-63. The Supreme Court should defer to congressional judgments recognizing expanded constitutional rights and refrain from reviewing state court decisions construing constitutional rights more broadly than corresponding federal interpretations. *See id.* at 1242.

Similarly, a more active role for state courts in federal constitutional interpretation could temper the oft-heard criticism that judges, particularly federal judges, are unaccountable and undermine democracy. Such criticisms would likely be less salient if responsibility for applying the federal Constitution were more evenly shared by state court judges,⁴⁸⁴ many of whom who are elected to office,⁴⁸⁵ and most of whom serve for fixed terms.⁴⁸⁶

C. Formalization and Its Limits

These are all possible benefits to Justice Stevens' proposal, broadly construed, to limit the Supreme Court's review of state court decisions upholding federal constitutional rights. However, there are also some significant difficulties that need to be addressed.

a. Crazy Quilts

Justice Scalia cautions that under Justice Stevens' proposal, federal constitutional law will vary around the country, with residents of some states enjoying, as a result of state court decisions, greater federal protections than residents of other states.⁴⁸⁷ This seems a strange outcome for the Constitution of "the People of the United States,"⁴⁸⁸ which guarantees the "*equal* protection of the laws."⁴⁸⁹

⁴⁸⁴ Though the benefit should not be exaggerated. See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1414 (1999) ("State court experience . . . has demonstrated the unfortunate, but unsurprising, truth that elected [state] judiciaries have difficulty protecting individual rights against majoritarian forces."); Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 161 (1989) (writing that "state courts are, like federal courts, ultimately anti-majoritarian political institutions" and that under *Long* "[t]he Supreme Court can [usefully] serve as an appropriate check on excessive and unsound decisions on federal law by state courts.").

⁴⁸⁵ **[RA check this and add cite:]** [?Elections, in various forms, are used to select judges in thirty-nine states. In 12 states, judges are appointed (in most of those states by the governor, in two states (SC and VA) by the legislature). In 16 states, judges are nominated by bipartisan commissions and then appointed by the governor and after completion of one term must be elected to a subsequent term. In ___ states, judges run for election.]

⁴⁸⁶ **[RA: get information]**

⁴⁸⁷ See *supra* Part ___.

⁴⁸⁸ U.S. CONST. pmb1.

It is clear that Stevens' proposal allows for constitutional protections, above a national floor, to vary from one state to another. The degree to which those protections will vary depends, of course, on the willingness of state judges to expand on what the Supreme Court itself requires. Yet even assuming very substantial variations among state court rulings, the inconsistency is not likely to outweigh the benefits to the proposal. Our legal system already tolerates a good deal of inconsistency and non-uniform outcomes, even as to matters of federal constitutional interpretation. Everyone knows that the Fourth Circuit is not the Ninth Circuit—it is, for example, probably no coincidence that, in the War on Terrorism, enemy combatants are held in Charleston and Norfolk rather than in San Francisco.⁴⁹⁰ The U.S. Supreme Court, which now controls its own docket, hears only a tiny fraction of cases presented to it,⁴⁹¹ and decides far fewer cases than it heard at the close of the nineteenth century and the first decades of the twentieth century.⁴⁹² Therefore, a conflict among the holdings of

⁴⁸⁹ U.S. CONST. amend. XIV, § 1.

⁴⁹⁰ See Susan N. Herman, *Yasser Hamdi and the Fourth Circuit's Legal No-Man's Land*, JURIST, Jan. 13, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew84.php> (last visited Jan 1, 2006) (suggesting, in a discussion of the detention of Yasser Hamdi at a naval brig in Norfolk, Virginia, that “the government . . . anticipated that this most conservative federal Court of Appeals would defer to its claim of executive prerogative.”).

⁴⁹¹ John G. Roberts, Jr., 2005 Year-End Report on the Federal Judiciary 7 (2006), available at <http://www.supremecourtus.gov/publicinfo/year-end/year-endreports.html> (last visited Feb. 4, 2006) (reporting that during the Supreme Court's 2004 Term, 7,496 cases were filed; 87 cases were argued; and 85 were disposed of in 74 signed opinions); David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134, 134, 135 (2005) (writing that “[a] major legacy of the Rehnquist Court . . . will remain a sharply diminished plenary docket” and that this diminishment is “striking in historical perspective.”); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35-36 (2005) (estimating that the Supreme Court reviewed 0.12% of the potentially reviewable state and federal decisions reached in 2003 and concluding that “the extraordinary growth in the ratio of lower court to Supreme Court decisions” means that “it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations . . . [and] [i]nstead, it must perform act legislatively.”).

⁴⁹² See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATE, DECISIONS & DEVELOPMENTS* 225-31 tbl. 3-1 (2007) (reporting more than two hundred cases decided in each term from 1875 to 1896 and between 166 and 285 cases per term in each term from 1897 to 1930). Epstein and her co-authors count for these periods cases with signed opinions only. If all cases disposed of by the Court are counted, the figures are higher. See FRANKFURTER & LANDIS, *supra* note 24, at

circuit courts does not necessarily lead to Supreme Court review; when circuit conflicts are not resolved, or not resolved promptly, federal constitutional law varies around the nation.⁴⁹³ Though the Court itself has emphasized that uniformity is one of the benefits of federal question jurisdiction,⁴⁹⁴ in practice, there remains scope for variation.⁴⁹⁵ So too, even in our current system, differences among state supreme courts in their interpretations of the federal Constitution might not be immediately resolved.⁴⁹⁶ Members of the Supreme Court

295 tbl. 1 (reporting 3321 cases for the terms 1916 to 1925, an average of 332 cases per term).

⁴⁹³ See Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81 (2001) (providing a detailed analysis of conflicts among circuit courts and the circumstances under which the Supreme Court resolves the conflicts); John Harrison, *Federal Appellate Jurisdiction Over Questions of State Law in State Courts*, 7 GREEN BAG 353, 356 (2004) (“Federal law is notoriously non-uniform among the different circuits, and the Supreme Court is apparently sufficiently indifferent to this fact that it leaves many inter-circuit conflicts unresolved”); Solimine, *supra* note 481, at 1483 (writing that “[e]ven narrowly focused federal rights often have nonuniform application, simply by virtue of various federal district courts, and federal appellate courts . . . coming to different conclusions on the same issue. Circuit splits on federal law are not an uncommon phenomenon, and not all such splits are . . . resolved by, the Supreme Court.”). *But see* Committee on Long Range Planning of the Judicial Conference of the United States, *Proposed Long Range Plan for the Federal Courts* 43-44 (1995) (“Current empirical data on the number, frequency, tolerability, and persistence of unresolved inter-circuit conflicts (i.e., those not heard by the Supreme Court) indicate that intercircuit inconsistency is not a problem that now calls for change.”); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 792 (1995) (concluding, based on an analysis of 210 cases of circuit conflicts that the Supreme Court did not review during the 1988, 1989, and 1990 terms, that most conflicts were eventually resolved by subsequent decisions or litigation or otherwise do not persist).

⁴⁹⁴ See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg. Co.*, 545 U.S. 308, 312 (2005) (stating that federal question jurisdiction gives litigants access to judges more experienced on issues of federal law and more solicitous of federal claims and promotes uniform interpretations of federal law).

⁴⁹⁵ See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 5.2.1, at 272 (2007) (writing that “[i]t is not clear that ninety-four federal judicial districts will produce more uniformity than fifty state judiciaries” and that even thirteen federal courts of appeals will not produce more uniformity than state courts because “[o]n a controversial issue, there are likely to be two or three different positions adopted,” whether the issue is considered by the federal courts or the state courts).

⁴⁹⁶ See LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 98 (“[T]he Supreme Court no longer has the capacity to sit as a court of error in routine cases.”); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1241 (2004) (noting the

have themselves recognized this feature of the modern judicial system.⁴⁹⁷ More generally, even if everyone is formally assigned the same set of rights, in practice, those rights can vary. “Each [constitutional right] requires a context, a set of facts, and a court to have an impact.”⁴⁹⁸ While Justice Stevens’ proposal might increase the degree of variation around the nation, there is probably little reason to imagine that the result would be unmanageable. Indeed, as noted, variation—because state courts are undertaking innovations—can be good for the system as a whole, which benefits from different perspectives and experiences.

Difference is not necessarily a good thing. Many commentators take the position that federal issues should be decided by federal judges because, compared to state court judges, federal judges have greater expertise on issues of federal law⁴⁹⁹ and are more sympathetic to federal claims.⁵⁰⁰ Whether these claims are true is not clear. State

“Supreme Court’s limited capacity to superintend the fifty state court systems”); Michael Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 359 (2002) (noting that severely downsizing the docket at some point will limit the ability of the [Supreme] Court to monitor state courts” and that “[p]erhaps the Court’s current docket approaches that limit” but that “available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out its monitoring function.”).

⁴⁹⁷ For example, Justice Brennan wrote:

One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly. ... [I]t is clear to me that, realistically, it cannot even come close to ‘doing the whole job.’

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting). See also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 280-92 (1996) (arguing that a lack of uniformity is not necessarily a bad thing, so long as a state court decision does not impose costs on other states and their residents).

⁴⁹⁸ SOLIMINE & WALKER, *supra* note 470, at 25.

⁴⁹⁹ See, e.g., Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304 (2003) (“We are federal judges, we have more knowledge of federal law. You are state judges, you have more knowledge of state law.”); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2 (2d ed. 1990) (“[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has . . . devoted the bulk of its efforts to the evolution of state law and policy.”).

⁵⁰⁰ See, e.g., *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (writing that one “reason Congress conferred original federal question

courts share general federal question jurisdiction with the federal courts and state courts decide large numbers of criminal cases that invoke federal constitutional rights. One recent study demonstrates that while federal judges hear more civil cases involving federal issues, state courts have significant experience adjudicating federal questions involving the provisions of the federal Bill of Rights and the Fourteenth Amendment, but less experience interpreting federal statutes.⁵⁰¹ With respect to state court solicitude towards federal claims, the proposal offered here does not deny a federal forum and it allows state courts only to go further than the Supreme Court in applying federal rights. It is, therefore, consistent with the view that “federalism-based jurisdictional doctrine should emphasize enforcement of individual rights and should take into account the state courts’ capacity to serve that goal.”⁵⁰² The proposal also involves only state government—there is no risk, therefore, of state courts being hostile to federal statutory law or executive action.

Moreover, the notion that federal judges should decide questions of federal constitutional law because they have greater expertise on those issues may have only limited traction. State judges regularly hear cases and write opinions on issues of federal constitutional law. As discussed in the previous Part of this Article, on some issues, including issues of criminal procedure, there is already significant reliance upon state judges to enforce properly the federal Constitution. More generally, reliance on federal courts because they have greater expertise is something of a self-fulfilling prophecy: if state courts were given greater authority, they would soon develop the expertise to use it properly.

b. Accountability

A different objection to Stevens’ proposal is that it would render state judges unaccountable. The mechanism for correcting

jurisdiction on the [federal] courts was its belief that state courts are hostile to assertions of federal rights.”); *See also supra* note 482 (discussing issue of parity, a concept that includes consideration of expertise and receptiveness to federal claims, along with the psychological disposition to enforce federal rights).

⁵⁰¹ *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 282-86 (2007) (reporting and discussing the results of an empirical study of federal issues decided in state and federal courts).

⁵⁰² Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 961 (1991).

erroneous decisions by state courts based on the federal constitution is by recourse in the Supreme Court. If the Supreme Court applies the Constitution in a way that is sufficiently unpopular (including by failing to correct an unpopular decision of a state court or a lower federal court), there is recourse in the amendment processes of Article V. State courts know they can be corrected by the Supreme Court; the Supreme Court knows that its decisions can be undone by constitutional amendment. If a state court has the last word on a federal constitutional issue, there is no recourse in the Supreme Court.

Article V is also not likely to provide a sufficient remedy for erroneous state court decisions, and, therefore, the threat of amendment will not constrain the actions of state court judges. Article V is deliberately cumbersome, requiring super-majorities in both chambers of Congress and of the states to ratify an amendment. The Constitution can, therefore, only be amended when there is a widespread motivation to do so. Most proposed amendments, even those that make it out of Congress, fail, because a minority of the states can veto the proposal. It is not hard to see that a state court decision, even one that provokes intense opposition from most (or even all) of the residents of the state, will be very unlikely to make it over the Article V hurdles. Members of Congress, representing the other forty-nine states, and the citizens themselves of those other states, have little interest in correcting an outrageous ruling by a single state court. Even where the ruling is based on the federal Constitution, it only affects the citizens of that one state. The remainder of the nation, while perhaps sympathizing with the plight of those who face a runaway state court, would have little incentive to mobilize under Article V. “Move to another state” is more likely advice than “Propose a federal constitutional amendment.” Perhaps, of course, many state courts will act in an egregious manner, producing a sufficient basis for correction under Article V. Until that happens, however, state judges, then, freed from the possibility of correction by either the U.S. Supreme Court or by a constitutional amendment, will be at liberty to do anything they please in the name of the federal Constitution. The quilt really could become crazy.

Here, the history of the Supreme Court’s jurisdiction to review state court decisions sheds some light. As discussed, only in 1914 did Congress give the Court statutory authority to review decisions from state courts upholding federal rights against state government. Commentators trace the enactment of the 1914 statute to the problem of state courts in the early twentieth century striking down on federal due process grounds, economic and social legislation—and in

particular the New York Court of Appeals' decision in *Ives v. South Buffalo*.⁵⁰³ In *Ives*, the New York Court of Appeals held that a railroad employee could not obtain compensation for an injury suffered at work because the state compensation statute violated the railroad's rights under the New York constitution and under the Due Process Clause of the federal Constitution.⁵⁰⁴ In the wake of this holding, New York amended its state constitution and re-enacted the statute, but there was no way to overturn the court's ruling under the federal Constitution—the Supreme Court could not hear the case because the state court had ruled in favor of the claimed federal right.⁵⁰⁵

Though commentators emphasize that Supreme Court review of state court decisions as a response to cases like *Ives*, the understanding does not entirely make sense. At the beginning of the twentieth century, federal courts were also invoking substantive due process, in cases like *Lochner v. New York*,⁵⁰⁶ and invalidating an array of federal and state laws.⁵⁰⁷ The decisions by federal courts on federal constitutional grounds could not be overridden by either state or federal legislative processes. And if the Supreme Court affirmed the decision of a state court on substantive due process grounds, the only remedy was the remote possibility of constitutional amendment.

Professor Hartnett therefore persuasively demonstrates that the 1914 statute, which he reads to allow only private litigants to seek review in the Supreme Court, was designed not to curtail state court judges but rather to protect their independence.⁵⁰⁸ In tracing the enactment of the 1914 law, Professor Hartnett notes that former President Theodore Roosevelt used *Ives* to argue in favor of his 1912

⁵⁰³ 201 N.Y. 271 (1911). See, e.g., Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1364 (1997) (describing *Ives* as the “particularly egregious exercise of state judicial power” that prompted Congress to act).

⁵⁰⁴ 201 N.Y. at 289.

⁵⁰⁵ See N.Y. Const. art I, § 18 (providing text of the amendment made in 1913).

⁵⁰⁶ 198 U.S. 45 (1905) (invalidating New York regulation of working hours in bakeshops).

⁵⁰⁷ See generally Paul Kens, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990) (discussing *Lochner*-era cases).

⁵⁰⁸ See Edward A. Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 913-56 (1997).

proposal, part of his presidential campaign, to recall state judicial decisions.⁵⁰⁹ However, Roosevelt's criticism of judges galvanized incumbent President (and future Supreme Court Justice) Howard Taft and his conservative supporters, produced an intense struggle for the Republican Party's nomination in 1912, which went to Taft, and was followed by a party platform against reducing the power of the courts.⁵¹⁰ Roosevelt ran as a candidate for the Progressive Party (in which capacity he advocated not the recall of state court decisions but review of them by the Supreme Court) and the Taft-Roosevelt split led to the election of Democrat Woodrow Wilson.⁵¹¹ After the 1912 election, Taft assumed the presidency of the American Bar Association which, as a strong supporter of judicial measures, opposed recall proposal but supported an expansion of the Supreme Court's jurisdiction as a measured way to respond to erroneous state court decisions.⁵¹² In the Senate, the ABA found a staunch ally in Elihu Root of New York, who favored greater Supreme Court review as a way to safeguard the state courts from more radical proposals (like Roosevelt's) for popular control.⁵¹³ Professor Hartnett reports that this same concern motivated enactment of the 1914 statute and explains that "while some members of Congress may well have supported the expansion of the Supreme Court's jurisdiction out of a desire to vindicate popular democracy, they were not the leading forces behind the bill. The efforts by Root, Taft, and the leaders of the American Bar Association, who were the leading forces, are better explained as the actions of wise conservatives: they sought to defuse the pressure for radical reform through measures that preserved existing authority—particularly judicial authority—rather than stoke the coals of radical reform through repression."⁵¹⁴ Consistent with this history of the statute, Hartnett concludes that the statute was intended to allow the Supreme Court to review cases in which a state court had upheld a federal claim asserted in litigation between private parties—the situation in *Ives*—but not to review cases when the state had lost in state court, though beginning in 1918 the Court (with Taft as Chief

⁵⁰⁹ *Id.* at 934-35.

⁵¹⁰ *Id.* at 935-940.

⁵¹¹ *See id.* at 940-43.

⁵¹² *See id.* at 943-55.

⁵¹³ *See id.* at 950-51.

⁵¹⁴ *Id.* at 954-55 (footnotes omitted).

Justice) read the statute broadly.⁵¹⁵ By 1928, the Court had retreated also from the earlier notion that, without specific authorization from the state, a state official lacked standing to challenge a ruling from a state court.⁵¹⁶

There exist in modern times mechanisms to temper the risk of unaccountability that may result from Stevens' proposal. Perhaps the most important are mechanisms within individual states. State judges operate under political and institutional constraints, which are often more severe than those faced by federal judges. State judges typically serve for fixed terms—thereby limiting at least the time in which any individual judge can cause mischief—and allowing for mistakes to be overturned when new personnel take office.⁵¹⁷ In many states, judges are elected.⁵¹⁸ Various studies have demonstrated that judicial elections produce accountability⁵¹⁹ and that case outcomes differ in states where judges are elected rather than appointed.⁵²⁰ Of course,

⁵¹⁵ *Id.* at 957-59.

⁵¹⁶ *Id.* at 962-63 (citing *Blodgett v. Silberman*, 277 U.S. 1 (1928)).

⁵¹⁷ *See supra* note ____.

⁵¹⁸ *See supra* note ____.

⁵¹⁹ *See* Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 315-30 (2001) (reporting that judicial elections produce substantial accountability); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 485-503 (1995) (reporting that judges take conservative positions in criminal cases where they face re-election); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 427-46 (1992); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 247-63 (2004) (reporting that judges alter their behavior when faced with re-election pressures). To be sure, accountability is not necessarily a good thing. *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). The defeat in 1986 of three California Supreme Court justices who set aside death penalties is often identified as an example of excessive control of judges by the electorate. *See id.* at 737-38 (discussing this example).

⁵²⁰ *See, e.g.* DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME COURT POLICY: INNOVATION, REACTION AND ATROPHY* (1995) (reporting that appointed judges are more likely to favor criminal defendants than are elected judges); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. L. & ECON. 157, 157-88 (1999) (reporting that tort awards are higher in electoral states than in non-electoral states). *See also* Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 24, 27 (2007) (reporting that compared to elected judges, appointed judges write higher quality opinions and are less likely to write

accountability might leave judges disinclined to expand upon the Supreme Court's interpretations of constitutional provisions. Even where state court judges are not elected, appointment processes tend to screen out most mavericks.⁵²¹ Empirical evidence confirms that “political, institutional, and other conditions” constrain the activities of state court judges.⁵²² Within a few years of the New York Court of Appeals' decision in *Ives*, a change in personnel on that court resulted in it changing course and upholding a workers' compensation statute.⁵²³ In a sense, then, Justice Stevens' proposal could produce greater overall accountability. Federal judges do not serve for fixed periods, and they are not subject to re-election. On these criteria, federal judges are the *least* accountable of all judges—shifting authority to state courts would put it in the hands of the judges who have to answer to the electorate. In addition, there would be increased accountability because, under Justice Stevens' proposal, it would be clear that state judges, when they rule on federal constitutional issues, are acting independently. A state judge could no longer defend an unpopular decision by saying, “The Supreme Court made me do it.”

Beyond the mechanisms of state court judicial appointments, a different kind of check on state courts is also the most intriguing. If Stevens' proposal were to become a reality, conceivably, the people of a state could amend their *state* constitution to limit how their state judges apply the federal Constitution. By way of background to this idea, consider how two states have already limited what state judges can do in interpreting state constitutional provisions. In 1982, Florida amended its constitution to provide that, in interpreting the state constitutional search and seizure provision, courts must follow the

dissents); *id.* at 32 (reporting that elected judges are “more politically involved, more locally connected, more temporary, and less well-educated than appointed judges”).

⁵²¹[**RA: add cite**] Some commentators have suggested that state courts judges have not deviated much from the decisions of the U.S. Supreme Court because state court judges are as conservative as a majority of the Supreme Court justices. See Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 JUDICATURE 190, 190-97 (1991).

⁵²² Robert M. Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 LAW & SOC'Y REV. 845, 865 (2006).

⁵²³ Hartnett, *supra* note 508, at 978 (citing and discussing *Jensen v. Southern Pac. Co.*, 109 N.E. 600, 604 (N.Y. 1915)). *Jensen* distinguished *Ives* and rejected a Fourteenth Amendment due process challenge to a statute creating a compensation scheme for injured workers employed by interstate carriers, in this case a railroad. See *id.* at 603.

Supreme Court's reading of the Fourth Amendment. The Florida Constitution reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.⁵²⁴

A different provision of the Florida Constitution imposes the same requirement on state judges when they interpret the state constitutional protection against cruel or unusual punishments.⁵²⁵ California has also tied interpretation of the state constitution's criminal procedural protections to the federal Constitution. After an amendment adopted in 1990, the California Constitution reads:

This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by⁵²⁶ the Constitution of the United States.⁵²⁷

⁵²⁴ FL. CONST. art. 1, sec. 12.

⁵²⁵ FL CONST. art. I, sec. 17.

⁵²⁶ [Presumably, the rights "afforded by the Constitution of the United States" references the decisions of the U.S. Supreme Court (rather than state

Building upon these existing models, a state might amend its state constitution to provide that, when a state court interprets a provision of the federal Constitution protecting an individual right, the court can go no further in protecting that right than is required by the decisions of the U.S. Supreme Court.⁵²⁸ Such an amendment might be made prospectively, if the people of a state, getting wind of Stevens' proposal, fear that under it, state judges will be uncontrollable. It could be a wholesale amendment: "The judges of this state shall not construe any provision of the federal Constitution to give greater protection for individual rights than recognized by the U.S. Supreme Court." It could be limited to issues of particular concern: "The judges of this state shall not construe the Eighth Amendment to give greater protection in capital cases than recognized by the U.S. Supreme Court." Alternatively, the state constitutional amendment might be made in response to a particular state court decision. Again, it could be general, tying the hands of state court judges in all cases. It could be limited to a specific right or set of rights. It could deal with one particular case that has generated opposition: "The judges of this state shall not construe the Equal Protection Clause of the Fourteenth Amendment to afford a right to same-sex marriage unless the Clause is so construed by a decision of the U.S. Supreme Court." A state constitutional amendment would curtail judges who were otherwise inclined to expand federal rights beyond the rulings of the Supreme Court and in ways the citizens of a state do not approve. Of course, the zealous state court judge committed to expanding federal rights no matter what might ignore or flout even a state constitutional amendment. In such circumstances, the existing processes for dealing with judges who act in contravention of state constitutions would be available.⁵²⁹

There are two objections to the use of a state constitutional amendment to constrain state court applications of the federal

courts)-- RA: Look for commentary or cases on this issue—did they seek to distinguish CA from FL?—look into history/press accounts of this amendment—confirm also the date is 1990]

⁵²⁷ CAL. CONST. art. I, § 24.

⁵²⁸ In their study of state court search and seizure decisions, Robert Howard and his colleagues find that state provisions bringing the interpretation of state legal rights to the interpretation of coordinate federal rights effectively prohibits the production of independent state law doctrines. Howard et al., *supra* note 522, at 865.

⁵²⁹ [RA: collect a few examples of state constitutional provisions for impeaching state judges]

Constitution. The first is that a state constitutional amendment that specifies how a judge is to interpret the federal Constitution would violate the Supremacy Clause. If the federal Constitution, as construed by the state court, requires a particular result, then the state constitution cannot prohibit the result. The objection seems particularly strong if a state constitutional amendment, rather than merely specifying in advance how state judges are to act, purports to undo an earlier state court decision on federal constitutional grounds. A state court, faced with a limiting state constitutional amendment, might simply declare the amendment violates the federal Constitution and proceed to interpret the federal Constitution independently. Should that happen, in order for the amendment to serve its purpose of accountability, the U.S. Supreme Court would have to hold that constitutional amendments limiting state courts from expanding on the Court's interpretations of the federal Constitution do not violate the Supremacy Clause.⁵³⁰ In other words, the Court (following Stevens) would permit state courts to go further in interpreting the federal Constitution, but the people of a state can themselves prohibit the state courts from taking a more expansive route.⁵³¹

A second objection to the use of state constitutional amendments is more practical. If the purpose of giving state court judges leeway under the federal Constitution is to generate innovations, the presence or risk of state constitutional amendments might defeat that goal. Indeed, state constitutional amendments might produce too much accountability, as the citizens of a single state become empowered to address, on their own, without having to wait for other states to share their pain, rulings on federal constitutional grounds. Every state might amend its state constitution to provide: "When courts of this state interpret the rights protecting provisions of the federal Constitution, those courts shall adhere strictly to the case law of the U.S. Supreme Court." Stevens' proposal would be nullified. Stated more generally, there is a tension in all of this. We might want state courts to be more innovative than they currently are, but we

⁵³⁰ Note that the Stevens' proposal would not prevent the Court from reviewing a state court decision striking down the state constitutional provision because it does not involve holding that state government has violated a federal right.

⁵³¹ Though the Court would have to wait for a suitable case to rule on the constitutionality of a state constitutional amendment, it could signal, at the time it announces it will not review state court judgments upholding federal rights, that citizens of a state can make use of their state constitutional processes to determine how far state judges go under the new rule.

probably do not want them to be so innovative that they issue rulings the people would like, but find themselves unable, to curtail.⁵³² Things have to be organized, then, so that state judges will perform in the zone between the (as now) undue passivity and the (as feared) undue activity. Still, the risk of every state amending its constitution to shut off entirely state court innovation might be more theoretical than real. Some states might well take this path. But it is likely that not every state will do so, and probable that not every state will do so in the same way.

Finally, there are also other possible ways in which, by tinkering with state law procedural and other devices, a state might reduce the risk of state supreme courts issuing wild rulings. For example, a state might provide that a state court ruling expanding a federal constitutional right requires a super-majority of the state court judges. Alternatively, a state supreme court's jurisdiction could be limited to where a lower state court had certified an issue of federal constitutional law for review. State law could provide that any state court decision expanding a federal constitutional right be submitted for ratification by the people through a referendum. And so on.⁵³³

c. Rights on Both Sides

A further difficulty with a rule that the U.S. Supreme Court will not review state court rulings that uphold a claim that the state government has violated a federal constitutional right is that in many cases there are rights, or constitutionally protected liberty interests, on both sides of a case. In such cases, upholding one right might deny, or undermine the protection of, another right. Should the Court deal with state court cases where there are rights, or arguably rights, on both sides?

Some commentators assert that any constitutional claim to X can be presented as somebody else's claim to be free from X.⁵³⁴ That

⁵³² See *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring) ("If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent.").

⁵³³ Finally, if, indeed, a state court rules in a way that is truly outrageous, and these other corrective mechanisms are insufficient, and in particular if multiple state courts take a similar course, Article V could be employed.

⁵³⁴ See, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) (presenting an argument that because any

claim is probably too broad, except in an exceedingly general sense.⁵³⁵ But there are clearly instances where one right implicates another right, or other important interests.⁵³⁶ For example, strong protections for one person's free exercise of religion at some point could undermine religious freedom of other people or become an unconstitutional establishment of religion.⁵³⁷ Broad protections for an author's copyright can undermine the free speech of other people—and vice-versa.⁵³⁸ Giving somebody a strong right of association can undermine the associational rights of others.⁵³⁹ Broad protections for

decision upholding one party's right can be framed by the losing party (including the state) as involving the state court's failure to protect that party from application of the federal right enforced, section 25 of the Judiciary Act did not limit the Court's ability to hear state court cases).

⁵³⁵ For example, if a court rules that a certain punishment is cruel and unusual and violates the Eighth Amendment, nobody else's constitutional rights are implicated by the ruling—unless one takes the position that the people of a state (or victims of crimes, perhaps) have a constitutional right to have punishments imposed without being burdened by broad constructions of the Eighth Amendment.

⁵³⁶ See, e.g., SOLIMINE & WALKER, *supra* note 470, at 100 (writing that “[t]he concept that state court overenforcement of federal rights should be free from Supreme Court review does not survive close examination” because “any discussion of rights must include other compelling constitutional and personal values. Any invocation of ‘rights’ by one person, or one group, affects and perhaps diminishes other individual or collective interests, broadly conceived.”); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA L. REV. 343, 344 (1993); (“We have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have. . . . [R]ights are conceptually interconnected with, and occasionally even subordinate to, governmental powers.”); Matasar & Bruch, *supra* note 503, at 1387 (“Decisions favoring assertions of rights frequently benefit one group of citizens, but do not always come without costs to others. . . . [O]ver protection of one class amount[s] to underprotection of another.”).

⁵³⁷ See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 703-04 (1985) (invalidating statute that allowed employees right not to work on their Sabbath because an accommodation is invalid if it has “a primary effect that impermissibly advances a particular religious preference.”); *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) (explaining that the Religion Clauses, “if expanded to a logical extreme, would tend to clash with the other” and that the task is to find the “play in the joints”) (upholding a New York City tax exemption for religious property).

⁵³⁸ See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1032-33 (2006) (discussing the relationship between copyright and the First Amendment).

⁵³⁹ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding unconstitutional a state law requirement that the Boy Scouts admit a gay Scout); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557

one person's speech might undermine somebody else's.⁵⁴⁰ Strong due process protections for one party can undermine rights belonging to other parties.⁵⁴¹ According somebody parental rights can weaken somebody else's rights to control the upbringing of their children.⁵⁴² Recognizing constitutional rights of unborn children would interfere with a pregnant woman's right to seek an abortion. Recognizing rights of children (for example, to medical care, schooling, television, exercise, a weekly allowance) would undermine the rights of parents to direct their children's upbringing. Broad understandings of state action and equal protection can undermine property or contract rights.⁵⁴³ A state court's recognition of a constitutional right to be free from the risk of violence might undermine somebody else's Second Amendment rights. Strengthening a witnesses' right to assert the Fifth Amendment privilege against self-incrimination could undermine a criminal defendant's right to confront the witness. Giving prosecutors and judges First Amendment rights to say whatever they want could

(1995) (holding unconstitutional a state law requirement that parade organizers include a gay organization).

⁵⁴⁰ For example, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) presented competing expressive claims of a political organization who sought to collect petition signatures in a privately owned shopping center and the owners of the shopping center. *See id.* at 87 (finding that the shopping center's openness to the public and the absence of any state action behind the speakers' message minimized the owners' expressive interests).

⁵⁴¹ For example, if state courts impose very strong procedural requirements before the entry of a divorce decree, before a custody determination, or before a foreclosure is final, somebody else's interests (in marriage, child rearing, and property rights) are implicated.

⁵⁴² *See, e.g., Troxell v. Granville*, 530 U.S. 57 (2000) (invalidating application of state statute—allowing “[a]ny person” to petition for visitation rights “at any time” and authorizing state courts to grant such rights whenever visitation may serve a child's best interest—to give grandparents broad rights to visit their grandchildren over the objection of the custodial mother); *Michael H. v. Gerald D.*, 491 U.S. 110 (1991) (rejecting the claim that a natural father has a constitutionally protected liberty interest in the relationship with his child, whose mother is married to another man).

⁵⁴³ *See, e.g., Shelley v. Kramer*, 334 U.S. 1 (1948) (holding that the Fourteenth Amendment prohibits state judicial enforcement of covenants prohibiting ownership or occupation of real property by members of a designated race); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding, as a proper exercise of Congress' power under the Thirteenth Amendment, a federal statute prohibiting private racial discrimination in housing).

undermine the fairness of judicial proceeding.⁵⁴⁴ Giving people strong constitutional rights to travel could interfere with the ability of property owner to exclude others from their land.⁵⁴⁵ If my property rights allow me to enlist the police to eject people from my home, other rights might be undermined—for example, if I tell the police to “round up the Black people” or to use cattle prods to expedite removals. Strong rights to contract can undermine other kinds of rights.⁵⁴⁶

In order to deal with these kinds of cases, some kind of mechanism needs to be worked out in advance; it would be undesirable simply to wait and see whether any particular case presents rights or interests sufficiently important on the opposite side so that the general approach of non-review may be discarded. One mechanism would be for the Court to have power to review, at the request of a party, any state court ruling on federal constitutional grounds that could reasonably be construed as infringing some constitutional right or interest, whether at issue in the state court case or not. The Court would, then, take into account the negative impact of the decision on the rights of the parties in the case as well as on the constitutional rights or interests of the citizenry more generally.⁵⁴⁷ The trouble with this kind of freewheeling approach is that it would likely subject too many cases to the possibility of review and undermine the benefits of state court independence. If the Justices wanted to correct what the state court had done, they could assert and emphasize some other constitutional right that had been impacted negatively. If they did not want to exercise review, they could assert that such rights were not seriously at stake. With this kind of uncertainty, state courts would be reluctant to expand federal constitutional protections in the first place—they would fear that the Court could, if it wanted to, review their decisions.

⁵⁴⁴ See [RA: collect cases on improper statements by prosecutors, judges in court, out of court].

⁵⁴⁵ Imagine, for instance, that a court held that the beachgoers in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), had a right to travel to the beach by any route, including across the Nollan’s property. *See id.* at 839-42 (holding unconstitutional an exaction of a public easement across beachfront land as a condition for approval of permit to expand beachfront home).

⁵⁴⁶ *See supra* note 543.

⁵⁴⁷ Note that since we are only talking here about whether the Court should exercise the jurisdiction it already possesses and hear a case, there is no constitutional difficulty with taking into account rights not presented in the case.

A better approach would be for the Court, in deciding whether to exercise review, simply to look to the four corners of the state court case. The Court would only review a state court decision if, and to the extent that, the state court had denied relief to a party invoking a federal constitutional right. Accordingly, the Court would deal with any conflict between rights only at the time it is presented, in a concrete way, through litigation. The party that had lost on the federal constitutional ruling would be able to ask the Court to reverse—the party on the other side would oppose that request, including because of the impact of a reversal on the opposing party’s own constitutional rights. The approach is not perfect. The state court might manipulate its decision to avoid the jot-for-jot language (i.e. “The plaintiff’s claimed right is denied”) that will trigger the possibility of review. If, in the state court case, both sides of a controversy presented claims involving federal constitutional rights, then only the losing party would be able to seek review.

d. Standards

The prior discussion, about the need to draw in advance some parameters to assess when a right, such as a right that is claimed on the other side of a case, has been denied, such that the Court can elect to exercise review, points to a more general concern. It seems essential for the Court to be committed in advance to a set of rules governing when cases are appropriately before it for review. Without objective criteria for determining whether a case is properly before the Court, state courts will be hesitant to engage in independent interpretations of the federal Constitution.

Consider, in this regard, what we might refer to as Justice Stevens’ *Bakke* problem.⁵⁴⁸ Stevens himself has been far from consistent in applying his *own* standard for declining jurisdiction and in numerous cases, he has voted to grant review where a state court has expanded upon federal constitutional rights.⁵⁴⁹ *Bakke* is a particularly striking example. To see why, it is useful to review briefly the issues and how they were presented to the Court. The case involved Michael Bakke’s challenge to the set-aside program at the medical school of the University of California at Davis, which reserved sixteen seats in

⁵⁴⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). I am grateful to Michael Solimine for bringing this issue to my attention.

⁵⁴⁹ [Add cases collected by RA]

the entering class for minority applicants.⁵⁵⁰ The Superior Court of California sustained Bakke's challenge, holding that the university's program violated the California Constitution, Title VI of the Civil Rights Act of 1964,⁵⁵¹ and the Equal Protection Clause of the Fourteenth Amendment.⁵⁵² The court enjoined the school from considering Bakke's race or the race of any other applicant in making admissions decisions.⁵⁵³ It refused, however, to order Bakke's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations.⁵⁵⁴ Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications.⁵⁵⁵ On appeal, the California Supreme Court⁵⁵⁶ accepted the findings of the trial court with respect to the University's program.⁵⁵⁷ Because the special admissions program involved a racial classification, strict scrutiny applied.⁵⁵⁸ Turning, then, to the University's justifications for its program, the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, but the court concluded that the special admissions program was not the least intrusive means of achieving those goals.⁵⁵⁹ Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the court held that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by

⁵⁵⁰ 438 U.S. at 275.

⁵⁵¹ 42 U.S.C. § 2000d (2006).

⁵⁵² 438 U.S. at 279.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 279.

⁵⁵⁶ In light of the importance of the issues, the Supreme Court of California transferred the case directly from the trial court. *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

standards applied without regard to race."⁵⁶⁰ With respect to Bakke's argument that the trial court should have ordered him admitted, the California Supreme Court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that, even without the special admissions program, he would not have been admitted.⁵⁶¹ After the University conceded its inability to carry that burden, the court amended its opinion and directed the trial court to order Bakke's admission to the medical school.⁵⁶² The University sought review in the U.S. Supreme Court.

Let us apply Stevens' proposal to the university's petition to the Supreme Court to review the California court's judgment. The state court had ruled in favor of a constitutional right and invalidated a state program. Even if the Supreme Court thought the state court had gone too far—perhaps because, in its view, the Equal Protection Clause allows consideration of race in assembling a medical school class—the Court should deny review. The state courts are free to apply the Equal Protection Clause more stringently than the Supreme Court, which has no interest in policing state court decisions that expand upon federal rights held against state government.

Justice Stevens, though, voted in favor of hearing the case.⁵⁶³ That vote is inconsistent with the deference he has (since) advocated to state courts that uphold federal constitutional rights.⁵⁶⁴ It becomes

⁵⁶⁰ *Id.* at 280 (quoting at 553 P. 2d. at 1166).

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 280-81.

⁵⁶³ *Bakke*, of course, precedes *Long*, and so perhaps Stevens had not developed his view at the time *Bakke* was heard. However, Stevens was clearly thinking about the problem by the time of *Bakke*. See *supra* note 357. He has also voted in ways inconsistent with *Long* in more recent cases. See *supra* note 549.

⁵⁶⁴ Stevens might respond that he voted to hear the case to decide the Title VI claim, not the constitutional claim. See 438 U.S. at 411-21 (opinion of Stevens, J. joined by Burger, Stewart & Rehnquist) (concluding that the university had violated Title VI and that there was no need to address the Equal Protection issue. The trouble with that argument is that the state supreme court's ruling did not rely upon, and the original petition for certiorari did not present, the statutory claim. See *id.* at 281. And, even if the claim had been presented in the petition for certiorari, it would have been more consistent with *Long* to take the position that whatever the correct ruling under Title VI, the state court is entitled to interpret the Fourteenth Amendment to prohibit the admissions program. A further question is why Stevens did not vote to remand the case to the state court for a ruling on the state constitutional claim, which if it were independent and adequate, would also have sustained the ruling.

difficult to avoid the conclusion that Stevens' judgment about when to hear cases rests on a judgment about the importance of state policies (or perhaps of constitutional rights).⁵⁶⁵ On this approach, review will be granted if the state interest—for example, in its university admissions program—is important, or if the claimed right—of an applicant (a white applicant) to be considered for admissions equally without regard to race. Review will be denied if the state interest—for example, in the criminal process—is less compelling, or the right at stake—for example, a criminal procedural protection—is significant.

This is not to say that, in determining which cases should be subject to the Court's review, the kind of right at issue is entirely irrelevant. We might craft very broad criteria, under which any state court decision upholding a constitutional right, regardless of the particular right at issue, will not be subject to the Court's review. On the other hand, we might prefer a more specific rule under which the Court could review state court decisions upholding certain categories of rights. For example, because of the constitutional experience with issues of race, an exception to a general rule against review might exist where a state court has upheld a claim of racial discrimination in violation of the Equal Protection. There might be special reasons for the Supreme Court to have power to review such cases. Whatever the parameters, they need to be established, and established firmly, in advance. In order for state courts to perform the kind of role this Article has suggested, there must be clarity about the kinds of cases the Court will and will not review. If there are going to be exception, they should be given up front, rather than emerge when the justices do not like the particular way a state court has ruled. Whether a state court ruling is the kind that can trigger review must be determined before the state court has ruled.

⁵⁶⁵ Solimine and Walker describe *Bakke* as presenting rights and interests on both sides. They state:

In . . . *Bakke*, both sides were claiming an equal protection right. Would an application of Justice Stevens's position have precluded the review of *Bakke*'s victory on the California Supreme Court? Should it? And what about the state of California agency that appealed the lower court ruling? Was it not representing a completely different set of interests contrary to those of citizen Alan *Bakke* and his supporters?

SOLIMINE & WALKER, *supra* note 470, at 100-01. The state was certainly representing interests different from Alan *Bakke*'s, but it is not clear that there were equal protection rights on both sides. [Ask Michael Solimine about this.]

e. New Lochnerism

A further objection to the proposal is that it would provide fertile ground for courts to invalidate, *Lochner*-style, all manner of state economic and social regulation on the ground that such laws violate vaguely defined due process rights of contract and property. Worse, the U.S. Supreme Court could never correct such rulings, and state courts could, if they pleased, shut down state government. State environmental laws could be struck down as violating the due process rights of property-owners; employers could be assigned a constitutional right to contract freely with their employees, without the burdens of state laws governing working conditions; state tax codes might be struck down as violating Fourteenth Amendment liberty; state laws that require recycling of soda bottles but not of milk cartons could be invalidated as violating equal protection.

Two factors provide some comfort. The first is that the state judge committed to relieving citizens from social and economic regulations could probably already accomplish the very same ends through expansive readings of state constitutional provisions. Greater independence under the federal Constitution might be enough to turn some otherwise restrained judges into modern-day Justice Pekhams. But the likelihood is probably small. Second, it is useful to recall that in *Lochner* it was the U.S. Supreme Court, not the New York state court, which enforced the substantive due process rights of the employer.⁵⁶⁶ At least from this historical perspective, *Lochnerism* might be more a risk with respect to the federal courts than the state courts.⁵⁶⁷

Here, too, there are practical mechanisms for guarding against the problem. The most obvious is the one that has already been suggested: certain categories of rights could be exempt from the rule against Supreme Court review. Here, then, there would be no review of state court cases that upheld claims of the rights enumerated in the Bill of Rights (and incorporated against the states by the Fourteenth Amendment). But, state court decisions based on other constitutional rights, including rights of due process or equal protection could still trigger review.

⁵⁶⁶ Note that under Stevens' approach, because the state court had denied the claimed constitutional right in *Lochner*, the Court's review of the state court decision was proper.

⁵⁶⁷ See SOLIMINE & WALKER, *supra* note 470, at 101.

f. Identifying when Rights are Denied

In some cases, it might also be difficult to determine whether a state court has in fact denied a constitutional right. A state court might, for example, hold that a right is very narrowly protected—more narrow than what the Supreme Court has recognized—and yet rule in favor of a plaintiff under that narrow standard. How should Justice Stevens' analysis operate in that situation? If the relevant focus is on which party has prevailed, here, the state court has ruled in favor of the plaintiff and invalidated state action. Review would, then, be improper. If the relevant focus is the substantive ruling by the state court, it has cut back on rather than expanded federal constitutional rights as construed by the Supreme Court. Review would be appropriate.

The cleanest way of dealing with this issue would be by allowing the plaintiff (who has prevailed), but not the state, to seek review of the state court ruling. Most winning plaintiffs will not exercise that option, especially given the risk that the Supreme Court might end up reversing the state court decision. Some plaintiffs, those with an interest in developing the law in a given area, will want the Supreme Court correct the state court's ruling. They should be permitted to seek review.

g. Removal

The federal removal statute allows defendants in civil cases to remove the case from state court to federal court if the case could have been originally filed in federal court.⁵⁶⁸ Under Justice Stevens' approach, state government, fearing an adverse state court decision that cannot be corrected by the Supreme Court, might remove all cases it can to federal court. In order for state courts to play a role in developing federal constitutional law, there would need to be restrictions on removal, so as to ensure some federal constitutional cases remained in the state court system.

⁵⁶⁸ See 28 U.S.C. § 1441(a) (2006). Accordingly, if the only federal issue is a federal defense, the case cannot be removed. Diversity cases cannot be removed from state to federal court if any of the defendants are residents of the state where the action was filed. *Id.* § 1441(b). Additional federal statutes also limit removal in specific kinds of cases. See, e.g., § 1445(a) (prohibiting removal in actions for damages under the Federal Employers' Liability Act).

This problem, while usefully flagged, cannot be resolved definitely at this time. It is hard to predict in advance how much of a restriction on removal would be needed to give state courts an adequate caseload. Two considerations bear keeping in mind. First, even if the state can remove a case, there might be independent reasons for it to keep the case in state court. For example, the state might believe that state judges (or juries) are more favorable to the state than federal district judges. State rules of procedure might be more palatable. Government litigators might have greater experience in state court. State courts might resolve cases faster or on a more predictable schedule. A second consideration is that, even under existing rules of removal, not all cases in which a state court ultimately rules against state government on a federal constitutional issue will be cases that can be or could have been removed to federal court. Though the federal courts have broad jurisdiction, concurrent with the state courts, to hear all cases involving federal questions,⁵⁶⁹ the federal issue must be presented in the plaintiff's well-pleaded complaint.⁵⁷⁰ In some cases, federal issues only arise after the litigation has begun. Those cases, which might result in a favorable ruling for the plaintiff, will not qualify for removal. Perhaps most significantly, state law criminal cases, even when they raise federal constitutional issues, cannot ordinarily be brought in or removed to federal court,⁵⁷¹ and, even when

⁵⁶⁹ 28 U.S.C. § 1331 (2006).

⁵⁷⁰ *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that federal question jurisdiction cannot be based on a defense (or anticipated defense)). *See also* *Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (holding that if the plaintiff's lawsuit would not state a federal question, the plaintiff cannot proceed in federal court by seeking a declaratory judgment that a federal law is unconstitutional or inapplicable because that too is merely an anticipation of a federal defense).

⁵⁷¹ *See* 28 U.S.C. § 1441 (2006) (providing for removal only in civil cases). The Civil Rights Removal Act allows a defendant to remove civil actions or criminal prosecutions if the defendant can show that the state court proceeding will deny rights protected by a federal civil rights law, or if the defendant's defense is that the action that is the basis for the state court action was required by federal civil rights laws. 28 U.S.C. § 1443 (2006). However, the Supreme Court has interpreted this first provision very narrowly to require deprivation of rights secured by a federal law protecting racial equality and the deprivation to result from a state statute or state constitutional provision. *See, e.g., Johnson v. Mississippi*, 421 U.S. 213, 219 (1975).

Congress has also assigned exclusive jurisdiction to the federal courts with respect to certain kinds of civil cases. These include patent and copyright, *see* 28 U.S.C. § 1338(a) (2000), admiralty, *see id.* § 1333, and bankruptcy, *see id.* § 1334. *See generally* *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (explaining that concurrent jurisdiction is presumed and overcoming the presumption requires

federal constitutional interests are at stake, federal courts cannot ordinarily intervene in state criminal prosecutions.⁵⁷² In criminal cases, therefore, state courts will, even under existing rules of federal jurisdiction, adjudicate federal constitutional claims.

h. A Note on Section 1983

42 U.S.C. § 1983 provides a federal cause of action against persons who, acting under color of state law, violate federal constitutional rights.⁵⁷³ Section 1983 does not require exhaustion of state remedies.⁵⁷⁴ Bringing a lawsuit in federal court under section 1983 is a popular route to seeking redress for constitutional violations.⁵⁷⁵ For one thing, state laws and state courts might not provide an adequate remedy, problems that give section 1983 its purpose.⁵⁷⁶ Plaintiffs (or their lawyers) might also prefer to proceed in

“an explicit statutory directive” or showing “unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests.”).

⁵⁷² See *Younger v. Harris*, 401 U.S. 37, 43 (1971) (holding that federal courts cannot enjoin state criminal prosecutions except in extraordinary circumstances, where there is a substantial and imminent risk of irreparable injury to those being prosecuted). *Younger* identified three circumstances in which abstention would not apply: where the prosecution was brought in bad faith, where the relevant state statute was patently unconstitutional, or where the state forum was inadequate to protect federal rights). See *id.* at 45, 53-54. The Court has extended *Younger* to civil litigation where the state is a party, *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), and in cases between private parties where there are sufficiently important state interests at stake, *Moore v. Sims*, 442 U.S. 415, 423 (1979).

⁵⁷³ 42 U.S.C. § 1983 (2006). 18 U.S.C. § 242 (2006) imposes criminal liability on “[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution.” *Id.* Section 1983 does not itself create any rights, only a cause of action for deprivations of federal rights.

⁵⁷⁴ *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167, 172 (1961). See also *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding that the federal Anti-Injunction Act, 28 U.S.C. § 2283, does not prevent a federal court from ordering equitable relief in cases brought under section 1983, because section 1983 expressly authorizes such relief).

⁵⁷⁵ **[RA: give figures on number of cases]**

⁵⁷⁶ See *Monroe v. Pape*, 365 U.S. 167, 173-75 (1961) (explaining that the purposes of section 1983 were to “override certain kinds of state laws,” provide “a remedy where state law was inadequate,” and to “provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.”).

federal court because they believe state courts are not hospitable, state judges less qualified than federal judges, rules of procedure are more favorable in federal court, federal judges have greater familiarity with federal law, or other reasons.⁵⁷⁷

At the same time, state courts have concurrent jurisdiction to hear section 1983 claims,⁵⁷⁸ and a considerable number of such claims are brought in state court.⁵⁷⁹ In addition, state law might provide an alternative remedy for violations of federal constitutional rights.⁵⁸⁰ Mini-section 1983 statutes allowing for civil suits in state court can provide an alternative to or supplement the federal cause of action. Section 1983 entails various hurdles and limitations.⁵⁸¹ State analogs might overcome these. States might have good reasons to entice state residents to pursue claims in state court under state law rather than with a section 1983 claim in federal court.

When a state court determines under section 1983 or a mini-section 1983 state statute whether a state official has violated a plaintiff's federal constitutional rights, the state court should be permitted to interpret the meaning of federal constitutional provisions more broadly than the Supreme Court. The Supreme Court should not grant review if the plaintiff prevails on the section 1983 claim. Indeed, state government should not necessarily be opposed to this scenario, in light of other benefits of proceeding in state rather than federal court, and broad state court interpretations can tempt litigants away from federal courts.

Congress or state legislatures might play a role here. Congress defines the section 1983 cause of action and the available remedies; state legislatures define the cause of action and remedies under state statutory causes of action. Congress might specify, as a statutory matter, that section 1983 allows a claim to be brought in state court

⁵⁷⁷ [RA: sources]

⁵⁷⁸ *Martinez v. State of Cal.*, 444 U.S. 277, 283 n.7 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1990). *See generally* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS 9.2 (2007).

⁵⁷⁹ STEINGLASS, *supra* note 578, at § 2.39 (reporting “the volume of state court § 1983 cases is increasing rapidly” and that “[t]he state court § 1983 caseload . . . resemble[s] the federal court caseload with the exception of pro se prisoner cases which are still not an important part of the state court . . . caseload.”).

⁵⁸⁰ [check preemption: maybe you need Congress to authorize—are there statutes like this now?]

⁵⁸¹ [discuss immunity, caps on damages, scienter etc.]

against state officials for violating federal constitutional rights as those rights are interpreted by the highest court of the state in which the action is brought. A litigant could then proceed in federal court, where Supreme Court interpretations of federal rights would govern, or in state court, where broader interpretations of constitutional protections might exist.⁵⁸² So, too, the state legislature might enact a mini-section 1983 statute, in which there would be a cause of action against state officials for violating federal constitutional rights as interpreted by the highest court of the state.⁵⁸³

E. Going Forward

In light of these considerations, it makes sense to give state courts formal authority to apply expansively against state government the Fifth Amendment Takings Clause and the criminal procedural protections of the Fourth, Fifth, and Sixth Amendments. As we have seen, in these areas, state courts already are largely responsible for protecting federal constitutional rights; this responsibility should be formalized. In takings cases, and in criminal cases, state government is always a party to the case; such cases do not typically pose the problem of rights presented on both sides of the dispute. More generally, in these cases, only on rare occasion will a state court's decision to construe broadly a federal constitutional right risk diminishing a constitutional right held by somebody else.⁵⁸⁴ Takings cases and criminal cases therefore present the best opportunity to capture the benefits of formal state court authority while minimizing the downsides.

As a practical matter, there are two ways to formalize state court authority. The first is for Congress to pass a statute akin to section 25 of the 1789 Judiciary Act limiting the Supreme Court's jurisdiction: the Supreme Court would, as a statutory matter, have power to review state court decisions that deny a claim of a federal constitutional right in a takings cases or a criminal case, but there would be no statutory power of review if the state court held the state government violated a

⁵⁸² Congress would likely also need to ensure state courts did not cut back on rights as interpreted by the Supreme Court. It could do this by providing for Supreme Court review of state court rulings on federal constitutional questions in cases where the section 1983 plaintiff had lost.

⁵⁸³ Perhaps, also, a state court might impose common law tort remedies based on constitutional rights.

⁵⁸⁴ [give examples: free press v. fair trial]

federal constitutional protection. A second way of accomplishing the proposal is for the Supreme Court to hold that state courts have the authority to expand federal constitutional rights against state government in takings cases and in criminal cases. Concurrently, the Court would announce that in controlling its own docket, it will no longer grant petitions for review where a state court has upheld a claim of a federal constitutional right against state government and the only challenge to the state court decision is that the state court has over-protected a federal constitutional right.

CONCLUSION

In the law, formal rules should reflect actual practices. In practice, the Supreme Court is not always supreme; state courts bear a large responsibility for interpreting and applying the federal Constitution. Formalizing state court authority will reflect the role of the state courts in our constitutional system.

In a sense, it should be no surprise that authority today to determine the meaning of the federal Constitution is shared. The courts are part of government; we are accustomed to other governmental powers being divided between the national government and the governments of the states. When, as today, federal constitutional questions arise in or bear on a large number of civil and criminal cases, it is inevitable that no single court be in a position to resolve them all. Federal constitutional law has a robust existence beyond the U.S. Supreme Court. It is time to recognize more fully how state courts make federal constitutional law and how, as a result, they support and enrich our constitutional government.