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# When Worlds Collide: Federal Construction of State Institutional Competence

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# 1WHEN WORLDS COLLIDE: FEDERAL CONSTRUCTION OF STATE INSTITUTIONAL COMPETENCE

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## I. INTRODUCTION

> In the 70s there was an . . . anti-war slogan: "What if they held a war and nobody came?" The contemporary . . . counterpart to this would be "What if we staged a revolution and nobody noticed?"
>
> —Handy Fuse, Simply Appalling[1]

The Supreme Court has staged a federalism revolution, but nobody noticed. Well, actually, many have noticed that some kind of revolution is happening, but few can make much sense of it, and nearly everyone has missed a piece that is revolutionary in its own right.[2] To many, the Court seems to be limiting the power of the federal government and expanding that of the states, as recent Commerce Clause, Tenth Amendment, and Eleventh Amendment cases suggest.[3] But at the same time that it has expanded state power in these areas, the Supreme Court has limited state power and expanded national power in others.[4]

[*] Assistant Professor of Law, Cumberland School of Law, Samford University. I am very grateful to my father, Mark McCormick, whose Supreme Court argument formed the basis for this Article, and to my husband, John O'Connell, who made several sacrifices that allowed me to attend the argument and to write this Article. For their probing questions, suggestions, assistance with resources, and comments on prior drafts of this Article, great thanks to Helen Hershkoff, Barry Friedman, Robert Schapiro, Brannon Denning, William Ross, David Smolin, and Howard Walthall. Thanks also to Erwin Chemerinsky for his willingness to read prior drafts. I would also like to thank all of the members of the Cumberland faculty who participated in a workshop on this paper. And, finally, thank you to Bill Jones for outstanding research assistance. Any errors, technical or substantive, are mine alone.

[1] Simply Appalling: A Jaundiced Eye on the News, http://simplyappalling.blogspot.com/2005/05/second-american-revolution-goes.html (May 16, 2005, 07:49 EST) This statement appeared as part of a post on right-wing revolutions and nuclear weapons. The original antiwar slogan is probably derived from a poem by Carl Sandberg, who wrote, "Sometime they'll give a war and nobody will come." CARL SANDBURG, THE PEOPLE, YES 43 (1936). The sentiment has undergone a number of permutations in service of various goals, and this permutation seemed appropriate to this topic.

[2] *See, e.g.*, Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659, 659 (2003) (critiquing Professor Merrill's "stunning article" analyzing the Rehnquist Court as "incomplete in a few important respects").

[3] *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 233–41 (2001) [hereinafter Jackson, *Narratives*] (discussing recent Supreme Court case law on federalism as a constraint on national power); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 699 (2000) [hereinafter Jackson, *Seductions*] ("There is no doubt we are in the midst of a federalist revival."); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570–71 (2003) (noting the dominance of constitutional federalism as a theme of the second Rehnquist Court).

[4] *See* Chemerinsky, *supra* note 2, at 659 (identifying a downward shift in the level of deference the Rehnquist Court gave elected branches of government); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 82–83 (2001) (arguing that the Rehnquist Court was not consistently in favor of States' rights); Merrill, *supra* note 3, at 571 (critiquing theories of the Rehnquist Court that ignored evidence of the Court's favoring national power in certain circumstances).

One of these expansions of national power has been in a reduction of the amount of deference the Court seems willing to grant to state court interpretations of state law. The method of this expansion lies in the Court's imposition of federal separation of powers principles on state governments. In three cases in recent years, the Supreme Court differentiated between the branches of government at the state level to justify a refusal to defer to the state courts. It had never done so before. By relying on a seemingly neutral federal principle, without analyzing its applicability to the new context, the Court hid the aggrandizement of power to itself.

The first case, which we are all familiar with, and in fact are probably weary of, is *Bush v. Gore*.[5] Here, the Supreme Court ordered an end to a recount of ballots cast in the 2000 presidential election.[6] Justice Rehnquist's concurring opinion argued that the Florida Supreme Court's interpretation of state law should be rejected. Because the United States Constitution delegates the power to design elections to the legislatures of the States, the Court had a duty to ensure that the state judicial branch was faithful to the will of the state legislative branch.[7] He explained that, given this federal constitutional duty, reviewing and rejecting the state court interpretation of state law "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[8]

A similar concurrence was issued by Justice Scalia in the 2006 term, in *Kansas v. Marsh*.[9] In that case, the Kansas Supreme Court had held that the State's death penalty statute violated the Eighth and Fourteenth Amendments, and the U.S. Supreme Court reversed.[10] Scalia emphasized in his concurrence why it was important for the Supreme Court not to let states overenforce federal constitutional principles:

> 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 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. 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. Thus, a general presumption against such review displays not respect for the States, but a complacent willingness to allow judges to strip the

5 531 U.S. 98 (2000) (per curiam).

6 *Id.* at 105–11 (holding that any recount attempting to meet the statutory deadline would be unconstitutional).

7 *Id.* at 112–13 (Rehnquist, C.J., concurring).

8 *Id.* at 115.

9 126 S. Ct. 2516, 2529–39 (2006) (Scalia, J., concurring).

10 *Id.* at 2520-21, 2529.

people of the power to govern themselves. When we correct a state court's federal errors, *we return power to the State, and to its people*.[11]

After *Bush v. Gore*, a flurry of scholarly contributions debated the propriety of not deferring to the state court's interpretation of state law, but none addressed the Court's construction of state separation of powers in a systematic way.[12]

That flurry over the concurrence may have been much ado about nothing, except that, in addition to the concerns appearing in another concurrence, those same sentiments provided a foundation for a unanimous court, deciding a relatively mundane equal protection challenge to a state tax, to reject an interpretation of state law by a state supreme court.[13] The Court stated that "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their . . . laws and how much help those laws ought to provide."[14] In other words, rather than defer to the state court, the Supreme Court deferred to the state legislature. To date, this case, *Fitzgerald v. Racing Association*, has not even been a blip on the radar screen of federalism scholars.

*Fitzgerald* is representative of the cases federal courts routinely encounter where they are asked to consider an issue of state law. That a state court had already analyzed the law at issue does not make this case

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[11] *Id.* at 2530-31 (Scalia, J., concurring).

[12] Two scholars have raised the issue prior to this article. Louise Weinberg discussed the issue in these terms, but devoted only a small portion of her article to the issue. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 625–27 (2002). Instead, Professor Weinberg focused primarily on the fact that the Court decided the outcome of the election, arguing that action was an unconstitutional aggrandizement of power. *See id.* at 620 ("[T]he Court's action was obviously incompatible . . . with the Constitution of the United States."). Additionally, Mark Tushnet wrote that Vicki Jackson suggested this separation-of-powers issue in an e-mail to him in 2001. Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 124 n.64 (2001).

[13] Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003). At issue were the taxes on the proceeds of slot machines at the State's racetracks and riverboats; these proceeds were the primary source of revenue for both types of gaming establishments. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 557, 559 (Iowa 2002), *rev'd*, 539 U.S. 103 (2003). At the State's horse and dog racetracks, slot machine proceeds were taxed at a maximum of 36%, while at the State's riverboats, they were taxed at a maximum of 20%. IOWA CODE ANN. §§ 99F.4A(6), .11 (West 2004). Finding that the proceeds were similarly situated, the Iowa Supreme Court held that the higher taxation on racetrack proceeds was irrational because it frustrated the purpose of the act creating it. *Fitzgerald*, 648 N.W.2d at 561. The legislative purpose found by the Iowa Supreme Court was to provide another source of revenue to the State's racing industry in an effort to make an unprofitable venture profitable again. *Id.* at 560. Taxing the proceeds at the racetracks at a much higher rate than that of the riverboats threatened that profitability, defeating the purpose of the act. *Id.* at 560–62. Before the Iowa Supreme Court, the State argued that the purpose of the act was to encourage economic growth and promote agriculture. *Id.* at 560. The court found that even if this were the purpose of the act, this purpose, too, was frustrated by the higher tax rate on racetracks. *Id.* at 561.

On appeal, the racetracks argued that, when the Iowa Supreme Court determined what the purpose of the act was, the court was interpreting Iowa law and its interpretation deserved the deference that is almost always accorded state supreme court declarations of state law. Transcript of Oral Argument at 26, *Fitzgerald*, 539 U.S. 103 (No. 02-695). In other words, the interpretation of the Iowa Supreme Court was binding on the United States Supreme Court. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1874) (holding that state courts are the final interpreters of state law, and the Supreme Court is limited to reviewing only questions of federal law).

[14] *Fitzgerald*, 539 U.S. at 108.

much more unusual. In every one of those cases, federal courts must decide whether to defer to the state-court analysis and, if so, by how much. Federal courts will often defer, but many times they have not done so, and they rarely explain the reasons for the departures they make. This Article explores the reasoning behind the courts' decisions about deference and endeavors to provide some guidance for when federal courts should defer to state-court pronouncements of state law.

More specifically, Part II of this Article illustrates the lines of authority on deference for different types of state statutory questions. Part III then suggests the principles that underlie this distinction, and Part IV proposes guidelines for federal courts to use in analyzing these problems.

I submit that when federal courts defer to a particular branch of state government at the expense of another branch, they infringe on State sovereignty. The power of federal courts to review acts of Congress is a constitutional power. Similarly, the power of state courts to review acts of state legislatures is a matter of state constitutional power. Where the Federal Constitution explicitly grants state legislatures particular powers, or where the state court's actions seem designed to evade judicial review or frustrate a federal right, federal courts are on relatively solid ground in not deferring to state courts. Conversely, where the Federal Constitution treats the States as unitary entities, and where there is no indication that state courts are working to undermine an important federal interest, federal courts have little justification to exercise independent review of state law. By not deferring, federal courts would essentially dictate what state constitutional law should be. That result could nullify the power of the people within the States to define their government and to define their individual rights in a way more generous than that of the Federal Constitution.

## II. FEDERAL COURT APPROACHES TO STATE LAW

The Framers of our Constitution are thought to have created our federal system of government to diffuse power, in order to guarantee the maximum amount of individual freedom.[15] The courts tend to treat our system of federalism as dual, creating two judicial tracks in which judges have competence over distinct subjects.[16] Federal courts are considered to have greater competence over federal law, and state courts greater competence over state law.[17] In other words, this notion of dual sovereignty suggests a

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[15] *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 4, 25 (1995) ("That the political structure adopted in the Constitution was designed simultaneously to preserve individual liberty and to avoid tyranny should come as no surprise to anyone reasonably well schooled in the theory of American government."); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1401 (2005) ("One of the key purposes of federalism is to offer enhanced protection for individual rights.")(citation omitted).

[16] *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246, 294 (2005) (describing and critiquing the theoretical model of dual federalism and its perpetuation by courts).

[17] *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSION IN THE ALLOCATION OF JUDICIAL POWER 2–3 (2d ed. 1990) (noting that federal courts are experts on national law and state courts are final interpreters of the law of their respective jurisdictions); Barry Friedman, *Under the Law of Federal Jurisdiction:*

particular division of labor for legal issues. Federal claims and federal issues should be heard by federal courts, and state claims and state issues should be heard by state courts.

Unfortunately, the world does not divide up quite so nicely, and there is significant overlap between state and federal issues. For example, state courts are often called upon to decide issues of federal law.[18] State court competence over federal law is not entirely surprising because state courts are courts of general jurisdiction. Bound by the Supremacy Clause, they not only are able to decide federal questions but also have a duty to do so.[19] Of course, that competence notwithstanding, scholars disagree on whether state courts can adequately protect federal interests.[20]

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*Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236–41 (2004) (discussing how a sovereign's own courts should decide questions involving that sovereign's laws); Schapiro, *supra* note 15, at 1409; *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607 (1981) (describing the rhetorical tradition that holds federal judges more competent to adjudicate federal matters); Philip B. Kurland, Professor of Law, Univ. of Chi. Law Sch., Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, Address Before the Conference of Chief Justices (August 20, 1959), *in* 24 F.R.D. 481, 487 (1960) ("I start with the principle that the federal courts are the primary experts on national law just as the State courts are the final expositors of the laws of their respective jurisdictions.").

[18] This role has always been part of the fabric of the federal judicial system, and the Madisonian Compromise, which gave Congress the option to create lower federal courts, reflects this. MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 29–31 (1999). The debate at the time centered on whether the creation of lower federal courts would be necessary to handle the broad caseload of federal cases or would instead infringe on the role of States in deciding federal issues. *Id.* And, given how few cases the United States Supreme Court hears, the States have become important guardians of federal interests. *See* Friedman, *supra* note 17, at 1218–20 (noting that caseload constraints make it impossible for the Supreme Court to review many of the state cases involving federal questions); Robert R. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1304 (2005) ("[T]he Court has often reassured us that federal constitutional rights will be protected because state judges would fairly consider them . . . ."); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 350–53 (2002) (arguing that a decrease in the review of state court cases by the Supreme Court "may make it difficult for federal and state lower court judges to resolve correctly or uniformly issues of federal law").

[19] *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 443 (1977) ("'[S]tate courts have the solemn responsibility equally with federal courts' to safeguard constitutional rights . . . ." (quoting Steffel v. Thompson, 415 U.S. 452, 460–61 (1974))); Testa v. Katt, 330 U.S. 386, 394 (1946) (holding that state courts may not discriminate against federal claims, but rather, have a duty to hear them); *see also* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 49–52, 161–70 (analyzing state-court obligations not to discriminate against federal claims); *cf.* Alden v. Maine, 527 U.S. 706, 757 (1999) (holding that this duty is simply not to discriminate between state and federal claims, but that the States are not required to hear federal claims if they do not entertain similar state claims).

[20] *Compare* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977) ("[T]he only judicial forums . . . capable of enforcing countermajoritarian checks in a sustained, effective manner are the federal courts[,] and . . . , to the extent that constitutional cases can be shifted from federal to state trial courts, the capacity of individuals to mount successful challenges to collective decisions will be substantially diminished.") *with* Bator, *supra* note 17, at 637 ("[S]tate courts will and should continue to play a substantial role in the elaboration of federal constitutional principles."), Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 599 (1991) ("[T]he differences between federal and state courts do not necessarily translate into decisions that are more protective of individual liberties."), Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236–37 (1988) ("[L]itigants with federal constitutional claims should generally be able to choose the forum, federal or state, in which to resolve their disputes."), *and* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*,

As accepted as the notion of state court competence over federal issues is, federal courts seem less competent to decide state law issues. The mantra of modern federalism is that federal courts are courts of limited jurisdiction and may only exercise the jurisdiction that the Constitution or federal statutes grant. Thus, our first instinct might be to say that federal courts should never decide issues of state law.[21]

That approach, however, is not required by the text or structure of the Constitution.[22] The Constitution extends the judicial power of the United States to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties[, and] . . . to Controversies" between certain parties.[23] Moreover, the appellate power of the Supreme Court extends "both as to Law and Fact."[24] By empowering the judicial branch to decide all cases and particular controversies, and by defining the appellate power as allowing de novo review, the Constitution gives the judicial branch the power to decide every issue, whether of fact or of law, whether state or federal, as long as that issue is contained in a case or controversy that would fall within Article III's limits.[25] Thus, under the Constitution's terms, federal courts likely have the power not only to

10 HASTINGS CONST. L.Q. 213, 214–15 (1983) ("[S]tate courts are no more 'hostile' to the vindication of federal rights than are their federal counterparts, and . . . the opportunity for review by state appellate courts and the United States Supreme Court significantly mitigates concern over the institutional competence of state trial courts.").

[21] *See* Schapiro, *supra* note 15, at 1426–28 (postulating that only state courts have the authority to dictate state law by interpreting it).

[22] Many scholars have described the way that the federal and state governments actually work together as "cooperative" federalism, which is not really a normative theory, but simply a description of voluntary activity. *E.g.*, Daniel J. Elazar, *Cooperative Federalism*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 80–83 (Daphne A. Kenyon & John Kincaid eds., 1991); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815–16 (1998). John Kincaid has argued that in the late 1970s cooperative federalism was replaced by coercive federalism when the federal government began using more coercive regulatory tools, such as preempting state authority and presenting the states with unfunded mandates. John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 148–49 (1990).

[23] U.S. CONST. art. III, § 2.

[24] *Id.*

[25] This is not to say that there are no constitutional limits on the review of facts found at the trial-court level. The Seventh Amendment explicitly limits the facts a federal appellate court can review, and the Due Process Clause may also provide some limit. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233–34 (1985) (noting the Seventh Amendment's prohibition against reexamining facts tried by a jury). Additionally, the doctrine of adequate and independent state grounds, which provides that the Supreme Court lacks jurisdiction over a case that presents a federal question if the judgment could be wholly supported on the outcome of a state-law issue, may have constitutional foundations. The Supreme Court's reversal of the judgment would have no effect on the result, since the state court could issue the same judgment on state-law grounds. Herb v. Pitcairn, 324 U.S. 117, 126 (1945). The Supreme Court's decision would be an advisory opinion. *Id.*; *see also* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053 (1999) (arguing that the adequate-and-independent-state-law-grounds doctrine is a part of Article III's standing requirement). It is difficult to see, though, how what happened in *Fitzgerald v. Racing Association*, where the State did just that on remand, would not be an advisory opinion in the same way. *But see* Michigan v. Long, 463 U.S. 1032, 1038 n.4, 1039–40 (1983) (detailing the circumstances in which the Court will take jurisdiction, even though the judgment could be sustained on state grounds, namely, where those grounds are not clearly the actual grounds relied on, not truly adequate, or not truly independent).

consider issues of state law, but also to decide them without deferring to state-court constructions of that law.[26]

Not only does the text of the Constitution allow federal courts a broad reach to decide state-law issues, the structure of the Constitution also demonstrates that state and federal governance overlap significantly. The federal government and the States share competence to legislate in many areas. While some categories are truly reserved to the States, like a general police power, and some are granted exclusively to the federal government, like the power to grant patents, these discrete categories grow ever fewer as our society changes and more conduct transcends State boundaries.

Because of the overlap of federal and state law, federal courts encounter state-law questions in a number of ways.[27] The most obvious situation is when the federal court is sitting in diversity.[28] In other situations, federal courts exercise supplemental jurisdiction over state-law claims that arise from the same nucleus of operative fact as a claim federal courts would have jurisdiction over.[29]

In addition to these situations in which the state-law issues make up discrete causes of action, questions of federal law are often intertwined with questions of state law. For example, a federal court may consider a federal question to which federal common law applies, and the content of that federal common law may be state law.[30] Other examples of intertwined issues include situations when the state-law question is an essential step in the analysis of federal law, such as when the court must decide whether the Federal Constitution protects a right created by state

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[26] Monaghan, *supra* note 25, at 272–73 (arguing that the Supreme Court can use its discretion to review the fact-finding and law application of state courts); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1967 (2003) ("[T]he Court's historical practice provides support for the existence of an ancillary authority to exercise independent judgment over state-law determinations in federal cases."). *But see* Friedman, *supra* note 17, at 1237–46 (noting the sovereignty interests that States have in state courts interpreting and enforcing their laws and the lack of interest federal courts have in interpreting and enforcing state laws); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2–3 (1990) (arguing that "rigid readings of the text [of Article III] fail to account for changing conceptions of the role of federal courts").

[27] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337–47, 358–59 (1816) (Story, J.) (considering the federal courts' power under Article III to review the judgments of state courts and to examine issues of state law); *see also* Maggio v. Fulford, 462 U.S. 111, 117 (1963) (per curiam) (requiring that, on habeas review of state criminal proceedings, federal courts defer to state-court findings of fact unless they "are not 'fairly supported by the record'" (quoting Act of June 25, 1948, ch. 646, § 2254, 62 Stat. 869, 967, *repealed by* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (codified at 28 U.S.C. § 2254(e) (2000)))).

[28] The Constitution grants federal courts jurisdiction over "Controversies . . . between Citizens of different States." U.S. CONST. art. III, § 2. Congress gave that jurisdiction to the lower federal courts as well. 28 U.S.C. § 1332 (2000).

[29] 28 U.S.C. § 1367 (2000). When federal jurisdiction is based on diversity, there is no supplemental jurisdiction over parties that would destroy that diversity. *Id.* § 1367(b). However, only one party needs to satisfy the amount-in-controversy requirement for diversity jurisdiction, so there will be supplemental jurisdiction over diverse parties that do not satisfy the amount-in-controversy requirement as long as one party does satisfy it. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005).

[30] *E.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (involving the time bar of a claim brought in the district courts of two different states); United States v. Kimbell Foods, 440 U.S. 715, 739–40 (1979) (involving the prioritization of public and private liens on property).

law[31] or when a federal statute confers a benefit or puts a burden on a class of people defined by state law.[32] A third category of these state-law-antecedent situations occurs when federal courts evaluate the constitutionality of state laws.

The analysis that follows will refer to state law as if it were a single, concrete concept. This is an oversimplification used to clarify a very murky area. In fact, state law issues may come to federal courts in a number of ways. State law may be contained in a statute never interpreted by any state court, or it may be contained in a statute that a state court interpreted at some point in an unrelated, prior proceedings. Conversely, the law may have been made entirely through state common law. Finally, the issue may come to the Supreme Court by direct review, and to the lower courts on certain limited kinds of collateral review, as a direct interpretation of the state law at issue by a state court applying that law to the exact factual context the federal court faces. The source and nature of the state law will make a difference in how federal courts should interpret and apply that law.

This Article also discusses the state courts' prior actions as if they were uniform, and that too is an oversimplification. For purposes of this discussion, state-law determinations could range from pure questions of law, like what law applies, to "mixed" questions of law and fact, or the application of the law to the facts.[33] Both categories of decisions may be

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[31] This describes, generally, procedural due process cases. The Constitution prohibits the government from depriving an individual of life, liberty, or property without due process of law. U.S. CONST. amend. V (applying to the federal government); *id.* amend. XIV, § 1 (applying to the States). The first step in a procedural due process case is, generally, to decide whether there is a property or liberty interest that the law protects, and usually that interest is created by state law. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[32] A well-known example is the Internal Revenue Code, which determines taxable income on the basis of whether an individual is married, but does not define how a person becomes married. *See* 26 U.S.C. § 1 (2000 & Supp. III 2003); *cf. id.* § 7703 (providing rules that govern when in time a person is considered married, if that person has had a change in marital status; certain married people living apart will not be considered married under the statutory definition). The Federal Defense of Marriage Act provides another limit on the definition of marriage, providing that, for federal purposes, marriage is any "legal union between one man and one woman," but not defining what a legal union is. 1 U.S.C. § 7 (2000).

A similar issue is present when state law incorporates a federal-law issue, such as when state tort law provides that violation of a federal regulation constitutes negligence per se, or when a state tax code defines taxable income as the income defined as taxable by the Internal Revenue Code. *See* Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 816 & n.14 (1986) (affirming in dicta that the Supreme Court would have appellate jurisdiction over the federal question posed in the former example, but holding that normally the issue would not present a federal question before the lower federal courts as their statutory "arising under" jurisdiction has been interpreted (quoting Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 214–15 (1934))).

[33] This Article does not touch on the amount of deference to be given to lower court findings of fact. For a discussion of that issue, see Monaghan, *supra* note 25, at 236–38. Although some courts and scholars assert that the different types of questions are discrete, they are more properly viewed as being on a continuum. *Id.* at 233. Professors Allen and Pardo argue that there is no defensible distinction between these types of questions, and that questions of law are simply different types of fact questions. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

reviewed de novo, but the more fact-intensive the question, the more the courts may choose to grant some deference to the lower courts.[34]

### *A. Rules Providing Deference to State-Court Determinations*

The propriety of federal courts considering state law has been addressed in several different situations, with fairly consistent results. In 1875, in the context of review of state court decisions, the Supreme Court examined whether to review issues of state law in state high-court cases when those state-law issues were distinct from the federal-law issues.[35] The Court determined that, under the jurisdictional statutes, it could review all of the federal issues, but that the holdings of the state court on issues of state law could not be reviewed.[36] This principle lies beneath the rule that the Supreme Court will not exercise jurisdiction over a case in which a federal issue is present, even if that issue was wrongly decided by the state court, if the judgment in the case rests on "adequate and independent state grounds."[37]

Similar to the rules developed for Supreme Court review of state court decisions, federal courts encountering state issues must often defer to state-court declarations of law. By statute, federal courts sitting in diversity must follow state constitutional, statutory, and common law.[38] Thus, when

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[34] *Compare* Illinois v. Wardlow, 528 U.S. 119, 123–26 (2000) (applying de novo review to a determination of reasonable suspicion), Lilly v. Virginia, 527 U.S. 116, 136–37 (1999) (opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (stating that fact-intensive issues of constitutional law require de novo review), *and* Ornelas v. United States, 517 U.S. 690, 697 (1996) (using de novo review because law "acquire[s] content only through application"), *with Lilly*, 527 U.S. at 148 (5-4 decision) (Rehnquist, J., dissenting) (arguing that the question's fact-intensive nature warranted deference), *Ornelas*, 517 U.S. at 700 (Scalia, J., dissenting) (arguing for deference), *and* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 176 (1983) (deferring to application of law to the facts on whether corporate activities constituted a unitary business). *But see* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (holding that in First Amendment cases the Court must exercise de novo review of the law and facts).

[35] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 614–15 (1875); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 392 (1798) (holding that federal courts lack jurisdiction to decide whether state statutes are valid under state constitutional law).

[36] *Murdock*, 87 U.S. (20 Wall.) at 632–33. This principle is so firmly established that, in *Ring v. Arizona*, the Supreme Court deferred to an Arizona Supreme Court's refusal to follow the U.S. Supreme Court's prior interpretation of an Arizona death penalty statute. 536 U.S. 584, 603 (2002). However, some scholars have argued that Congress did intend to give the Supreme Court the power to review holdings in state court decisions because, after the Civil War, Congress fundamentally distrusted the state courts. 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, 1319–20 (1986).

[37] Michigan v. Long, 463 U.S. 1032, 1038 (1983).

[38] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71–80 (1938) (interpreting the Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2000))). The holding in *Erie* rested, in part, on perceived constitutional limitations. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 703 (1974) ("[N]othing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising . . . ."); Paul J. Mishkin, *Some Further Last Words on* Erie*: The Thread*, 87 HARV. L. REV. 1682, 1683 (1974) ("That Congress may have constitutional power to make federal law displacing state substantive policy does *not* imply an equal range of power for federal judges."). Some scholars have cast doubt on these principles as constitutionally required. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 326 (5th ed. 2007) ("The constitutional basis for the *Erie* decision has confounded scholars." (citing Ely, *supra*; Stewart

the State's highest court has declared what the law is, federal courts must follow that determination when deciding diversity cases.

Similar to the adequate-and-independent-state-grounds threshold for Supreme Court review of state court decisions, lower federal courts may abstain entirely from considering cases in certain circumstances when state law is unclear.[39] For the court to abstain in constitutional cases, the state law must be substantially uncertain, and there must be a reasonable possibility that the state court's clarification will resolve the issue so that the court need not reach the constitutional issue.[40] In diversity cases, the state-law issue must be unclear and the case must involve some important state interest that is part of the State's unique power as sovereign, like eminent domain.[41] Similarly, in federal-question cases in which the issue is regulated by a complex state administrative process designed to treat uniformly an essentially local problem, federal courts may defer to the state process rather than issue injunctive relief.[42]

Short of abstention, special rules of construction have been developed that embody deference to the states for cases in which federal courts must interpret state laws that have been challenged as violating the Federal Constitution.[43] Statutes, even those enacted by states, are presumed to be constitutional, and a challenger bears the burden of demonstrating that a statute violates the Constitution.[44] Where the challenge is that the law is unconstitutionally vague, it must be vague in all of its applications, not merely unclear in some instances.[45] And where a statute might seem on its

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Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231 (1985); and Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977))).

39 *See* La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27–29 (1959) (abstaining to allow the state court to decide an unclear issue of state law of great local importance); Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 345, 349–50 (1951) (deferring to "state court review of an administrative scheme based on predominantly local factors"); Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943) (deferring to the state court regarding a complex state regulatory scheme); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941) (abstaining to allow a state court to determine a state-law issue that would be dispositive to a constitutional claim).

40 *See* Kusper v. Pontikes, 414 U.S. 51, 54 (1973) (stating that abstention is appropriate "where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question"); Baggett v. Bullitt, 377 U.S. 360, 375–78 & n.11 (1959) (declining abstention where the state statutory question could not dispose of the federal constitutional issue).

41 *Thibodaux*, 360 U.S. at 28; *see also* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 191–96 (1959) (holding that abstention was not appropriate where there were no "exceptional circumstances" or "important countervailing interest").

42 *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728–30 (1996) (holding that abstention on administrative-process and local-problem grounds is only appropriate in cases of discretionary relief); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 364 (1989) (limiting abstention to situations that would substantially interfere with administration of an essentially local program).

43 These ideologically neutral rules of construction have been called "quasi-constitutional law," and can be used by the Court in a very sophisticated way to promote a number of values, including ideological ones, through its decision making. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

44 Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 198 (2001) (citing INS v. Chadha, 462 U.S. 919, 944 (1983)).

45 Grayned v. City of Rockford, 408 U.S. 104, 121 n.50 (1972) (citing Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965)).

face to violate the Constitution, if the state court has given the statute a narrower construction that would be constitutional, that construction will be upheld.[46]

### *B. Rules Providing Less Deference to State Courts*

Federal courts will not always defer to state-court determinations, however. Even in the diversity context, federal courts have some flexibility to interpret state law. If a State's highest court has not spoken on the issue, federal courts are not required to certify a question to that court. Nor do federal courts have to defer to the State's appellate courts, unless federal courts are convinced that the state supreme court would agree. In other words, federal courts are allowed to predict how the state supreme court would decide the issue.[47]

Additionally, there are many situations in the state-law-antecedent cases where federal courts will interpret what state law means, even if the federal court also gives some amount deference to a state-court interpretation. State law is antecedent to a federal issue when the "existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law."[48] When the federal right depends in this way on an issue of state law, federal courts have the ability and the duty to decide what impact the state law will have on the federal law.[49] That impact is actually a federal question, and not really interpretation of state law at all, even though the federal-court analysis may look as if the federal court is interpreting the state law.[50] Moreover, even in a state-law-antecedent case in which the state court construction of the issue would resolve the matter and preclude consideration of the federal question, the federal court may still need to review the state law to some extent, to ensure, at the least, that the law is not being construed to impair federal interests.[51] As a practical matter, the Supreme Court will often interpret state law, rather than remand the matter to the State's highest court for

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[46] Bell v. Cone, 543 U.S. 447, 452–53 (2005) (per curiam) (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990), *overruled on other grounds*, Ring v. Arizona, 536 U.S. 584 (2002)). Not exactly a rule of construction, is the related doctrine of constitutional avoidance. It is an approach that is less deferential to the States than abstention, but is similar. A federal court can decide a case based on a pendent state-law claim if doing so avoids the case's constitutional issue; it need not refer to the State for decision. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 192–93 (1909). This approach still affords the State significant deference by not calling the state law into constitutional question, and it avoids some of the problems posed by abstention, such as delay and increased cost.

[47] CHARLES WRIGHT & MARY KAY KANE, FEDERAL COURTS § 58, at 396 (6th ed. 2002). Additionally, the Supreme Court has traditionally deferred to the findings of lower federal courts regarding the law of a State within their jurisdiction. Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) ("[There is a] presumption of deference given the views of a federal court as to the law of a State within its jurisdiction."). Deference is not warranted, however, if State expertise would not be warranted in interpreting the state law. Town of Castle Rock v. Gonzales, 545 U.S. 748, 757 (2005) (overturning lower court's interpretation of state law where it "did not draw upon a deep well of state-specific expertise").

[48] Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977).

[49] Monaghan, *supra* note 26, at 1925–26, 1935–47.

[50] *Id.* (analyzing the issue primarily in the context of constitutional cases, and referring to this as "characterization" of the issue for federal-law purposes).

interpretation, when it must determine whether a right under a state statute was unconstitutionally denied,[52] or when the state statute itself is unconstitutional.[53]

When a state court has spoken on the issue, the Supreme Court usually looks only far enough into the issue of state law to see whether the decision of the state court "rests upon a fair or substantial basis. . . . [I]f there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, [the] Court will not . . . substitute its own view of what should be deemed the better rule. . . ."[54] This fair-support rule applies generally to state-law-antecedent issues.

However, the Supreme Court does not always follow the fair-support rule. For example, in *Indiana ex rel. Anderson v. Brand* the issue before the Court was whether a teacher had a vested contract right that could not be impaired under the Constitution's Contract Clause.[55] The Indiana Supreme Court had ruled that she had no contract under Indiana law, but the Supreme Court maintained the authority to address the question directly:

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts.[56]

The Supreme Court determined that, contrary to the Indiana Supreme Court's finding, the Indiana statutory scheme and the State's actions under it created a contract between the teacher and the State that was protected under the Federal Constitution's Contract Clause.[57]

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[51] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 498 (5th ed. 2003); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 83–85 (2002) ("[T]he Court routinely claims the power to review a *state*-law decision that blocked a state court from considering a federal claim . . . .").

[52] *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) (affording the state court some deference but ultimately deciding for itself whether a contract was made and, if so, whether the State failed to honor the contract).

[53] *See* Standard Oil Co. v. Johnson, 316 U.S. 481, 482 (1942) ("Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal . . . .").

[54] Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540–41 (1930).

[55] 303 U.S. 95, 96–99 (1938). For the Constitution's Contract Clause, see U.S. CONST. art. I, § 10.

[56] *Brand*, 303 U.S. at 100 (internal citation omitted).

[57] *Id.* at 105, 108–09. One possible interpretation of the holding is that, rather than deciding the issue as a matter of state law, the Court was deciding the federal effect of the state laws, an issue of federal, not state law. *See* General Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) ("The question whether a contract was made is a federal question for purposes of Contract Clause analysis, and 'whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment.'" (internal citation omitted) (quoting Appleby v. City of N.Y., 271 U.S. 364, 380 (1926))). Professors Monaghan and Fallon argue that the Due Process Clause has some core conception of liberty and property, defined as matters of federal law, that state law must satisfy, but state law rarely fails to satisfy those thresholds. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327–29 (1993); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 440 (1977); *see also* Sandin v. Conner, 515 U.S. 472, 484–86 (1995) (holding that state law mandating certain procedures to follow before a prison

Even though the Supreme Court found no evasion of the constitutional issue, the Court did not evaluate whether the state court's interpretation of state law had fair support.[58] Thus, federal supremacy may sometimes provide a basis for federal courts to deviate from the normal rules of deference.

### *C. Unifying the Two Approaches*

This review of deference rules reveals that the amount of deference that federal courts afford the states ranges from total abstention from even considering a case to de novo review of state law. The rules that have emerged are pragmatic and balance State autonomy against federal interests.[59] Essentially, the traditional rule has embodied a dualist federal approach: federal courts review issues of federal law, and state high court determinations are final on issues of state law.[60] While this is generally true, federal courts are less likely to defer or affirmatively ask the State to interpret a state law when faced with a state-law-antecedent situation.

This description of the federal-court approach to state-law issues demonstrates that, in practice, the decisions of the federal court can appear ad hoc and result-oriented. And when judicial federalism cases are compared to other cases considering legislative federalism, the federal courts' approach seems even more confusing. The Supreme Court appears to sometimes promote States' rights and to sometimes expand national power, without consistency.

Most recently, the Rehnquist Court seemed to breathe new life into state power by limiting Congress's power under the Commerce Clause and Section Five of the Fourteenth Amendment, while also strengthening the Tenth and Eleventh Amendments. In *United States v. Lopez*[61] in 1995 and *United States v. Morrison*[62] in 2000, for the first time since 1937, the Court struck down legislation as beyond Congress's Commerce Clause power.[63]

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inmate could be disciplined did not by itself create a liberty interest; only a sentence that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" would impair an inmate's limited liberty interest).

58 The Court may have implicitly made this fair-support analysis by considering prior rulings by the Indiana Supreme Court. *See Brand*, 303 U.S. at 107.

59 The rules could actually promote an ideological purpose of the Court, rather than a neutral federalism purpose. *See* Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 745–46 (2000).

60 *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) (deeming state courts the "appropriate tribunals" for state-law questions).

61 514 U.S. 549 (1995) (considering the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45), *superseded by statute*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125–26.

62 529 U.S. 598 (2000) (considering the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941–42 (1994)).

63 *See* Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2–3 (2004). Since *Morrison*, the Court seems to have stepped back from this states'-rights jurisprudence. In *Gonzales v. Raich*, 545 U.S. 1, 12–22 (2005), the Court upheld the Federal Controlled Substances Act, 21 U.S.C. §§ 801–904 (2000), as valid Commerce Clause legislation that preempted California's Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2007). The Compassionate Use Act had allowed individuals to grow small amounts of marijuana for their own use when a doctor recommended

In *City of Boerne v. Flores*,[64] the Court limited Congress's power to create legislative rights broader than the constitutional rights the Fourteenth Amendment created.[65] That decision was applied to broaden the reach of the Eleventh Amendment, limiting Congress's ability to subject the States to suits for money damages.[66] Using the Tenth Amendment, as well, the Court during this time period limited federal power in *New York v. United States*[67] and *Printz v. United States*.[68] The Court has also taken a restrictive view of federal power in habeas corpus jurisdiction[69] and civil rights cases.[70]

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the drug for serious medical conditions. *Id.* In its most recent decision on the topic, the Court avoided the federalism issue in a case involving the executive branch's attempts to preempt the Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800–.897 (West Supp. 1998), which allows doctors to prescribe drugs to help terminally ill patients commit suicide, by finding that Congress failed to give the executive branch the power to prohibit doctors from prescribing these drugs. Gonzales v. Oregon, 126 S. Ct. 904, 916–22 (2006).

64 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

65 *See id.* at 519–20, 536 (holding that, while Congress has broad authority under the Constitution to adopt legislation to protect Fourteenth Amendment rights, the Court retains the right to determine whether such legislation amounts to an abuse of authority under the Constitution).

66 For examples of cases in which the requirements were not met for private individuals to recover money damages against the States, see Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); and Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). The Eleventh Amendment was strengthened in this way by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could abrogate state sovereign immunity only under its Fourteenth Amendment powers. *Id.* at 57–60. Not only are States immune from suit in federal court, but Congress cannot subject them to suit in their own courts either. Alden v. Maine, 527 U.S. 706, 730–54 (1999). For a thorough analysis of this Eleventh Amendment jurisprudence, see Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37. IND. L. REV. 345 (2004).

As in the Commerce Clause context, the Court seems to be stepping back here as well. Four cases in the last three years have upheld Congress's power. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court held that Congress had the power under the Fourteenth Amendment to enact the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–54 (2000). In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court upheld Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–65 (2000), as a valid abrogation of state sovereign immunity, at least as far as it mandated access to courthouses and other functions of government. Then, in two bankruptcy cases, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), and *Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006), the Court held that Congress could subject the State to suit for in-rem bankruptcy proceedings under its Article I bankruptcy powers.

67 505 U.S. 144, 174–77 (1992) (holding that Congress could not coerce State governments into either accepting ownership of radioactive waste or implementing legislation dictated by Congress).

68 521 U.S. 898, 925–33 (1997) (overturning Congress's mandate that local law enforcement conduct background checks on applicants for gun permits as commandeering).

69 *E.g.*, Schlup v. Delo, 513 U.S. 298, 318 (1995) (expressing concern that habeas filings threatened the finality of state court judgments, implicating comity and federalism), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101, 105, 106, 110 Stat. 1214, 1217, 1220 (codified at 28 U.S.C. §§ 2244, 2255 (2000)).

70 *E.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 476–85 (1996) (holding that preclearance under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000), cannot be denied simply because a jurisdiction's voting procedures violate section 2 of the Act, *id.* § 1973); Growe v. Emison, 507 U.S. 25, 32 (1993) (recognizing that, even though federal and state courts may have concurrent jurisdiction over particular subject matter, there are circumstances in which federalism and comity concerns dictate federal abstention). *But see* Bush v. Vera, 517 U.S. 952, 1069 (1996) (5-4 decision)

Currently, in all but the Tenth Amendment context, the Court has issued subsequent decisions that elevate federal interests above states rights.[71] Furthermore, at the same time that it issued the strong states'-rights decisions described above, the Court also issued decisions that extend the national power in other areas.[72]

Taken as a whole, then, the Court's federalism decisions seem inconsistent and ideologically based.[73] The following section of this Article seeks to divine some nonideological guiding principles that federal courts can draw on to explain the level of deference they give to States in state-law issues.

## III. FEDERAL CONSIDERATION OF STATE-LEVEL INSTITUTIONAL COMPETENCE

There is a spectrum of options available to federal courts encountering state-court determinations of state law. At one end of the spectrum, federal courts would abstain from hearing cases that involved issues of state law, or they would consider the cases but not consider the state-law issues at all, instead deferring entirely to any state determination of what the law means or how it should be applied to these facts. At the other end of the spectrum, federal courts would review every issue of law or fact de novo, with no deference to any prior holdings by state courts either in the case before the federal court or in a prior, unrelated proceeding that would be precedential in state court.

While all of the cases fall along this continuum, federal courts rarely explain what reasoning underlies their decisions to defer or not. A great number of the variances from the usual rule of deference can be explained, however, by notions of institutional competency: federal courts are deferring to the State institution that they perceive to be most competent to perform the task at issue or not deferring where the particular State institution lacks special competency.

Federal-court discourse has long incorporated the concept of institutional competence, usually under the principle of separation of powers. That notion has nearly always been articulated when federal

(Souter, J., dissenting) (criticizing the plurality opinion for going too far in limiting State discretion under the Voting Rights Act).

71 *See supra* notes 63, 66.

72 *E.g.*, United States v. Locke, 529 U.S. 89, 112–16 (2000) (holding that state laws governing design standards for oil tankers were preempted by federal law); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575–88 (1997) (striking down a state tax incentive on Dormant Commerce Clause grounds); Morales v. TWA, 504 U.S. 374, 387–91 (1992) (finding a state law regarding airline-fare advertising preempted by federal statute). There have been a large number of preemption cases in recent years, some expanding the scope of federal power and some not. For a full discussion of these preemption cases in a functional analysis, see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 47 (2006), and Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1365–98 (2006).

73 *See* Cross & Tiller, *supra* note 59, at 757–62, 768; David Niven & Kenneth W. Miller, *Federalism by Convenience: The Supreme Court's Judicial Federalists on the Death Penalty and States' Rights Controversies*, 33 CAP. U. L. REV. 567 (2005); *see also* Jackson, *Narratives*, *supra* note 3, at 280 (arguing that the Court's record on protection of State power from federal encroachment is suspect).

courts employ it in a horizontal fashion, that is, when determining whether the federal judicial branch, Congress, or the President is more properly suited for a particular task. Occasionally, though, state-level institutional competence has been the explicit focus of federal courts. Chief Justice Rehnquist's concurrence in *Bush v. Gore*[74] is the most famous, or infamous, example.

This Part analyzes the cases in which the Supreme Court has not deferred to state-court interpretations of state law, with a particular focus on those cases in which the Court has explicitly deferred to the state legislative branch. As part of this analysis, I distinguish between two kinds of state court decisions: interpretations of what a statute means; and discernment of what the purpose of a state law is. The distinction has important implications.

In either context, I submit that, because the Federal Constitution rarely differentiates between the branches of state government, federal courts have little justification for doing so. Ultimately, deciding which branch of state government should have primacy over any particular issue is a matter of state constitutional law. In other words, just as federal judicial review is part of the federal courts' constitutional power, the interpretation of state law is simply an exercise of the state courts' state-constitutional power. As such, the determination of the proper balance of that power should be up to each State.

### *A. Independent Review in State Courts' Interpretations of the Meaning or Content of State Law*

In only a few cases has the Supreme Court admitted to engaging in independent review of the meaning of state law and of rejecting the state court's interpretation of that law, and each of those instances was in service to the supremacy of an important and substantive federal right or enumerated power. In *Fairfax's Devisee v. Hunter's Lessee*, for example, the Supreme Court indepentendly reviewed Virginia law to determine the proper title to land, because the state-law issues were antecedent to deciding what rights the putative owner had under federal treaties.[75] State hostility to the role of the Supreme Court and the supremacy of federal law at the time of the *Fairfax* case may have made such rejection necessary.[76] Born out of similar resistance to federal authority, the Supreme Court's decisions in *NAACP v. Alabama ex rel. Patterson*[77] and *Bouie v. City of*

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[74] For more information on Justice Rehnquist's concurrence, see *supra* notes 7–8 and accompanying text.

[75] 11 U.S. (7 Cranch) 603, 618–28 (1813). The Court explained its reasoning for deciding in this manner in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 357–58 (1816).

[76] *See* Bush v Gore, 531 U.S. 98, 140 (2000) (per curiam) (Ginsburg, J., dissenting) (discussing how *Fairfax* "occurred amidst vociferous States' rights attacks on the Marshall Court" (citing GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 61–62 (13th ed. 1997))). This hostility was based, at least in part, on State hostility to British creditors after the Revolutionary War. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1438–49 (discussing specific legal actions by States to prevent British creditors from recovering debts after the Revolutionary War).

[77] 357 U.S. 449 (1958).

*Columbia*[78] rejected state-supreme-court deviations from prior state law when those deviations themselves violated due process.[79] Even before State resistance to federal enforcement of civil rights, in *Indiana ex rel. Anderson v. Brand*, the Supreme Court rejected the Indiana Supreme Court's construction of state law where that construction could have arguably deprived a teacher of property without due process of law.[80]

Conversely, in most instances in which a state court is interpreting what a state statute means, federal courts will defer to that state court's interpretation.[81] But this is not always the case. The most controversial example is *Bush v. Gore*, in which a majority of the Supreme Court ordered an end to a recount of ballots cast in the 2000 presidential election.[82] The majority held that no constitutionally permissible recount could be accomplished by a deadline that gave the States a "safe-harbor," even though the Florida Supreme Court was given no opportunity to determine whether the legislature intended to meet this deadline in situations like the one presented.[83] Rather than remand to the Florida Supreme Court to order that the recount proceed in a method consistent with Florida's election law, the Supreme Court held that no constitutional method could complete the recount in time to comply with what the Court interpreted the election law to require.[84]

Chief Justice Rehnquist's concurrence went further. In it he argued that the Florida Supreme Court misinterpreted Florida election law when it ordered the recount and, thus, impermissibly thwarted the will of the Florida Legislature.[85] As a precursor to this conclusion, the Chief Justice argued that the United States Supreme Court had a duty under Article II of the United States Constitution, which assigns the power to direct the appointment of electors to the legislatures of the States, to ensure that the state judicial branch was faithful to the will of the state legislative branch.[86] He explained that given this federal constitutional duty, the review and rejection of the state court interpretation of state law "does not imply a

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78 378 U.S. 347 (1964).

79 *Id.* at 350, 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 455, 457–58 ("Novelty in [state] 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.").

80 303 U.S. 95, 108–10 (1938). The Court may have based its decision on the fact that the Indiana Supreme Court had changed its interpretation of state law in holding that Brand did not have a contract. *Id.* at 107. Thus, *Brand* may be completely analogous to *Martin*, *Bouie*, and *Patterson*. For a detailed discussion of *Brand*, see *infra* Part II.B.

81 *See* Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding the state court's interpretation of a local ordinance binding); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971) (plurality opinion, in a part joined by five justices) ("[W]e lack jurisdiction authoritatively to construe state legislation."); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993) (contrasting interpretation of a state statute with conclusions about what effect the statute has).

82 531 U.S. 98, 105–11 (2000) (per curiam).

83 *Id.* at 110–11.

84 *Id.* at 111.

85 *Id.* at 116–22 (Rehnquist, C.J., concurring).

86 *Id.* at 111–13 (Rehnquist, C.J., concurring).

disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[87]

Thus, where state courts are suspected of undermining the supremacy of the federal government as an institution, depriving an individual of a federal constitutional right, or otherwise violating an express provision of the Constitution, federal courts will not defer to those courts.[88]

### *B. Independent Review in the Statutory-Purpose Context*

Another, less-analyzed area is state-court declarations of the purpose of legislation. The purpose of legislation or of other government action is an important consideration in First, Fifth, and Fourteenth Amendment constitutional analysis, as well as Dormant Commerce Clause analysis. In these contexts, the courts apply varying levels of scrutiny, based on the type of legislation at issue and the interest at stake. These levels of scrutiny embody varying levels of deference to the States. Some types of restrictions and classifications are simply not allowed. For example, in the Establishment Clause context, the government may not impose a requirement or restriction on individuals for a religious purpose.[89] Other restrictions and classifications are given strict scrutiny: the law must be the least restrictive means to achieve a compelling state interest.[90] Still others receive intermediate scrutiny: the law must be substantially related to an important state interest.[91] The vast majority of legislation receives rational-basis review: the law must be rationally related to a legitimate governmental purpose.[92]

For strict and intermediate scrutiny, the State bears the burden of demonstrating that the purpose of the legislation is to promote the right

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87 *Id.* at 115 (Rehnquist, C.J., concurring).

88 Laura S. Fitzgerald has argued that these should be the only times that federal courts should fail to defer to state court interpretations of state law. Fitzgerald, *supra* note 51, at 89, 91–99.

89 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that statutes related to religion must have a secular legislative purpose, have "principal or primary effect . . . that neither advances nor inhibits religion," and "must not foster 'an excessive government entanglement with religion'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

90 *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (plurality opinion) (holding that differential treatment on the basis of race can only be upheld where it is justified by a "compelling governmental interest" and is "narrowly tailored" to meet that goal (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984), and Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (plurality opinion), *overruled on other grounds*, Adarand Constructors v. Pena, 515 U.S. 200 (1980))).

91 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that Virginia did not show an important enough interest in maintaining its single-sex military academy).

92 *See, e.g.*, Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 319–20 (1993) (applying rational-basis review to Kentucky statutes that required different standards of evidence for involuntary commitment based on mental retardation and mental illness). Justice O'Connor has suggested that there should be an even lower threshold for invalidating state legislation under the Commerce Clause than the standard used under the Due Process Clause because a federal court decision on Commerce Clause grounds may be overcome more easily by the legislature. ASARCO, Inc. v. Idaho St. Tax Comm'n, 458 U.S. 307, 350 n.14 (1982) (O'Connor, J., dissenting); *see also* Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 419 (1985) (noting that Justice O'Connor's *ASARCO* footnote might have far-reaching implications for federal court deference to state statutes that are suspect under the Due Process Clause).

kind of governmental interest.[93] For rational-basis review, on the other hand, the burden is on the challenger to demonstrate either that there is no legitimate governmental interest or that there is no rational relationship between the interest and the means chosen by the legislature.[94] The legislature need not articulate that purpose, and if it does not, the courts will evaluate whether any plausible legitimate purpose could be behind the legislation.[95] This test is not completely boundless, however: the legislature must have been able to reasonably consider the legislative facts before it to be true.[96] Still, those facts need not actually be true; that legislative facts turn out to be mistaken is not a reason to reject a purpose based on those facts.[97]

The Supreme Court has stated that it affords deference to state court declarations of purpose similar, if not quite at the same level, to that which it affords interpretations of meaning.[98] For example, in *United States Term Limits, Inc. v. Thornton*, the Court stated, "[w]e must, of course, accept the state court's view of the purpose of its own law . . . ."[99] Similarly, in *Allen v. Illinois*, both the majority and the dissent agreed that the state court was the authority on both the meaning and purpose of state law.[100] In fact, the rules that the Supreme Court has developed will sometimes lead to greater deference to findings of purpose. For example, the Supreme Court has held that the purpose of a state law is a question of fact,[101] and that the parties

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93 *See Virginia*, 518 U.S. at 532–33 (stating that, in intermediate scrutiny cases, the State bears the burden of showing an important governmental objective and that the means are substantiallly related to that objective); Miller v. Johnson, 515 U.S. 900, 922 (1995) (holding that, in the strict scrutiny context, the State may not simply assert that the interest to be served is compelling and the means narrowly tailored, but must provide strong evidence of it).

94 *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003) (explaining that the burden is on the challenging party in such cases to "'negative every conceivable basis' that might support different treatment" (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940))).

95 *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (stating that rational-basis analysis "require[s] that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker" (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528–29 (1959))).

96 *Id.* at 11 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)).

97 *Clover Leaf*, 449 U.S. at 464 ("Where there was evidence before the legislature reasonably supporting classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.").

98 This qualification was noted by Justice Breyer in his dissent in *Kansas v. Hendricks*, 521 U.S. 346, 383–84 (1997) (5-4 decision) (Breyer, J., dissenting), although it is not made explicit in the cases that he cites.

99 514 U.S. 779, 829 (1995).

100 478 U.S. 364, 367 (5-4 decision) (1986) (accepting the state court's interpretation of purpose, but also analyzing the statute); *accord id.* at 380 (Stevens, J., dissenting) (stating that the State is the final authority on both meaning and purpose, but disagreeing with the effect of the statute).

101 *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005) (treating the question of the purpose of a government action, eminent domain, as a question of fact); Crawford v. Bd. of Educ., 458 U.S. 527, 543–44 (1982) (treating the question of legislative intent as one of fact). Although the law at issue in *Crawford* was a proposition amending the California Constitution, the Supreme Court did not indicate that the type of state law made a difference in the analysis. It does not seem that a statute's purpose should be treated more like a question of law. Certainly state-court interpretations of the meaning of state constitutional provisions should be given enormous deference: because those constitutions embody a particularly sovereign interest, the state courts are uniquely situated to interpret that meaning, and federal courts are not competent to second-guess the state courts, except in extremely rare circumstances. However, the issue here is not one of meaning, but rather one of purpose, which is more

may present evidence on the subject.[102] Questions of fact are routinely afforded high levels of deference.[103]

Despite these assertions, the Supreme Court has rejected state-court findings of purpose in several cases. In the Establishment Clause context, the Court has stated that, "[w]hile 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."[104] Because Establishment Clause cases warrant a very searching review, this result seems analogous to those cases involving meaning where the Court suspected state courts of evading Supreme Court review.

In the context of rational-basis review as well, though, the Supreme Court has rejected state-court findings of purpose. In *Allegheny Pittsburgh Coal Co. v. County Commission*, both state statute and the constitution provided that property tax valuation be based on a particular criterion.[105] The Supreme Court rejected a state-court finding that the legislature could have intended to allow valuation based on a different and incompatible criterion.[106]

In these examples the Supreme Court rejected expansive state-court interpretations of purpose meant to find state legislation legitimate, but, in at least two recent cases, the Court has also rejected the limiting interpretations of purpose state courts have used to strike down legislation.

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like a historical fact than is the slippery notion of group intent.

[102] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry" (citing Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194 (1934))). It is not enough to provide evidence that the legislature was mistaken, however:

> [Parties challenging legislation] cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

*Clover Leaf*, 449 U.S. at 464 (alterations in *Clover Leaf*) (quoting *Carolene Prods.*, 304 U.S. at 154). This is not the type of proof at issue in *Fitzgerald* or *Kansas v. Hendricks*, 521 U.S. 346 (1997), discussed *infra* notes 108–130 and accompanying text. Those cases concerned evidence of what the legislature considered and intended, not of the validity of the facts before the legislature.

[103] Fed. R. Civ. P. 52(a) (stating that "[f]indings of fact shall not be set aside unless clearly erroneous").

[104] Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (citing Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring)); *see also Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring) (arguing that the secular-purpose requirement is meaningful because "our courts are capable of distinguishing a sham secular purpose from a sincere one"); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (holding that the avowed secular purpose of a statute would not blind the Court when the statute had a plainly religious nature); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223–24 (1963) (holding that the implementation of a purportedly secular practice made clear its religious nature).

[105] 488 U.S. 336, 345 (1989).

[106] *Id.* at 345; *see also* Nordlinger v. Hahn, 505 U.S. 1, 14–16 (1992) (distinguishing another unequal tax assessment on the basis that "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme"). In another situation in which the Supreme Court defended its decision to construe purpose broadly, the Court distinguished a prior case that had not construed purpose broadly. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959) (distinguishing Wheeling Steel Corp. v. Glander, 337 U.S. 562, 572 (1949), by stating, "[h]aving themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence").

In *Kansas v. Hendricks*,[107] a Kansas man challenged the State's Sexually Violent Predator Act,[108] arguing, among other things, that it was a punitive statute that violated the federal constitutional prohibitions against double jeopardy and ex post facto laws.[109] The Supreme Court treated the question of whether the statute was civil or criminal as a matter of law, and thus a question of statutory construction.[110] The Court then looked at the placement of the statute in the Kansas codes and analyzed the statute's language and structure.[111] The Court found that two things manifested the intent of the legislature that the statute not be punitive, and therefore not criminal: (1) the placement of the statute in the probate code; and (2) the statement within the statute that its purpose was to create a civil commitment procedure.[112]

Previously, the Kansas Supreme Court had held, despite these two points, that the "overriding" purpose of the statute was punitive—to segregate people subject to it from the public—and that any treatment was "incidental, at best."[113] The court held this in part because the legislature had stated in its declaration of purpose that sexually violent predators could not be treated under the existing civil commitment statute, which provided for commitment of people with mental illnesses, and because no effort had been made to treat any offenders.[114] Accordingly, the Kansas Supreme Court held that the primary purpose of the statute was to incarcerate, not to provide treatment.[115]

The United States Supreme Court rejected this formulation, finding that the statute could have more than one purpose, and noting that the mere possibility that the Kansas legislature could have intended for sexually violent predators to have treatment, in an ideal situation, was enough to make this a civil statute.[116]

Justice Breyer dissented, arguing that the statute contained enough punitive aspects that its purpose was ambiguous.[117] Given that ambiguity, Justice Breyer argued that the finding by the Kansas Supreme Court, that the purpose of the statute was to incapacitate and not to treat offenders, should be entitled to deference.[118]

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107 521 U.S. 346 (1997) (5-4 decision).

108 KAN. STAT. ANN. §§ 59-29a01 to -29a21 (2005).

109 *Hendricks*, 521 U.S. at 360–61.

110 *Id.* at 361 (citing Allen v. Illinois, 478 U.S. 364, 368 (1986)).

111 *Id.* at 361–67.

112 *Id.* at 362.

113 *In re* Care & Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 521 U.S. 346 (1997).

114 *Id.* at 136. The state supreme court found it particularly troubling that the statute did not even allow for treatment until after a sexually violent predator had served the original criminal sentence. *Id.* (quoting Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995), *rev'd en banc*, No. CV-94-00480C (W.D. Wash. Feb. 10, 1998), *aff'd*, 192 F.3d 870 (9th Cir. 1999), *rev'd sub nom.* Seling v. Young, 531 U.S. 250 (2001)).

115 *Id.*

116 *Hendricks*, 521 U.S. at 367–69.

117 *Id.* at 379–81 (Breyer, J., dissenting).

118 *Id.* at 384–85. Justice Breyer supported the finding of the Kansas Supreme Court by analyzing the statute and the record, which detailed the lack of effort made to treat Hendricks. *Id.* at 385–95.

Six years later, Justice Breyer delivered the unanimous opinion in *Fitzgerald v. Racing Ass'n of Central Iowa*, refusing to defer to the Iowa Supreme Court's finding of purpose.[119] At issue in *Fitzgerald* was a tax on the proceeds of slot machines at the State's racetracks and riverboats; these proceeds were the primary source of revenue for both types of gaming establishment.[120] At the State's horse and dog racetracks, slot machine proceeds were taxed at a maximum of 36%, while at the State's riverboats, they were taxed at a maximum of 20%.[121] Finding that the proceeds were similarly situated, the Iowa Supreme Court then found the scheme irrational because the tax frustrated the purpose of the act creating it.[122] The purpose found by the Iowa Supreme Court was to promote the State's racing industry in an effort to make an unprofitable venture profitable again.[123] Taxing the proceeds at the racetracks at a rate so much higher than that of the riverboats damaged their profitability, defeating the purpose of the act.[124]

The racetracks argued that when the state court determined the purpose of the act, it was interpreting Iowa law, and that interpretation deserved the usual deference.[125] In other words, that interpretation was binding on the United States Supreme Court.[126] Here it would mean that the Supreme Court was bound by the state-court finding that the purpose of the statute at issue was to promote the racing industry in Iowa.[127] With that threshold, it would follow that the differential tax rate could not be rationally related to that purpose.

The Supreme Court did not agree that it owed any deference to the state court. Rather than accept the purpose the state court found—the *actual*[128] purpose—the Supreme Court theorized multiple *potential* legitimate State interests to which the differential tax could be rationally related. Finding this rational relationship, the Court upheld the tax under the Federal Constitution.[129] To justify its decision not to defer to the state court, the

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119 539 U.S. 103, 110 (2003).

120 Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 557, 559 (Iowa 2002), *rev'd*, 539 U.S. 103 (2003).

121 IOWA CODE ANN. § 99F.4A(6), .11 (West 2004).

122 *Fitzgerald*, 648 N.W.2d at 561.

123 *Id.* at 560.

124 *Id.* at 560–62. Before the Iowa Supreme Court, the State argued that the purpose of the act was to encourage economic growth and promote agriculture. *Id.* at 560. The court found that, even if this were the purpose of the act, this purpose, too, was frustrated by the higher tax rate on racetracks. *Id.* at 561.

125 Transcript of Oral Argument at 26, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003) (No. 02-695).

126 *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 607–08 (1875) (holding that state courts are the final interpreters of state law, with the United States Supreme Court limited to reviewing only questions of federal law).

127 This was the stated purpose of the legislation. *Fitzgerald*, 648 N.W.2d at 560–61.

128 I use this term here to highlight the approach of the Iowa Supreme Court and not necessarily as an endorsement of the correctness of that court's holding.

129 Not to be outdone, the Iowa Supreme Court later struck down the tax under the Iowa Constitution's Equal Protection provision, although it did so not by creating a separate test under its constitution but through an "independent application" of the federal test. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 6–7 (Iowa 2004) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977)). There is no (federal) question that

Supreme Court stated, "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."[130] In other words, rather than defer to the state court, the Supreme Court deferred to the state legislature.

While this may seem analogous to Justice Rehnquist's concurrence in *Bush v. Gore*, which relied on the Constitution's delegation of authority to the state legislative branch, one important ingredient is missing. The Constitution does not expressly delegate the authority to set state nonelectoral policy to the state legislative branch. That power would be reserved to the State as a whole, as evidenced by the Tenth Amendment, which makes no distinction between the branches of state government.[131]

Certainly, there may be other arguments that support the decision to defer to a particular branch of state government in the purpose context that are different from those in the meaning context. For example, less deference may be warranted in the meaning context because the difference between saying what a statute means and saying why it exists suggests different institutional competencies. First, saying what a statute means has a more powerful effect on individuals than does stating the statute's purpose. The language and meaning of the statute determine how that statute will operate on the world and how it will curtail people's behavior or penalize them for that behavior. Conversely, the purpose of legislation has very little direct effect on the world, simply being the context in which the legislation arose or an aspirational statement in the enacted legislation. That context or aspirational statement can be used to help interpret the meaning, or, given an improper purpose, it can make the statute invalid. However, the purpose, by itself, usually changes nothing in practice. Because it is not the purpose of a statute that affects people, but rather, the language or meaning of the statute that does so, declaring the purpose runs little risk of curtailing liberty or impairing individual rights. Accordingly, as there is little reason to worry that the legislature could oppress political minorities by its purpose alone, this provides more of a reason to defer to the legislative branch in discerning purpose.

A second argument might be that, as the body that saw the need for the legislation in the first place and created it, the legislature is in a better position than are the courts to say why a particular statute is needed. Thus, when the legislative act is presumptively valid—in other words, when rational basis would apply under a constitutional analysis—federal courts must defer to legislative possibilities rather than to the holdings of courts. Conversely, where the judicial branch has greater competence, such as when it interprets statutory meaning, giving effect to legislative intent and

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the Iowa court could apply the federal test and reach a result that the United States Supreme Court had rejected, as long as the Iowa court's result rested on the Iowa Constitution. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1501, 1514 (2005).

130 *Fitzgerald*, 539 U.S. at 108.

131 U.S. CONST. amend. X.

culling a single meaning from multiple actors, the state judicial branch warrants deference.

Yet an equally persuasive argument could be made to treat purpose interpretations with more, rather than less, deference. Federal courts have expertise equal to that of state courts in interpreting statutory language, and statutory interpretation is something that all U.S. courts do. The search for meaning is a matter of construction of language, clearly a question of law. However, discerning the purpose or purposes of a law is not an act of construction, necessarily, and may not be a question of law at all. Rather, discerning a purpose may be more like finding a fact, a point the Supreme Court itself seems to have accepted.[132]

Whether it is a question of fact or an unusual question of law, state courts, as part of the state government, are in a much better position than are federal courts to understand why particular state legislation was passed. State judges are more likely, than are their federal counterparts, to know what the public debate over the issues was when the legislation was created. State judges are also more likely to have some insight into the state legislative process. Thus, state courts are in a substantially better position to interpret the purpose of state legislation than are federal courts.[133]

### *C. Separation of Powers at the State Level*

The lesson to be taken from all of these cases and modes of deference is that, where the Constitution affords leeway to the States, the Court is likely to defer to the state legislative branch at the expense of the state judiciary. This was implied by the majority in *Hendricks*, and it was stated explicitly by the Court in *Fitzgerald*. Conversely, where the Constitution limits State power, the Court is more likely to defer to the interpretation of state law by state courts, unless there is a reason to suspect the courts themselves of interpreting the state law in order to mask a constitutional violation, or to deprive a party of due process or equal protection.[134]

But there is nothing in the Federal Constitution that warrants giving deference to the state legislative branch at the expense of the state judicial branch in the majority of situations. The Federal Constitution does not distinguish between state legislative and judicial branches in describing the

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[132] Kelo v. City of New London, 545 U.S. 469, 478 (2005) (treating the purpose of government action as a question of fact); Crawford v. Bd. of Educ., 458 U.S. 527, 543–44 (1982) (treating the question of legislative intent of a constitutional proposition as one of fact).

[133] On yet another side, the existence of the Fourteenth Amendment may suggest that States cannot be trusted to tell the truth about what the purpose of some legislation is if that legislation impacts individual rights. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 71–74 (1993) (chronicling John Bingham's advocacy of the Fourteenth Amendment as a means to enforce the Bill of Rights on the States that were disregarding the Constitution).

[134] This was Justice Rehnquist's stated reason for deferring to the legislative branch in his concurrence in *Bush v. Gore*, 531 U.S. 98, 115 (2000) (per curiam) (Rehnquist, C.J., concurring). *See also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1900–01 (2001) (arguing that deference by federal courts to state sovereignty in these cases is preferable because it leaves room for the state political process, rather than federal judicial mandate and private suits, to remedy constitutional violations).

powers of each.[135] The only constitutional provision that limits the form the state government may take and the distribution of powers within state government is the Guarantee Clause, which provides, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."[136] Not only is the Constitution silent about how States organize themselves within the bounds of a republican form of government,[137] the Supreme Court has held that interpretation of this Clause is a political question and not justiciable.[138]

State constitutions, then, define how state governments are to be formed and how various governmental powers should be exercised. Because the institutions of state government are not identical to their federal counterparts, the competence of those institutions is not identical to that of their federal counterparts, and their powers need not be separated in exactly the same way.[139] In fact, state constitutions often give the judicial branch a

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[135] It is true, as Chief Justice Rehnquist noted in his concurrence in *Bush v. Gore*, that Article II, Section 1, delegates the power to determine how to elect presidential electors to the legislature of each State. *See* U.S. CONST. art. II, § 1. Article I, Section 4, which details how members of Congress shall be elected, also refers to state legislatures but contrasts that power with Congress's power, rather than the power of the state judicial branch. *See* U.S. CONST. art. I, § 4. In other places as well, the Constitution refers to different branches of state government, assuming a structure somewhat similar to that of the federal government. *See* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54–58 (1998) (illustrating that the amendment procedure of Article V assumes a distinct state executive and state legislature, and Article III assumes the existence of a state judicial branch). No section suggests anything about the primacy of one branch over another. Moreover, there is no historical support for the significance of the language in Article II. *See generally* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 783–84 (2001) (concluding that the Framers of the Constitution never understood Article II to show any particular solicitude towards state legislatures and that it has historically only been used in make-weight arguments by politicians and courts).

[136] U.S. CONST. art. IV, § 4.

[137] This silence has not uniformly been interpreted to mean that the Constitution fails to limit the exercise of power within state government. *See* Dorf, *supra* note 135, at 58 (arguing that the structure of the Federal Constitution implies that States should be organized in federal-style separation of powers terms); Louis H. Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 88 (1962) (stating that the Federal Constitution "postulated the *idea* of" a tripartite arrangement like that of the federal government).

[138] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (determining that the question of selection among competing state constitutions was valid for Congress to decide because "the Constitution of the United States . . . has treated the subject as political in its nature, and placed the power in the hands of that department"). That the issue is a political question does not leave the States entirely unregulated. The federal government must guarantee that a State's form of government is republican, and, with federal courts out of the picture, it is up to Congress to interpret what that means. Congress has not spoken on the subject.

Congress's power is probably not unbounded. The Court's opinion in *Baker v. Carr* may have signaled that, in the right case, the Court will interpret issues touching on the Guarantee Clause. 369 U.S. 186, 208–32 (1962); *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70–78 (1988) (arguing that the Guarantee Clause is a judicially enforceable limit on federal power). The Supreme Court has suggested, based on Merritt's argument, that the Clause might limit Congress's power to regulate State activities and would, in those cases, be justiciable. *See* New York v. United States, 505 U.S. 144, 185 (1992) (citing Merritt's argument but not reaching the issue); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (same).

[139] In fact, the Supreme Court has noted that this issue is a matter of state constitutional law:

> Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in

much broader role in government than that possessed by the federal judicial branch.[140] For example, state courts are not bound by Article III's justiciability doctrines and, in fact, often share a policy-making role with the legislative branch.[141] Conversely, in some instances, state courts have a narrower role in government than does the federal judicial branch.[142] Thus, separation of powers operates quite differently at the state level, and among the States, from how it operates at the federal level,[143] but it remains an issue of state constitutional law.

Federal separation-of-powers doctrine limits the power of federal courts to strike down federal legislation, on the ground that unelected judges should not be given the chance to frustrate the will of the majority, except in a few instances.[144] In every case involving legislation, there is a chance that the court could frustrate the will of the majority. It is easy to see that when a court strikes down legislation as unconstitutional the court is countering the will of the majority, but that is only the tip of the

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respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.

Dreyer v. Illinois, 187 U.S. 71, 84 (1902); *see also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (holding that the States need not have the same separation of powers limitations as the federal government); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 3 (1998) (emphasizing that state constitutions, not the Federal Constitution, dictate the distribution of power among the branches of state government ); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1744–46 (2003) (listing the variety of ways state constitutions separate powers); Hershkoff, *supra* note 134, at 1884–86 (noting that States are not required to imitate the federal separation of powers system, and observing the variety of systems developed across the States). Federal courts lack jurisdiction to determine whether State actions violate the state's constitution. Calder v. Bull, 3 U.S. (3 Dall.) 386, 392 (1798) ("[T]his court has no *jurisdiction* to determine that any law of any state *Legislature*, contrary to the Constitution of such *State*, is void.").

[140] Hershkoff, *supra* note 134, at 1844–76 (illustrating the ways in which state courts "undertake and discharge functions that are conventionally deemed beyond the Article III power"); Hans A. Linde, *The State and the Federal Courts in Governance:* Vive la Différence*!*, 46 WM. & MARY L. REV. 1273, 1273–79 (2005) (highlighting the extent to which "state courts take on responsibilities federal courts decline").

[141] *See* Hershkoff, *supra* note 134, at 1861–68 (discussing the extent to which state courts are involved in matters that would be nonjusticiable as political questions for Article III courts).

[142] *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1359–62, 1375–80 (2005) (discussing the strong nondelegation principle in state constitutional law and other differences from federal organization of powers).

[143] *See* Stanley H. Friedelbaum, *State Courts and Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1458–59 (1998) (suggesting that separation of powers is becoming more meaningful in the States); Hershkoff, *supra* note 134, at 1882–98 (discussing the differences between federal and state legislatures and judiciaries); *see also* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 88–94, 99–107 (1998) (arguing that differences at the state and federal level counsel against the States' routine practive of adopting federal separation-of-powers concepts).

[144] *See* REDISH, *supra* note 15, at 5, 17–19 (discussing the theoretical legitimacy of judicial abstention); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707–08 (1995) (noting the Framers' intent to limit the scope of what appointed judges can hear, to prevent them from threatening the representative branches of government). As the Supreme Court has said, federal courts may exercise power only "'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" Allen v. Wright, 468 U.S. 737, 752 (1984) (alteration in *Allen*) (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892), and Flast v. Cohen, 392 U.S. 83, 97 (1968)).

countermajoritarian iceberg. Every time a court is asked to interpret legislation it risks frustrating the will of the majority, because the court might come to a meaning different from what the majority of legislators intended.[145] Similarly, even where the court has interpreted the statute "correctly," the court might apply the statute to reach a conclusion different from what a majority of legislators would have reached. Thus, every interaction between federal courts and a legislative enactment brings with it an inherent risk of contermajoritarian action.[146] Because of this risk, many scholars contend that federal courts should intervene only where intervention is necessary to protect the political minority from a tyranny of the majority.[147]

The countermajoritarian concern is not as warranted for many States as it is for the federal government, and thus the state court powers need not be quite so limited. Many States elect their judges, and once elected, because they are more accountable to the electorate than are appointed judges, such judges may pose less of a danger of frustrating the majority by creating a tyranny of the minority.[148] Even unelected state judges may arguably pose

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[145] Evidence of this phenomenon can be seen where Congress has amended statutes in response to interpretations with which it did not agree. *E.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071 (codified at 42 U.S.C. § 1981 note (2000)) (finding that the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), was not an accurate interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

[146] Part of this difficulty lies in the nature of statutory interpretation. How is it possible to assign a single meaning to a complex collection of words put together by a number of different actors, subject to differing influences, through an interactive process designed to frustrate the exercise of power? The elusive nature of statutory interpretation and how courts should engage in it has been debated by many. *See, e.g.*, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252–54 (1992) (describing the views of three prominent voices in the current statutory-interpretation debate: Judges Posner and Easterbrook in the Seventh Circuit and Justice Scalia). For more on the debate between Judge Posner, on the one hand, and Judge Easterbrook and Justice Scalia on the other, compare United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991), *superseded by statute*, Mandatory Minimum Sentencing Reform Act of 1994, Pub. L. No. 103-322, §§ 80001(a), 280001, 108 Stat. 1985, 1985, 2095 (codified at 18 U.S.C. § 3553 (2000)), *as recognized in* United States v. Clark, 110 F.3d 15 (6th Cir. 1997), with *id.* at 1331–38 (Posner, J., dissenting). *See also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 275 (1990) (discussing whether an objective method of statutory interpretation is possible); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–29 (1997) (outlining a textualist theory of statutory interpretation); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533 (1983) (listing the sources judges draw upon when interpreting statutes). For an alternate view of statutory interpretation, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38–47 (1994) (describing and criticizing overreliance on text to the exclusion of other interpretive tools).

[147] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 113–83 (1962) (arguing that the judicial power could be dangerous, but that the institutional limits the Court puts on itself guard against the worst dangers); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–9 (1980) (describing the underlying theory of the Constitution as grounded in the notion of government by the majority); STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM 177–87 (2002) (criticizing recent Supreme Court jurisprudence with respect to both constitutional and statutory interpretation); Redish, *supra* note 144, at 707–08 (describing the countermajoritarian difficulty). *But see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 500 (1989) (suggesting that courts might have a role in defining public policy).

[148] *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 414 (1999) (remarking on the use of elections in state court regimes to hold judges politically accountable); Helen Hershkoff, *Positive*

less of a countermajoritarian difficulty for state-law issues than do federal judges for state or federal law issues. State judges may feel closer to their communities than do federal judges simply by virtue of the fact that state districts are smaller.[149] Additionally, as a part of state government, state judges may feel more bound to that smaller community of people and may be more active in other ways in it.[150] As a result, they may be more likely to know what the will of the representative branches is and what remedies are expected within the State.

This closeness is especially salient for statutory interpretation; state judges are more likely than their federal counterparts to know what the issues of public debate were when state legislation was proposed, what the state legislature thought it was doing when it passed the legislation, and what the situation in the State was before and after that legislation was passed. That distinction may be less important at the trial level, where even federal districts are within a State's boundaries, but it would apply with some force at the appellate level. Certainly, there is little to suggest that the United States Supreme Court is in a better position than any state court to understand why the state legislature thought a particular piece of legislation was needed.

State courts also have more flexibility to respond to local concerns than do federal courts, because state court decisions are not as far reaching, and, as a result, they may be viewed as more democratically legitimate.[151] Thus, a state judicial branch need not be restrained in the same way that the federal judicial branch has restrained itself.

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*Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1158–60 (1999) [hereinafter Hershkoff, *Positive Rights*] (discussing how judicial election results in judicial vulnerability, which impacts decision making); Hershkoff, *supra* note 134, at 1887 (noting the effect of elected judiciaries (citing HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 21 (7th ed. 1998))). Of course, state judges may be ill-equipped to prevent tyrannies by the majority, but that is an entirely separate issue being debated in states across the country. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726–28 (1995) (questioning whether elected judiciaries may be unable to protect minorities and whether they are capable of impartial decision making); Hershkoff, *supra* note 134, at 1887 (noting that critics question whether elected state judges can sufficiently protect against the majority (citing DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 288 (1996))); Hershkoff, *Positive Rights*, *supra*, at 1160–61 (expressing concern over the threat to the judiciary's rights-enforcing role when the judiciary is elected, because the judiciary will simply reflect legislative choices).

149 *See* Hershkoff, *supra* note 134, at 1887 (citing Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 542).

150 Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985).

151 *See* Hershkoff, *supra* note 134, at 1887, 1902 (commenting on the local, rather than national, scope of state court decisions, which allows for more experimentation (quoting Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 732 (1981))); Burt Neuborne, Foreword, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899 (1989) (discussing the democratic imprimatur of state courts). This flexibility, however, might limit state judges' use of politically unpopular remedies when those remedies are called for. Hershkoff, *supra* note 134, at 1887 n.287 (citing CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 148–50 (1996)); *see also* Dan T. Carter, *"Let Justice Be Done": Public Passion and Judicial Courage in Modern Alabama*, 28 CUMB. L. REV. 553, 554 (1998) (describing the refusal of the Alabama Supreme Court to order new trials in the infamous, racially charged Scottsboro trials of 1931).

Apart from the concerns about the accountability of institutions, federal separation-of-powers theory seeks to take advantage of a different kind of institutional competence: a faith in a functional division of labor.[152] The federal elected branches are better equipped than the federal courts to create national policy and were designed that way.[153] Conversely, federal courts are more competent to adjudicate disputes among parties and to say what legislation means or how it applies to the world.[154] Coupled with this separation of functions is the notion that the federal government is one of limited jurisdiction, and hence, the judicial power of federal courts is thought to be rather narrow.[155]

The functions of state courts, on the other hand, are not limited in this way. First, they are courts of general jurisdiction, and therefore, are viewed as having broader inherent powers than those of federal courts.[156] For example, state courts have always engaged in common-law creation, while federal courts are thought to be able to create common law only in limited circumstances.[157] Many state constitutions give the state judicial

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[152] Rogan Kersh et al., *"More a Distinction of Words than Things": The Evolution of Separated Powers in American States*, 4 ROGER WILLIAMS U. L. REV. 5, 12 (1998); *see also* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833–35 (1991) (arguing that the judicial branch has characteristics that make it an appropriate check on legislative power). *But see* Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 785 (suggesting that lawmaking is not so easily divided between adjudicative and legislative institutions).

[153] *See* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 122 (1991) (describing Hamilton's theory that "separation makes the powers work better" and that "power is not generalized but kept distinct in sorts or classes and understood as power to perform some definite function (well)"); Hershkoff, *supra* note 134, at 1891 (describing the ways in which Congress's setup enhances its policy-making ability); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1828 (1998) (arguing that both the fact of election and the procedures that Congress follows make it institutionally better able to craft policy for the nation); David L. Schapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551–58 (1988) (comparing the institutional advantages of courts and legislatures).

[154] *See* Hershkoff, *supra* note 134, at 1877–79 (defining the power granted by Article III in terms of the traditional power of common-law courts to decide cases and controversies); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (describing the judicial function as one of interpretation); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 518 (1966) (underscoring the court's role in saying what the law is).

[155] *See* Aldinger v. Howard, 427 U.S. 1, 15 (1976) (comparing the limited jurisdiction of federal courts with the general jurisdiction of state courts), *superseded by statute*, Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 104-650, § 310(a), 104 Stat. 5104, 5113; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739, 823–34 (2001) (describing the narrowness of the federal government's powers as a structural constitutional principle).

[156] *See* Hershkoff, *supra* note 134, at 1888–89 (remarking that state courts can often hear claims in substantive areas, arising under both the common law and expansive state constitutions, that federal courts cannot); Mark H. Zitzewitz, Comment, State v. Krotzer*: Inherent Judicial Authority—Going Where No Court Has Gone Before*, 81 MINN. L. REV. 1049, 1060 (1997) (describing the inherent authority claimed by state courts).

[157] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (determining that there is no general federal common law and, rather than discerning principles of such nonexistent general common law, federal judges are to apply the law of the State in which they sit); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) (discussing the scope of power of federal courts to create federal common law); Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725, 733 (1992) (noting the policy-making aspect of creating common law); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 486 (1982) (describing the perception that the scope of judicial review should be limited).

branch a broad responsibility to help make state policy or exercise administrative power, either explicitly or through provisions that grant positive rights to individuals.[158] Additionally, state legislative and executive branches are not necessarily organized the same way, or with the same power, as their federal counterparts, which lessens their special expertise or democratic responsiveness.[159] Finally, many States have mechanisms for direct, rather than representative democracy,[160] which some commentators suggest necessitates greater state-court vigilance to protect against tyrannies of the majority made possible by a less deliberative form of lawmaking.[161] Based on the different institutional competencies of state courts and state representative branches, there is little reason to assume that state separation of powers must play out the same way as in the federal system.[162]

Because the issue of state separation of powers is fundamentally a matter of state constitutional law, federal courts should leave that balance to the States as a unitary entity. Where the state court interpreted a state statute, its very exercise of interpretation struck a particular balance. Even if the state court exceeded its powers under the state constitution, the issue is one that should be left to the States to resolve. In fact, because of interbranch cooperation in state systems, it may be significantly easier for state legislatures to correct erroneous state court decisions than it is for Congress to correct erroneous federal rulings.[163] Federal courts, even if

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158 *See* Hershkoff, *supra* note 134, at 1863–75, 1880–82, 1889–94 (describing the various ways in which state courts exercise power that Article III courts lack and the ways in which state constitutional provisions might differ from federal provisions).

159 *See* Hershkoff, *supra* note 134, at 1895–98 (emphasizing that Article III's preference for legislative lawmaking on the federal level is not similarly expressed in state constitutions or divisions of power); Rossi, *supra* note 142, at 1359–62, 1375–80 (discussing the strong nondelegation principle in state constitutional law and other differences in organization of State powers).

160 *See* 33 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 233 tbl.5.14 (2000).

161 *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 529 (1994); John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 258–59 (1998); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 435 (1998); David B. Magleby, *Let the Voters Decide? An Assessment of Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 40–42 (1995); *cf.* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 974–84 (1988) (considering the problem of interest-group capture of plebiscites).

162 *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999) (discussing the different effects that result when an institution or practice is appropriated from one government to another). Despite this fact, some commentators suggest that the States ought to mimic the federal system. *See, e.g.*, Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 23 (1998) (proposing that state and federal courts adopt the same approach to the constitutional requirement of judicial independence); Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 736 (1988) ("We simply cannot reason or argue about what state constitutional law should be without resort to principles of federal constitutional law . . . .").

163 The combination of lawmaking by referendum; the smaller, more localized lawmaking body; and the use of advisory opinions all work to limit the power of the state courts to frustrate the will of the people. *See* Hershkoff, *Positive Rights*, *supra* note 148, at 1162–66. Many states also allow for much easier amendment of their state constitutions, providing a more significant check on the state courts' powers to interpret their own constitution. *Id.* at 1164. My own State of Alabama reflects an extreme

they have to power to do so, should not intervene. Therefore, federal courts should defer to the balance struck by state courts and accept the interpretation offered by the state court in an exercise of that balance, unless there is an important federal interest that would conflict with that deference.[164]

## IV. TO DEFER OR NOT

We could adopt a number of different approaches to federalism, or get rid of it entirely in favor of a unitary system. Instead, for structural, functional, qualitative, economic, or philosophical reasons,[165] we, as a country, have retained not only a federal structure but a system of judicial federalism in which much of the development of law, both state and federal, is done by state courts.[166] And if we have held on to this federal arrangement for the value of diversity and experimentation or to promote individual liberty or community, we should erode it only after deliberation and consideration of the effects of such erosion.

Fundamental to maintaining states as separate from the federal government is the ability of the State to define itself through its own constitution. And given the starting point of analysis in this Article, that the primacy of a branch of government is a matter of state constitutional law, our inquiry necessarily must turn to explore what interest might be sufficient to warrant not deferring to the state judicial branch once it has struck a balance of state powers and interpreted state law. In order to prevent inadvertent erosion of federalism, that reason would have to be a relatively strong one that promotes some substantive federal interest, apart from uniformity for the sake of uniformity.

The most compelling reason not to defer would be a circumstance in which the federal court has a reason to suspect the state court of working to frustrate a federal right or a federal interest.[167] For example, where the state court deviated from prior state law in a way that violated due process, as the Supreme Court found had happened in *NAACP v. Alabama ex rel.*

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in this regard, with 777 amendments as of the date this Article went to press. *See* ALA. CONST.

164 *Cf.* Romer v. Evans, 517 U.S. 620, 626 (1996) (deferring to the Colorado Supreme Court's interpretation of the purpose of a constitutional amendment); Crawford v. Bd. of Educ., 458 U.S. 527, 543–45 (1982) (treating the purpose of a proposition to amend the California Constitution as an issue of fact, although that court agreed that the purpose stated in the proposition was the actual purpose); Reitman v. Mulkey, 387 U.S. 369, 373–74 (1967) (deferring to the state court's interpretation of a state constitutional provision).

165 These terms are described by Michael Solimine and James Walker as some broad labels applicable to some of the schools of thought about federalism. SOLIMINE & WALKER, *supra* note 18, at 8–9.

166 *See id.* at 33 (describing the Hart and Wechsler paradigm in which state courts have some responsibility for defining and enforcing federal law).

167 *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 83 (5th ed. 2004) (describing the possible problem of unlimited state authority to define contracts undermining the Contracts Clause of the Constitution); Fitzgerald, *supra* note 51, at 158–71 (discussing the theories of federal supremacy and due process that are used to justify federal policing of state court decisions).

*Patterson*[168] and *Bouie v. City of Columbia*,[169] the federal court would have a constitutional duty to intervene. In this way, state courts might interpret state law in a way that frustrates review by federal courts and hampers enforcement of important federal rights.[170] Conversely, the most compelling reason to defer would be where the state-law issue was truly discrete from any federal issue, such that no federal interest could be said to be at stake.

Short of these situations, deciding whether to defer is much more difficult. The vast majority of State action is reviewed under a standard that is designed to be quite deferential: rational-basis review.[171] In fact, rational-basis review is so deferential that some commentators have suggested that it is not review but is instead the absence of review, the refusal to commit judicial resources to subjects outside of core constitutional concerns.[172] Rational-basis review does not enforce any substantive right or enumerated power.[173] Rather, it is a way to limit the countermajoritarian power of Article III judges.[174] Thus, rational-basis review embodies a policy of deference to the federal legislative branch as well as to the States. However, the rational-basis test does not enforce any positive constitutional delegation of power to the state legislative branch that would justify not treating the States as unitary entities.

And so, on the one hand, it is easy to see why, as a function of accepted notions of federal institutional competence, federal courts, in exercising rational-basis review, reflexively defer to the legislative branch, any legislative branch, at the expense of any gloss a court has put on the law. But as explained above, assessing institutional competence at the state level is not for federal courts to address in most instances.[175] The question of institutional competence is a matter of state constitutional law in the first instance, making it a question more properly dealt with by state courts

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168 357 U.S. 449, 457 (1958).

169 378 U.S. 347, 350 (1964).

170 *See* Fitzgerald, *supra* note 51, at 87–90 (arguing that the Supreme Court should defer to state-court judgments, unless the Court explains why it has reason to suspect the States of frustrating the operation of federal law).

171 *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1282–84 (1993) (critiquing the application of rational-basis review to laws burdening the poor); Lawrence G. Sager, *Justice in Plain Clothes: Reflecting on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410–11 (1993) (noting that constitutional jurisprudence identifies very few classes for heightened review).

172 Hershkoff, *Positive Rights*, *supra* note 148, at 1153; *see also* Loffredo, *supra* note 171, at 1282–84 (explaining the very deferential review of laws burdening the poor); Sager, *supra* note 171, at 410 (discussing the Court's minimum protection of economic rights).

173 *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 49 (1989).

174 *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 84–95 (1994) (describing judicial minimalism); Barry Friedman, *The History of the Countermajoritarian Difficulty: The Road to Judicial Supremacy* (pt. 1), 73 N.Y.U. L. REV. 333, 335 (1998) (discussing the ongoing debate over the ability of an unelected branch to overturn popular decisions); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, Address at the Congress on Jurisprudence and Law Reform (Aug. 9, 1893), *in* 7 HARV. L. REV. 129, 144 (1893) (noting the different obligations of legislators and judges in interpreting the Constitution).

175 For examples of when the institutional competence of state courts may need to be examined in order to protect individual rights, see Hershkoff, *Positive Rights*, *supra* note 148, at 1159–60.

under the Supreme Court's notions of dual federalism.[176] Thus, without some substantive federal interest to enforce, federal courts have no good reason not to defer to state court interpretations of state law.

One could argue that the federal interest at stake is uniformity; the rational-basis test must mean the same thing everywhere that it is applied.[177] Uniformity is an important federal interest, but only when it serves to protect federal sovereignty and supremacy. If the federal government has no sovereignty interest, then it has no interest in uniformity. To say otherwise would take us to the world envisioned by the Supreme Court in *Swift v. Tyson*,[178] where the development of common law by federal courts spread uniform common law throughout the country for the sake of uniformity alone. Going there is certainly a choice we could make as a society, but we have not made it, and the Supreme Court specifically rejected it in *Erie*.[179] Without a substantive federal interest to be enforced by the rational-basis test, it is difficult to see why federal courts should exercise independent judgment on an issue of state law any time a state court has spoken.

At the opposite end of the review spectrum, where a fundamental right is at stake, or a suspect class affected, the federal constitutional test to apply would be strict scrutiny. Strict scrutiny, unlike rational-basis review, is employed to enforce substantive federal constitutional values of equality and liberty. The Fourteenth Amendment represents a fundamental shift of power away from the States and to the federal government to protect individual rights.[180] Individual rights to liberty and equality are at stake even where strict scrutiny is not employed, and the Fourteenth Amendment places vindication of those rights primarily in the federal government.[181] So perhaps the proper touchstone here is simply whether a liberty or equality issue is at stake. If so, federal courts have an interest that warrants exercising independent review, not deferring to at least some state court interpretations.

Certainly, however, there are reasons to defer even here. For example, allowing States to interpret their laws narrowly so as to avoid federal constitutional questions strengthens the quality of state government by allowing the state judicial branch to participate in enforcing the Federal Constitution. It also limits the extension of constitutional principles without a solid foundation. So, federal courts, it would seem, have stronger reasons both to defer and not to defer in the strict-scrutiny context.

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176 *See* Schapiro, *supra* note 15, at 1409 (noting that, under *Erie*, interpretation of state constitutions rests with with the high court of each State).

177 *But see* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1483–86 (2005) (noting an inevitable lack of uniformity in the application of even ostensibly uniform federal tests).

178 41 U.S. (16 Pet.) 1 (1842), *overruled,* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

179 *Erie*, 304 U.S. at 79–80.

180 *See* Aynes, *supra* note 133, at 66–74 (describing early theories of incorporation of the Bill of Rights against the States through the Fourteenth Amendment); *see also* McCormick, *supra* note 66, at 370 (noting that Congress enacted the Fourteenth Amendment because States could not be trusted to sufficiently protect equality and liberty).

181 *See* McCormick, *supra* note 66, at 370–71 (suggesting that this arrangement maximizes liberty and equality for all citizens).

In either context, where the state court is overprotecting a federal interest or underprotecting a state interest, it is difficult to see what federalism value is promoted by failing to defer to the state-court interpretation of state law.[182] One argument for not deferring to state-court interpretations could be that, if States wish to deviate from the federal model, they should do so by grounding decisions in their own constitutions, rather than by relying on federal constitutional principles. In other words, let the States be politically accountable for their decisions rather than suggesting that the federal government is responsible.[183]

By not allowing state courts to shift responsibility, federal courts may enhance political responsibility in a more positive way as well. States and localities are given the chance to use the state political process to remedy constitutional violations, which may give those remedies greater credibility with the people of the State, which, in turn, should make those remedies more effective.[184] The effectiveness of the remedy is enhanced not only by the chance for democratic resolution, but also by the fact that it is chosen by insiders rather than being imposed from outside.[185] Experimentation by state legislatures may lead to a greater ability by the states to develop innovative ways to remedy constitutional problems.[186] That innovation benefits us all.[187] This state innovation, however, might be achieved by ensuring a strong role for the state judiciary, regardless of whether the constitutional limit state courts rely on is a federal or state one.

This inquiry has implications far beyond the meaning or purpose state courts find, as well. State courts' processes necessarily impact the deference equation. For example, for a brief period of time the Connecticut Supreme Court adopted a method of statutory interpretation different from the method used in federal courts.[188] That court held that it could use any

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[182] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1249 (1978) ("Unless competing constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values."). Justice Stevens has repeatedly raised this issue in dissents to cases that reverse an overprotection of federal rights. Kansas v. Marsh, 126 S. Ct. 2516, 2540–41 (2006) (Stevens., J., dissenting); Delaware v. Van Arsdall, 475 U.S. 673, 695 (1986) (Stevens, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1067–70 (1983) (Stevens, J., dissenting).

[183] This seems to be the gist of Scalia's concurrence in *Kansas v. Marsh*, 126 S. Ct. at 2530–31 (Scalia, J., concurring), in which he discusses the difficulty of Kansas voters remedying the state supreme court's error. So Scalia, it seems, would argue that this accountability is essential to the political process because voters must know how to change the law that a state court is applying if they do not agree with a result.

[184] *See* Hershkoff, *supra* note 134, at 1900–01 (noting the Court's approach of giving States the opportunity to address their equal protection and due process violations).

[185] *Id.* at 1902.

[186] In his dissent in *New State Ice Co. v. Liebmann*, Justice Brandeis expressed this point in a now-famous line: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[187] *See id.*; *see also* Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1387–88 (2005) (demonstrating that liberal moral progress, such as the right to gay marriage or the right of the terminally ill to die with dignity, comes about through a process of invention by a single State, propogation to other States, and then consolidation within the federal system).

[188] *See* State v. Courchesne, 816 A.2d 562, 582 (Conn. 2003) (explicitly rejecting the plain-meaning rule used by the Unied States Supreme Court in statutory interpretation), *superseded by statute*, Act of

contextual information to interpret the text of a statute, even if that text was not ambiguous. That approach is contrary to what is called the "plain meaning rule," which is used by federal courts and which allows a court to consult extratextual materials only when statutory language is ambiguous.[189] The method of statutory interpretation should be a matter negotiated between the States' legislative and judicial branches, and not necessarily imposed from outside, unless that method is somehow used to frustrate a substantive federal interest. Similarly, State choices regarding the amount of deference reviewing state courts give to lower state tribunals may differ from the level of deference given by their federal counterparts. It is difficult to see how that decision implicates any substantive federal interest that would warrant imposing the federal model on the States. Ultimately, a lack of deference could impact the States' abilities to interpret the substantive provisions of their own constitutions where those constitutions mirror the language of the Federal Constitution, or perhaps even where similar rights are only mentioned. Even for those who argue against a dual-federalism model, this result would encroach too far into State autonomy and sovereignty.

## V. CONCLUSION

Federal courts encounter state-law issues in a great variety of situations, with varying levels of state-court interpretation attached. To date, federal courts have treated state courts sometimes as if they were lower federal courts and sometimes as if they were the courts of completely separate sovereigns, without explaining why. While this lack of transparency gives federal courts the greatest amount of discretion and power, it does little to support the legitimacy of federal courts. This Article has attempted to describe when the Supreme Court will defer and when it will not, and has found that difference somewhat counterintuitive and in conflict with the Supreme Court's notions of dual sovereignty. While dual sovereignty might be neither truly possible nor desirable in the age of the administrative state, it can provide some practical boundaries to divide the labor of the courts in our federal system when they necessarily interact. Thus, this Article has suggested that federal courts defer to state courts unless an issue presents a substantive federal interest that warrants independent federal review. I hope that this provides some normative guidance that the courts could consider in negotiating those interactions.

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June 26, 2003, 2003 Conn. Pub. Acts 154 (codified at CONN. GEN. STAT. ANN. § 1-2z (West 2005)). The Connecticut legislature enacted a statute to overrule that part of *Courchesne*, and the Connecticut Supreme Court acquiesced without analyzing whether the legislative overruling was valid under the state constitution. Goodyear v. Discala, 849 A.2d 791, 796 n.4 (Conn. 2004) (citing Paul Dinto Elec. Contractors, Inc. v. City of Waterbury, 835 A.2d 33, 39 n.10 (Conn. 2003)). Despite the fact that Connecticut no longer deviates from the federal method, the example remains a useful illustration of the possibility that a State could makes this change.

[189] *See Courchesne*, 816 A.2d at 578–86 (explaining reasons for rejecting the plain-meaning rule and adopting instead a broader inquiry into the meaning of the statutory language in all cases).