

## WHEN THE SUPREME COURT IS NOT SUPREME

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## INTRODUCTION

The Supreme Court is not always supreme.

For much of this nation's history, this statement was true as a matter of law. Today, it is true in practice.

By supremacy, I mean the authority to determine, for everyone else, and in particular for every other court, what the Constitution of the United States means and requires. The Court says that it is supreme in this sense, and although many people complain about it, nearly everybody agrees with the Court. But this supremacy is a myth.

Instead, the authority to interpret the Constitution has always been shared. This Article focuses on how the Supreme Court shares that authority with state courts.<sup>1</sup> State courts have always exercised a good deal of authority to determine, independently and definitively, the meaning of the Constitution. Until the early twentieth century, this authority was formalized in the statutory law that governed the Court's appellate jurisdiction. Today, though that statutory law has changed, in practice state courts continue to hold and to exercise substantial authority on issues of federal constitutional law.

To be sure, the Supreme Court can, and sometimes does, reverse a state court ruling on an issue of federal constitutional law, and the state court must obey the decision. Indeed, on some issues, the Court aggressively keeps the state courts (and the lower federal courts) in check. This Article does not challenge the supremacy of the Court in this sense. Rather, the claim made here is that there are areas of the law where state courts have, as a practical matter, the ability to determine what the Constitution means with little or no oversight by the Supreme Court. In this sense, the Court is not supreme because authority is shared. State courts have practical constitutional autonomy.

Several factors, explored closely in this Article, account for the practical constitutional autonomy of state courts. In part, it results from some limitations on the Court's power and ability to review cases from the state courts. In part, the Court itself has simply given up the interpretive function to state judges. At times, state courts are autonomous because their rulings on constitutional issues are not readily noticed or easily scrutinized. Historically, the law drew clear lines between the authority of the state courts and the authority of the Supreme Court. Today, while the lines are there, they can appear faint and overlapping. It is no wonder we have had trouble noticing them.

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<sup>1</sup> I choose state courts because they are assumed to be inferior to the Supreme Court on issues of federal constitutional law. Similar arguments could be made about how the Court shares authority with the lower federal courts and nonjudicial branches of government. Further, while I focus on the authority to interpret the Constitution, my approach could also apply to the interpretation of federal statutes.

Once we see that authority to interpret the Federal Constitution is shared, the world of constitutional law and politics looks different. Hard-fought battles over who serves on the Supreme Court seem excessive. The Court's support of particular rights or claims is less consequential. The modern fascination with the Court's seventy-odd decisions each year—instantly reported, dissected, critiqued, turned into symposia—appears extravagant. Divining the future from the Justices' words becomes improbable. None of this is to deny that the decisions of the Supreme Court are important: some are momentous. But when authority is shared, we should worry less about the Supreme Court and more about how federal constitutional law is developed and implemented in the state courts and other venues.

In addition to exploring the ways in which the Supreme Court is not supreme, and the consequences that result, this Article offers a proposal. Historically, the autonomy of state courts was formalized. It makes sense to formalize it again. A sensible first step would be a rule allowing state courts hearing federal constitutional claims against state governments to deviate from the rulings of the Supreme Court without fear of correction. The Article qualifies this proposition in various ways. For example, state courts would be permitted to expand but not narrow federal constitutional rights as construed by the Supreme Court, and state courts would have leeway only in certain kinds of cases. The basic idea, however, is that the state courts would once again have formal independent authority to interpret the Constitution. The Article shows that there are good reasons for formalizing state court autonomy under the Federal Constitution even though state courts already have the last word when it comes to interpreting state constitutional provisions.

The proposal offered here is more than an imaginative exercise. Since John G. Roberts became Chief Justice, the Supreme Court has shown a keen interest in the appropriate role of the state courts in developing federal constitutional law, and the Court has granted review in some important cases in this area. In a series of recent cases, Justice John Paul Stevens has called upon the Roberts Court to refuse to hear cases against state governments in which a state court has expanded upon the Court's own rulings on federal constitutional rights. Under Justice Stevens's approach, examined closely in this Article, the Court's denial of certiorari would permit state courts to interpret the Constitution more generously in their own states. Though the proposal advanced in this Article does not depend on the Court's adoption of such rules—Congress might, for instance, take the lead role—Justice Stevens's suggestion provides a useful starting point for considering the benefits to formalizing state court autonomy.

Part I of this Article traces how the Supreme Court and the state courts historically shared authority to interpret the Federal Constitution, contrasting this with the modern consolidation of formal authority in the Supreme Court. Part II shows that interpretative authority continues to be shared in

practice, and Part III illustrates this shared authority with specific examples. Part IV offers a proposal, building on Justice Stevens's arguments, to formalize state court autonomy and discusses the benefits of and drawbacks to the idea.

### I. THE SUPREMACY MYTH

Here is a familiar claim: In the judicial system of the United States, the Supreme Court decides what the provisions of the U.S. Constitution mean and require. The Supreme Court is, therefore, superior to the state courts (as well as to the lower federal courts) on issues of federal constitutional law. When state courts rule on such claims, they must adhere closely to the precedents of the Supreme Court or face reversal. Indeed, it would be fair to conclude, state courts do not truly decide questions of federal constitutional law. Rather, they implement the prior answers the Supreme Court has given to those questions. The idea that the Supreme Court is superior to the state courts on issues of federal constitutional law is so firmly established and widely recognized as a central component of the Constitution that it barely needs stating.

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

#### A. *Early Jurisdiction and Dockets*

The Constitution provides that the "judicial Power [of the United States] shall extend to all Cases"<sup>2</sup> arising under the Constitution and federal law, and the Constitution vests that power in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>3</sup> Yet in the early national period, few people would have imagined that the Supreme Court was the sole authority on the meaning of the Constitution. As a result of the so-called Madisonian compromise, the Constitution did not even establish lower federal courts: state courts were assumed to be able to hear federal cases.<sup>4</sup> In the Judiciary Act of 1789,<sup>5</sup> Congress as-

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<sup>2</sup> U.S. CONST. art. III, § 2.

<sup>3</sup> *Id.* art III, § 1.

<sup>4</sup> *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124–25 (Max Farrand ed., 1966) (remarks of John Rutledge) ("State Tribunals . . . ought to be left in all cases to decide in the first

signed the Supreme Court original jurisdiction closely matching the constitutional allocation,<sup>6</sup> but it gave the Court only limited appellate powers. The Supreme Court had no authority to hear appeals of criminal cases from the lower federal courts the Act created,<sup>7</sup> and civil cases could only be appealed from the lower federal courts if they met a \$2,000 amount in controversy requirement.<sup>8</sup> Section 25 of the Judiciary Act limited the circumstances under which the Court could review, by writ of error, the decisions of state courts on federal issues.<sup>9</sup> The Court could review a decision of a state's highest court invalidating a federal statute, treaty, or exercise of federal authority.<sup>10</sup> The Court could also review state court decisions denying a title, right, privilege, or exemption claimed by a party under the Constitution, a treaty, a federal statute, or a federal commission.<sup>11</sup> In cases in which a state law was challenged on federal constitutional grounds, the Supreme Court could review the state court decision if it rejected the constitutional claim and upheld the state law but not if the state court accepted the constitutional claim and invalidated the law.<sup>12</sup> When, beginning in the 1820s, Congress considered whether to change the Supreme Court's authority to review state court decisions, the proposals were not to add state court cases invalidating state laws but to abolish review altogether.<sup>13</sup> Such a change was not made and the basic distinction in the Judiciary Act of 1789 between state court decisions denying and upholding federal constitutional claims remained in place when it was amended in 1867<sup>14</sup> and reenacted in

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instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights . . ."). *But see* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 112–19 (arguing that the compromise did not have the significance to the founding generation that we attach to it today and that there was a widespread belief that the state courts could not hear all Article III cases, leading some to conclude that lower federal courts were in fact constitutionally required). *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6–8 (5th ed. 2003) (discussing the compromise).

<sup>5</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>6</sup> *See id.* § 13, 1 Stat. at 80–81 (setting out the cases in which the Court would have original jurisdiction).

<sup>7</sup> *See id.* However, the Supreme Court and the lower federal courts did have a power of habeas review with respect to prisoners held in federal custody. *See id.* § 14, 1 Stat. at 81–82.

<sup>8</sup> *Id.* § 22, 1 Stat. 73, 84.

<sup>9</sup> *See id.* § 25, 1 Stat. 73, 85–86 (setting out the circumstances in which the Court could review state court decisions).

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; *see also* Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 18–23 (2007) (discussing Section 25 of the Judiciary Act of 1789).

<sup>13</sup> *See, e.g.*, H.R. REP. NO. 43, at 1–11 (1831) (urging Congress to repeal Section 25 of the Judiciary Act of 1789). *See generally* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 4 (1913) (reporting that there were at least ten bills introduced between 1821 and 1882 that would have revoked the Supreme Court's jurisdiction to review cases from the state courts).

<sup>14</sup> *See* Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87.

1873<sup>15</sup> and 1911.<sup>16</sup> Not until 1914 did the Supreme Court receive statutory authority to review state court decisions upholding federal claims against state government,<sup>17</sup> and even then review was at the Court's discretion by a writ of certiorari.<sup>18</sup> Until 1914, the Court simply refused jurisdiction in cases in which the state court had ruled against a state law and in favor of a federal claim.<sup>19</sup> As a result, prior to 1914, "no state seeking to vindicate its sovereignty interests . . . obtained review on the merits of its own court's decision in the Supreme Court."<sup>20</sup> As for the lower federal courts, the 1789 Act assigned them a jurisdiction that also fell short of the judicial branch's constitutional grant.<sup>21</sup> In particular, lower federal courts had no general federal question jurisdiction in civil cases and were thus dependent upon Congress's piecemeal allocation of cases to them.<sup>22</sup> Apart from the short-lived Midnight Judges Act of 1801,<sup>23</sup> only in 1875 did Congress assign the lower federal courts authority to hear all cases arising under federal law.<sup>24</sup>

The early dockets of the federal courts reflected their limited statutory authority. The Supreme Court, which until 1860 operated mostly out of the basement of the Capitol,<sup>25</sup> heard no cases in its first three terms.<sup>26</sup> From

<sup>15</sup> See Act of Dec. 1, 1873, ch. 11, § 709, 18 Stat. 1, 132.

<sup>16</sup> See Act of Mar. 3, 1911, Pub. L. No. 475, ch. 231, § 237, 36 Stat. 1087, 1156.

<sup>17</sup> Act of Dec. 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790, 790.

<sup>18</sup> *Id.* From 1916 to 1988, there was mandatory review (by writ of error) where a state court had upheld a state law against a federal constitutional claim, but discretionary review (by writ of certiorari) where the state court had invalidated the state law. Act of Sept. 6, 1916, Pub. L. No. 258, ch. 448, § 2, 39 Stat. 726, 726–27; see 28 U.S.C.A § 1257, Historical & Statutory Notes, Amendments (West 2006) (describing changes made by the 1988 law).

<sup>19</sup> See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 190 n.20 (1928) (collecting cases).

<sup>20</sup> Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 *TEX. L. REV.* 907, 913 (1997).

<sup>21</sup> See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (specifying the jurisdiction of the federal district courts); *id.* § 11, 1 Stat. at 78–79 (specifying the original jurisdiction of the circuit courts); *id.* §§ 21–22, 1 Stat. at 83–85. (specifying the appellate jurisdiction of the circuit courts).

<sup>22</sup> See, e.g., *id.* § 9(b), 1 Stat. at 77 (codified at 28 U.S.C. § 1350 (2006)) (giving the lower federal courts jurisdiction to hear alien tort claims); Act of Feb. 4, 1815, ch. 31, §§ 7–8, 3 Stat. 195, 197–98 (assigning lower federal courts jurisdiction in cases involving enforcement of federal customs laws); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (repealed 1802) (giving the lower federal courts jurisdiction in copyright infringement cases).

<sup>23</sup> Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802). The Act, passed by the Federalist Congress of 1801, conferred federal question jurisdiction on the federal circuit courts. See *id.* § 11, 2 Stat. at 92 (giving the circuit courts "cognizance" of all cases "arising under" the Constitution and federal laws). The new Republican Congress repealed the law the next year. See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

<sup>24</sup> See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (giving the federal circuit courts jurisdiction over all civil cases "arising under" federal law, subject only to an amount-in-controversy requirement of \$500).

<sup>25</sup> The Court held its first two terms in New York in 1790 and then met in Philadelphia until 1800, when it moved with the rest of the federal government to Washington, DC. Supreme Court Historical

1801 to 1829, the Court averaged about twenty-eight cases with signed opinions per year.<sup>27</sup> Very few cases before the Court involved issues of federal constitutional law. In the 1825 Term, for example, the Supreme Court decided no cases involving the Bill of Rights or the constitutionality of federal or state laws under the Commerce or Contracts Clauses.<sup>28</sup> Of the twenty-six cases that term, ten involved common law questions, and the remainder dealt with a mix of statutory, jurisdictional, maritime, and other matters.<sup>29</sup> As of 1840, the Court had found state laws unconstitutional in just nineteen cases.<sup>30</sup> Between 1803, when the Court decided *Marbury v. Madison*,<sup>31</sup> and 1857, the year of the decision in *Scott v. Sandford*,<sup>32</sup> the Court did not hold unconstitutional a single federal statute.<sup>33</sup> The Justices were busy riding circuit in compliance with the Judiciary Act of 1789, which staffed the circuit courts with one district court judge and two Supreme Court Justices.<sup>34</sup>

### B. Early State Courts and the Federal Constitution

As a result of the limited jurisdiction of the federal courts, the early state courts decided what the federal Constitution meant. Chief Justice Marshall's assertion in *Marbury v. Madison*<sup>35</sup> that the federal judiciary had power to review congressional legislation is well known, but state courts al-

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Society, History of the Court: Home of the Court, [http://www.supremecourthistory.org/history/supremecourthistory\\_history\\_homes.htm](http://www.supremecourthistory.org/history/supremecourthistory_history_homes.htm) (last visited Sept. 21, 2010).

<sup>26</sup> See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294 (1985) ("As a practical matter, the Court had no need of a reporter . . . during its first three Terms, for its docket was empty. Not until the Court's August 1791 Term was its first case, *West v. Barnes*, called for argument." (footnote omitted)). The Court also heard no cases in its two 1802 Terms, which Congress had cancelled. See Supreme Court Historical Society, *The Marshall Court, 1801–1835*, [http://www.supremecourthistory.org/history/supremecourthistory\\_history\\_history\\_marshall.htm](http://www.supremecourthistory.org/history/supremecourthistory_history_history_marshall.htm) (last visited Sept. 21, 2010); see also Act of Apr. 29, 1802, ch. 31, §§ 1–2, 2 Stat. 156 (providing for the Court to have one term annually, beginning on the first Monday of February each year). It also heard no cases in the 1811 Term, when, as a result of illness among its members, it lacked a quorum. See JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 400 (1996).

<sup>27</sup> Averaging the number of cases per term provided for this period in LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 227 tbl.3–2 (4th ed. 2007), gives an average of 27.76 cases.

<sup>28</sup> See FRANKFURTER & LANDIS, *supra* note 19, at 302 tbl.I (reporting cases).

<sup>29</sup> See *id.*

<sup>30</sup> See EPSTEIN ET AL., *supra* note 27, at 181 tbls.2–16 (listing cases).

<sup>31</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>32</sup> 60 U.S. (19 How.) 393 (1857).

<sup>33</sup> See Morton J. Horwitz, *Constitutional Transplants*, 10 THEORETICAL INQUIRIES L. 535, 541 (2009).

<sup>34</sup> See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75. See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1763–71 (2003) (describing the challenges of riding circuit and the Justices' efforts to overhaul the circuit-riding system).

<sup>35</sup> See 5 U.S. (1 Cranch.) at 177–80.

so enforced the Constitution's limitations on the powers of the federal government.<sup>36</sup> Under the Judiciary Act of 1789, only if a state court invalidated a federal law was the decision subject to review in the Supreme Court.<sup>37</sup>

With the federal courts lacking federal question jurisdiction, state courts also enforced the Contracts Clause<sup>38</sup> and other provisions of the Constitution that limited state governments.<sup>39</sup> Supreme Court review of these state court decisions was available if the state court rejected a federal constitutional challenge to a state law.<sup>40</sup> However, there was no review of state court decisions that invoked the Constitution to invalidate state laws.<sup>41</sup> The Judiciary Act of 1789 thus gave the state courts space to interpret the Constitution without fear of correction by the Supreme Court.<sup>42</sup>

Accordingly, state courts concluded they only needed to follow Supreme Court rulings on federal constitutional issues if their decisions were subject to review. In evaluating the constitutionality of state laws, state courts could not deny or narrow protections the Supreme Court had recog-

<sup>36</sup> See, e.g., *Ferris v. Coover*, 11 Cal. 175, 178–79 (1858) (holding that section 25 of the Judiciary Act of 1789 is constitutional); *Griffin v. Wilcox*, 21 Ind. 370, 372–73 (1863) (holding that a federal statute prohibiting actions for wrongful imprisonment is unconstitutional); *Sims's Case*, 61 Mass. (7 Cush.) 285, 303–10 (1851) (holding that the 1850 federal Fugitive Slave Act is constitutional); *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 19–20 (1823) (rejecting argument that a federal fugitive slave law allowing seizure of escaped slaves without a warrant violates the Fourth Amendment); *Wetherbee v. Johnson*, 14 Mass. (1 Tyng) 412, 421 (1817) (holding that a federal statute allowing removal of cases from state court after final judgment is unconstitutional); *Patrie v. Murray*, 43 Barb. 323, 336–37 (N.Y. Sup. Ct. 1864) (holding that a federal removal statute is unconstitutional).

<sup>37</sup> See Judiciary Act of 1789 § 25, 1 Stat. at 85–86 (providing for Supreme Court review of state court decisions “where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity”).

<sup>38</sup> U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

<sup>39</sup> See, e.g., *State, for the use of the Charity Hospitals of New Orleans v. Fullerton*, 7 Rob. 219, 224 (La. 1844) (rejecting a Commerce Clause challenge to a Louisiana tax on passengers arriving in New Orleans from out of state). On occasion, federal courts, though they lacked federal question jurisdiction until 1875, heard challenges to state laws in diversity cases. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 281, 293 (1827) (applying the Contracts Clause of Article I, § 10 in a diversity case). See generally Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–99 (1997) (tracing the Supreme Court's expansive reading of diversity jurisdiction in Contracts Clause cases).

<sup>40</sup> See Judiciary Act of 1789 § 25, 1 Stat. at 85–86.

<sup>41</sup> See *id.*

<sup>42</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), upheld the power of the Supreme Court to review state court decisions under Section 25 of the Judiciary Act of 1789. *Id.* at 351. However, state courts sometimes resisted following the Court's rulings even in cases in which the state court decision was subject to review. For example, Justice Benning of the Supreme Court of Georgia took the view in one case that “the Supreme Court of Georgia is co-equal and co-ordinate with the Supreme Court of the United States . . . and that as a consequence, the Supreme Court of the United States has no jurisdiction over the Supreme Court of Georgia; and cannot, therefore, give it an order, or make for it a precedent.” *Padelford, Fay & Co. v. Mayor of Savannah*, 14 Ga. 438, 506, 514 (1854) (holding, contrary to the Supreme Court's ruling in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), that a state sales tax on imported goods did not violate the Commerce Clause).

nized under the Constitution—that would trigger review. But they could impose more stringent constitutional requirements on state governments than the Supreme Court elected to impose. For example, the Supreme Court of Ohio stated:

[T]he limited and qualified character of the appellate jurisdiction, conferred by the 25th section of the [J]udiciary [A]ct, does not countenance the idea . . . that [C]ongress had in view a uniformity of decisions upon questions arising under the [C]onstitution and laws of the United States, and that the [S]upreme [C]ourt was the common arbiter for the decision of such questions.<sup>43</sup>

In dozens of cases, state courts articulated the difference between cases in which they were and were not bound to follow the U.S. Supreme Court on issues of federal constitutional law.<sup>44</sup> Consistent with their view of their independent authority, state judges also made clear that because their deci-

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<sup>43</sup> *Skelly v. Jefferson Branch of the State Bank of Ohio*, 9 Ohio St. 606, 612 (1859), *rev'd*, 66 U.S. (1 Black) 436 (1861). In *Skelly*, the Ohio court took the position that a state court could uphold a state law as constitutional even after the Supreme Court had invalidated it because otherwise, under Section 25, the Supreme Court would never have an opportunity to correct its own prior ruling. *See id.* at 613. Whether the Ohio court thought this was a general principle is not certain because the case involved a Contracts Clause claim, and the state court may have thought there was a special role for state judges on issues of contract law. Nonetheless, the Ohio court departed from prior Supreme Court rulings, *id.* at 621–22, and held that a state incorporation law was not a contract for purposes of the Contracts Clause. *Id.* at 626–27. That ruling against a federal constitutional claim triggered review, and the Supreme Court reversed. *See* 66 U.S. (1 Black) at 449–50.

<sup>44</sup> *See, e.g., Linn v. President of the State Bank of Ill.*, 2 Ill. (1 Scam.) 87, 90 (1833) (holding that bills issued by the Bank of Illinois were unconstitutional bills of credit and stating that “the Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question the validity of a statute of . . . any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity” and, therefore, that “[w]hen the Supreme Court of the United States ha[s] decided that a State law violates the Constitution of the United States, the judges of the respective States have no right to overrule or impugn such decision” but must “simply . . . ascertain what the Supreme Court of the United States has decided” (internal quotation marks omitted)); *Braynard v. Marshall*, 25 Mass. (8 Pick.) 194, 196–97 (1829) (explaining that Supreme Court decisions on the interstate effect of discharges of debts under state “insolvent laws” are binding upon the state court since a state court’s holding on such a question “may be carried to [the Supreme Court] by writ of error, and our judgment be reversed; it being a question, of which, by section 25 of the [J]udiciary [A]ct of the United States . . . that court has jurisdiction”); *Bailey v. Fitz-Gerald*, 56 Miss. 578, 588–89 (1879) (recognizing that the state court was obligated to follow Supreme Court precedent when the Judiciary Act authorized the Supreme Court to review a state ruling upholding a state statute against a federal constitutional challenge); *Susquehanna Canal Co. v. Commonwealth*, 72 Pa. 72, 78 (1872) (“We are not bound by the decisions of our Supreme Court, except in cases arising under the Constitution of the United States, or where the Federal judiciary has superior jurisdiction. Should these courts hold that . . . [the challenged statute] impairs the obligations of the contract, . . . our judiciary must give way.”); *see also Thurston v. Fisher*, 9 Serg. & Rawle 288, 293 (Pa. 1823) (“[A]ll the decisions of [the Supreme Court] are entitled to great respect; but unless in cases where it has appellate jurisdiction, and may revise and correct the decisions of the state courts, its opinions are not conclusive.”).

sions were not subject to further review, they should only invalidate state laws where the Constitution clearly commanded that result.<sup>45</sup>

Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*<sup>46</sup> is conventionally described as affirming the Court's supremacy over state courts on questions of federal law.<sup>47</sup> However, viewing *Martin* against the precise background limitations of Section 25 of the Judiciary Act of 1789 suggests a more modest understanding of the case. In a predecessor case to *Martin*, the Supreme Court considered a decision by the Virginia Court of Appeals denying Thomas Martin title he claimed, by operation of a U.S. treaty with Great Britain, to land Virginia seized from his loyalist uncle during the Revolutionary War.<sup>48</sup> The Virginia Court of Appeals' decision fell within the Supreme Court's appellate jurisdiction under Section 25 of the Judiciary Act. The Supreme Court reversed, holding in Martin's favor.<sup>49</sup> Upon remand, however, the Virginia Court of Appeals refused to obey that ruling. It held anew that Martin lacked title to the land and, further, that Section 25, which authorized Supreme Court review in the case, was unconstitutional.<sup>50</sup> Justice Story's subsequent opinion in *Martin*, then, came not merely upon review of a state court decision in a case falling within the scope of Section 25, but also in the face of that state court's refusal to comply with the Court's directive. That context, one Justice Story flags at the outset of his opinion,<sup>51</sup> is crucial to understanding *Martin's* reach. The decision stands for the proposition that in a state court case properly before the Supreme Court pursuant to Section 25, the Supreme Court is superior to the state court that rendered the decision, and the state court must comply with the Supreme Court's ruling.<sup>52</sup>

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<sup>45</sup> For example, in 1825, Justice John Gibson of the Pennsylvania Supreme Court urged that, because the Judiciary Act of 1789 did not allow the U.S. Supreme Court to review state court decisions invalidating state laws on federal constitutional grounds, state courts should be cautious in striking down state legislation as unconstitutional. *Eakin v. Raub*, 12 Serg. & Rawle 330, 357 (Pa. 1825) (Gibson, J., dissenting).

<sup>46</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>47</sup> See, e.g., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 615 (Kermit L. Hall ed., 2d ed. 2005) (stating that Story's opinion was "a landmark in the history of federal judicial supremacy" because it "insisted that the power to interpret the Constitution had to rest with one ultimate source of authority").

<sup>48</sup> *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603–08 (1813).

<sup>49</sup> *Id.* at 628.

<sup>50</sup> See *Martin*, 14 U.S. (1 Wheat.) at 323–24 (reporting the state court decision).

<sup>51</sup> See *id.* at 323 ("This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court . . ."); cf. *id.* at 365 (Johnson, J.) ("In the case before us, the collision has been, on our part, wholly unsolicited.")

<sup>52</sup> See *id.* at 351 ("[T]he court [is] of the opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the [J]udiciary [A]ct, which authorizes the exercise of this jurisdiction in the specified cases, . . . is supported by the letter and spirit of the [C]onstitution."); *id.* at 354 ("The case . . . falls directly within the terms of the [A]ct.")

Likewise, although commentators emphasize Justice Story's concern in *Martin* with ensuring the uniformity of federal law,<sup>53</sup> that reading also appears exaggerated in light of Section 25's limits. Justice Story speculated that one reason the "enlightened convention which formed the [C]onstitution"<sup>54</sup> assigned the Supreme Court appellate power over state court decisions was "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the [C]onstitution."<sup>55</sup> Justice Story referred to the "public mischiefs" that could result from a lack of uniformity.<sup>56</sup> But even if Justice Story thought there were good policy reasons for uniformity, he must have known that, given the limitations of Section 25, there could not be complete uniformity on federal constitutional issues. This explains why Justice Story went on to suggest a specific kind of uniformity: a common floor of federal constitutional rights throughout the country. Supreme Court review, according to Justice Story, ensures that a state court does not deprive a party "of all the security which the [C]onstitution intended in aid of his rights."<sup>57</sup> State court rulings might vary, but not so as to deny a common set of constitutional rights.

We come, then, to the most remarkable form of state court authority in the early Republic. The state courts, hearing challenges to state laws, developed a sophisticated body of constitutional law derived from the Federal Bill of Rights. Notwithstanding the U.S. Supreme Court's 1833 refusal in *Barron v. Baltimore* to apply the Fifth Amendment to the states,<sup>58</sup> the early state courts, in a series of cases, invoked provisions of the Federal Bill of Rights, particularly the Second, Fourth, Fifth, and Sixth Amendments, to invalidate state laws and otherwise constrain state government.<sup>59</sup> Although

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<sup>53</sup> See, e.g., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 47, at 615 ("Without Story's decision, the Supremacy Clause . . . would have lost much of its salience, since the states would not have been bound to conform their laws to a national constitutional standard.")

<sup>54</sup> *Martin*, 14 U.S. (1 Wheat.) at 348.

<sup>55</sup> *Id.* at 347–48.

<sup>56</sup> *Id.* at 348; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415–16 (1821) (noting that "nothing but contradiction and confusion can proceed" from failing to "vest[] in some single tribunal the power of deciding, in the last resort, all cases in which [the Constitution and laws of the United States] are involved" (internal quotation marks omitted)).

<sup>57</sup> *Martin*, 14 U.S. (1 Wheat.) at 348–49.

<sup>58</sup> 32 U.S. (7 Pet.) 243, 247, 251 (1833) (dismissing for lack of jurisdiction a Fifth Amendment Takings Clause claim against the City of Baltimore).

<sup>59</sup> See, e.g., *Young v. McKenzie*, 3 Ga. 31, 31–33, 43–45 (1847) (invoking the Fifth Amendment Takings Clause to enjoin the construction of a public bridge); *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that while the state legislature could prohibit the carrying of concealed weapons, parts of an act generally prohibiting possession of weapons violated the Second Amendment); *Bonsell v. United States*, 1 Greene 111, 115 (Iowa 1848) (applying to a state court proceeding the Sixth Amendment's requirement that a defendant be informed of the nature and cause of the accusation); *Larhet v. Forgay*, 2 La. Ann. 524, 525 (1847) (affirming a civil jury award for a warrantless search of a cigar shop and reasoning that the search violated the Fourth Amendment prohibition on unreasonable searches and seizures);

as a matter of federal constitutional law enforced by the federal courts, the Bill of Rights applied only to the national government, the state courts understood the Bill either to apply directly to state governments or to set out general constitutional principles that bound the states, even when their own constitutions imposed no such constraint.<sup>60</sup> The jurisdictional limits of the Judiciary Act of 1789 protected these state court decisions from Supreme Court review.<sup>61</sup> Accordingly, state courts could apply more generous constitutional protections against state governments than the U.S. Supreme Court was willing to impose.

### C. *The Shift to Formal Supremacy*

As a formal matter, the authority to decide what the Constitution means is no longer shared. This is because Congress has expanded the Court's statutory authority. In 1914, Congress for the first time gave the Court statutory authority to review state court decisions upholding federal claims against state government.<sup>62</sup> Current law provides that the Court may review a final judgment of the highest court of a state "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution" or other federal law.<sup>63</sup> Thus, while under the Judiciary Act of 1789 the Court could only review the holding of a state supreme court rejecting a federal constitutional claim made against state government, today the Court can hear any decision by a state supreme court on a federal issue. The Court's formerly limited jurisdiction permitted state courts reviewing state laws to expand federal constitutional rights beyond those recognized by the federal judiciary; the modern Court's plenary jurisdiction means that any inconsistent state court decision is subject to correction.

Commentators trace the enactment of the 1914 statute to the problem of state courts striking down economic and social legislation on federal due process grounds—and in particular to the New York Court of Appeals' decision in *Ives v. South Buffalo Railway Co.*<sup>64</sup> In *Ives*, the court held that a railroad employee could not obtain compensation for a work injury because the state compensation statute violated the railroad's rights under the New

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People v. Goodwin, 18 Johns. 187, 200–01 (N.Y. Sup. Ct. 1820) (applying the Fifth Amendment Double Jeopardy Clause to state court proceedings).

<sup>60</sup> See Mazzone, *supra* note 12, at 23–55 (collecting and analyzing state court decisions invoking the Bill of Rights against state government).

<sup>61</sup> Judiciary Act of 1789 § 25, 1 Stat. 73, 85–86.

<sup>62</sup> Act of Dec. 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790.

<sup>63</sup> 28 U.S.C. § 1257(a) (2006).

<sup>64</sup> 201 N.Y. 271 (1911); see, e.g., Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1364 (1986) (describing *Ives* as the "particularly egregious exercise of state judicial power" that prompted Congress to act).

York constitution and the Due Process Clause of the Federal Constitution.<sup>65</sup> In the wake of this holding, New York amended its state constitution and re-enacted the statute,<sup>66</sup> but there was no way to overturn the court's federal due process ruling—the Supreme Court could not hear the case because the state court had ruled in favor of the claimed federal right.

Although many commentators emphasize that Congress's 1914 expansion of the Supreme Court's authority to review state court decisions was a direct response to cases like *Ives*, that understanding only captures part of the story. At the beginning of the twentieth century, the Supreme Court and the lower federal courts also invoked substantive due process to invalidate an array of federal and state laws.<sup>67</sup> Indeed, the federal judiciary was often a greater threat to legislation than were the state courts. In *Lochner v. New York*, after the New York Court of Appeals rejected a due process challenge to a New York law regulating working hours in bakeries, the U.S. Supreme Court reversed the state court and struck down the law.<sup>68</sup>

Professor Edward Hartnett therefore persuasively demonstrates that the 1914 statute, which he reads to allow only private litigants to seek review in the Supreme Court, was designed to shield state courts from more far-reaching reforms.<sup>69</sup> Tracing the law's enactment, he notes that Theodore Roosevelt used *Ives* to argue in favor of his own 1912 presidential campaign proposal to “recall” state judicial decisions by giving the voters of a state the ability to overturn a ruling of the state court by majority vote in a referendum.<sup>70</sup> Roosevelt's criticism of state judges galvanized incumbent President (and future Supreme Court Justice) William Howard Taft and his conservative supporters and produced an intense struggle for the 1912 Republican Party nomination, which went to Taft and was followed by a party platform that opposed reducing the power of the state courts.<sup>71</sup> Running as a candidate for the Progressive Party, Roosevelt advocated not the “recall” of state court decisions by popular vote but their review by the Supreme Court.<sup>72</sup>

After the Taft–Roosevelt split led to the election of Democrat Woodrow Wilson, Taft assumed the presidency of the American Bar Association, which opposed any recall proposal but supported an expansion of the Supreme Court's jurisdiction as a measured response to erroneous state

<sup>65</sup> *Ives*, 201 N.Y. at 273, 292–300, 317.

<sup>66</sup> See N.Y. CONST. art I, § 18 (providing text of the 1913 amendment); see also Hartnett, *supra* note 20, at 933, 978 (discussing the amendment).

<sup>67</sup> See generally PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER* V. *NEW YORK* (1990).

<sup>68</sup> 198 U.S. 45, 52–53, 64–65 (1905).

<sup>69</sup> See Hartnett, *supra* note 20, at 913–56.

<sup>70</sup> *Id.* at 934–36.

<sup>71</sup> *Id.* at 934–40.

<sup>72</sup> *Id.* at 940–41.

court decisions.<sup>73</sup> The ABA found a staunch ally in New York Senator Elihu Root, who favored expanded Supreme Court review out of practical necessity to safeguard the state courts from recall measures and other more radical proposals for popular control.<sup>74</sup> Professor Hartnett reports that the enactment of the 1914 statute expanding Supreme Court jurisdiction resulted not from Congress's "desire to vindicate popular democracy," but from "the actions of wise conservatives . . . [who] sought to defuse the pressure for radical reform through measures that preserved existing authority—particularly judicial authority—rather than stoke the coals of radical reform through repression."<sup>75</sup> Consistent with this history of the statute, Hartnett concludes that the statute was intended to allow the Supreme Court to review cases in which a state court had upheld a federal claim asserted in litigation between private parties—the situation in *Ives*—but not to review cases when the state had lost in state court.<sup>76</sup> Beginning in 1918, however, the Court read the statute broadly.<sup>77</sup> In 1922, in a case from New York involving a worker's compensation claim, the Court, without fanfare, granted for the first time a petition from a state officer to review a state court judgment and it reversed the state court.<sup>78</sup>

Coupled with the Court's expanded statutory jurisdiction, the incorporation of most of the provisions of the Bill of Rights against the states has also diminished state court autonomy. In the early Republic, state courts were unique in applying provisions of the Bill of Rights to state government. Today, however, as a matter of Supreme Court jurisprudence, most protections of the Bill of Rights apply equally—"with full force"<sup>79</sup>—to the states and the federal government.<sup>80</sup> Accordingly, state courts no longer may interpret the Bill independently or derive from it general principles of

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<sup>73</sup> See *id.* at 943–46, 949.

<sup>74</sup> See *id.* at 949–52.

<sup>75</sup> *Id.* at 954–55 (footnotes omitted).

<sup>76</sup> *Id.* at 957.

<sup>77</sup> *Id.* at 957–59.

<sup>78</sup> *Id.* at 958–59 (citing *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263, 269–70 (1922)). By 1928, the Court had also abandoned its short-lived notion that, without specific authorization from the state, a state official lacked standing to challenge a ruling from a state court. *Id.* at 962–63 (citing *Blodgett v. Silberman*, 277 U.S. 1 (1928)).

<sup>79</sup> *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

<sup>80</sup> See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States."). "In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010) (citation omitted) (holding that the Second Amendment is fully applicable to the states).

constitutional law applicable to state government.<sup>81</sup> Instead, they are bound by whatever the Court says the Bill of Rights requires.<sup>82</sup> For example, if the Court holds that the death penalty does not violate the Eighth Amendment, a state court may not hold that the death penalty is unconstitutionally cruel and unusual punishment.<sup>83</sup> “[A] state court can neither add to nor subtract from the mandates of the United States Constitution”<sup>84</sup> as it is interpreted by the Supreme Court.

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<sup>81</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” (citation omitted)).

<sup>82</sup> See, e.g., *People v. Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991) (“All courts are, of course, bound by the United States Supreme Court’s interpretations of . . . the Federal Constitution.” (citations omitted)); *State v. Gomez*, 163 S.W.3d 632, 651 (Tenn. 2005) (“Like all Tennessee courts, this Court is bound by the United States Supreme Court’s interpretation of the United States Constitution.”).

<sup>83</sup> The interplay between the Supreme Court and the state court in *Roper v. Simmons*, 543 U.S. 551 (2005), demonstrates the point. Prior to *Roper*, the Supreme Court had held in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that the Eighth Amendment does not prohibit the execution of defendants for crimes they committed as minors. The defendant in *Roper*, Christopher Simmons, was sentenced to death for a murder he committed at age seventeen. 543 U.S. at 556–58. On appeal, the Missouri Supreme Court affirmed Simmons’s death sentence. *Id.* at 559. Subsequently, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment, construed “in the light of our ‘evolving standards of decency,’” prohibited the execution of mentally retarded defendants. *Id.* at 321 (citation omitted). In reaching this conclusion, the *Atkins* Court invoked the emergence of a “national consensus” against the execution of mentally retarded offenders. *Id.* at 316. Following *Atkins*, Simmons filed a state habeas petition in which he argued that a similar national consensus had developed against executing defendants for offenses committed as juveniles and his sentence was therefore unconstitutional. The Missouri Supreme Court agreed with Simmons, granted his petition, and resented him to life without parole. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399–400, 413 (2003) (en banc). Judge William Ray Price, Jr., joined by two other judges, dissented on the ground that “[t]he majority opinion of this Court . . . is directly in conflict with the United States Supreme Court decision of *Stanford v. Kentucky*.” *Id.* at 419 (Price, J., dissenting). Judge Price complained that the majority had taken upon itself to overrule a Supreme Court case: “This Court,” he wrote, “is bound by the United States Supreme Court’s decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision. . . . Neither can this Court . . . anticipate the overruling of a decision of the United States Supreme Court.” *Id.* at 419–20. In his view, only the Supreme Court could grant Simmons the relief he sought. *Id.* at 421. In her majority opinion, however, Judge Laura Denvir Stith contended that the majority was faithfully applying both *Stanford* and *Atkins*, inasmuch as they instruct that “decisions as to standards of decency are to be decided by current standards, not ones of years ago.” *Id.* at 406 (citation omitted). In her view, the dissent was “simply incorrect” in claiming that the majority was “overrul[ing] *Stanford*.” *Id.* at 407. Instead, she explained, the court “clearly has the authority and the obligation to determine the case before it based on current . . . standards of decency.” *Id.* Although the majority and the dissenting justices disagreed about which side was more faithful to Supreme Court case law, both sides accepted the premise that a state court had no authority to depart from Supreme Court precedent. See *id.* at 415 (Wolff, J., concurring) (“Both the principal opinion and the dissent strive earnestly to follow relevant precedent of the United States Supreme Court—whether that be the line of reasoning in *Atkins v. Virginia* or the result in *Stanford v. Kentucky*.” (citations omitted)). The Supreme Court in *Roper* affirmed the state court decision. See 543 U.S. at 568 (“A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18 and we now hold this is required by the Eighth Amendment.”).

<sup>84</sup> *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

Against these general developments, the Warren Court played a specific role in diminishing state court authority by expansively reading the Bill of Rights, especially provisions protecting criminal defendants, and by aggressively incorporating those rights against the states.<sup>85</sup> The Court furthered these interpretations with a broad understanding of federal jurisdiction.<sup>86</sup> Although the Burger and Rehnquist Courts pruned some of the Warren Court's innovations,<sup>87</sup> its legacy remains: state government is deemed bound by constitutional rules articulated and enforced by the Supreme Court, and modern state courts are meant to be "faithful agents of the Supreme Court in applying federal law."<sup>88</sup>

The next two parts of the Article show that, in spite of the state courts' formal subordination to the Supreme Court, authority continues to be shared in practice. Part II traces generally the circumstances that give state courts practical constitutional autonomy. Part III examines two areas of constitutional law where state courts enjoy special autonomy: the Takings Clause of the Fifth Amendment and the provisions of the Fourth, Fifth, Sixth, and Eighth Amendment that protect the rights of criminal defendants.

## II. PRACTICAL STATE COURT CONSTITUTIONAL AUTONOMY

State courts frequently interpret the Federal Constitution with little or no likelihood of review by the Supreme Court. This Part traces six factors which give rise to practical state court constitutional autonomy: (1) federal constitutional decisions' dependence on underlying state laws; (2) the importance of factual determinations to constitutional rulings; (3) rules of preclusion; (4) state courts' role in adjudicating criminal cases; (5) indepen-

<sup>85</sup> See DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 47–69 (2003); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

<sup>86</sup> See Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 957 (1991) ("Many legal scholars believe that the Warren Court increased access to federal courts to give an advantage to the individual who claims a violation of her rights . . ."); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 234–35 (1988) (describing the Warren Court's success in making habeas corpus more available to state prisoners, expanding the scope of relief under 42 U.S.C. § 1983, limiting federal abstention requirements, and minimizing the extent to which state court judgments precluded federal review).

<sup>87</sup> See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 28–39 (1995) (discussing the diminishing impact of Burger and Rehnquist Court decisions on the Warren Court's rights-expansive precedent in the context of criminal lineups and searches and seizures); David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS*, 101–02 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Chemerinsky, *supra* note 86, at 234–35 (discussing how the Burger Court's confidence in state processes led it to narrow the scope of federal jurisdiction by limiting habeas corpus and § 1983 suits and expanding abstention and preclusion principles, thereby reversing the course initiated by the Warren Court).

<sup>88</sup> Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 363 (2002).

dent and adequate state law grounds precluding Supreme Court review of state court rulings on federal questions; and (6) the possibility of state decisions flying below the radar.

Before proceeding, it is useful to note that I focus on circumstances in which state courts are able to have the last word on a constitutional issue. Whether a state court *actually* departs from Supreme Court precedent is a separate question. Even if its decision is not subject to correction, a state court might agree with Supreme Court precedent and think it should be followed, or use the Court to deflect criticism from state residents. Work by previous commentators sheds some light on these issues.<sup>89</sup> In addition, there is a rich scholarly debate over how the Court's very small docket<sup>90</sup> affects the degree to which state and lower federal courts adhere to Supreme Court precedents.<sup>91</sup> Determining the full extent to which state courts make use of the opportunities they have to provide their own constitutional inter-

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<sup>89</sup> See, e.g., Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUSTICE SYS. J. 109 (2002) (analyzing 661 state court confession cases between 1970 and 1991 and concluding that state courts generally complied with Supreme Court precedent); Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008) (showing how on some questions of federal law state courts have been able to actively defy the Supreme Court).

<sup>90</sup> In the 2008 Term, 7738 cases were filed in the Supreme Court, 87 cases were argued, and 83 were disposed of with signed opinions. See JOHN G. ROBERTS, 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (2009), <http://www.supremecourtus.gov/publicinfo/year-end/2009year-endreport.pdf>. In addition to deciding a case on the merits, the Court may also grant certiorari, vacate the decision below without finding error, and remand to the lower court. Typically this occurs when the ruling below may be affected by a recent decision of the Court. See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711 (2009).

<sup>91</sup> See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1219, 1241 (2004) (stating that “no one plausibly can argue that Supreme Court review standing alone” suffices to “address federal interests” implicated in state court cases and that “disuniformity and assuring the supremacy of federal law are serious problems, especially . . . in light of the Supreme Court's limited capacity to superintend the fifty state court systems” (citation omitted)); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35–36 (2005) (estimating that the Supreme Court reviewed 0.12% of the potentially reviewable state and federal decisions reached in 2003 and concluding that “it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations” and that “[i]nstead, it must perforce act legislatively”); David W. Romero & Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 LAW & SOC. REV. 809, 819 (2003) (comparing federal and state court responses to the Supreme Court's *Brown* decision and concluding that “dramatic changes occurred, but only at the federal level”); Solimine, *supra* note 88, at 359 (“Whether under an expanded or shrunken docket . . . the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function.”). The Supreme Court disclaims a general supervisory power over state courts. See *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (“It is beyond dispute that we do not hold a supervisory power over the courts of the several States.” (citation omitted)); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (“Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” (citation omitted)).

pretations will require further study.<sup>92</sup> For now, the task is to identify where and why those opportunities exist.

### A. *The Constitution as State Law*

The first circumstance that gives state courts autonomy is that many federal constitutional questions turn on issues of state law. State law questions, on which state courts are generally authoritative, often determine the outcome of federal constitutional claims. For example, the Fourteenth Amendment's prohibitions on deprivation of liberty or property without due process of law depend upon property or liberty interests created by state law.<sup>93</sup> Whether a state proceeding is criminal for purposes of the Self-

<sup>92</sup> The final outcome in the recent case of *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008), bears mentioning. In *Danforth*, the Court held that state courts, in their own postconviction proceedings, were entitled to give broader retroactive effect to new rules of federal constitutional criminal procedure announced by the Supreme Court than would be available to state inmates on federal habeas review under the restrictive standards of *Teague v. Lane*, 489 U.S. 288, 307–13 (1989) (plurality opinion) (explaining that a new rule is applied retroactively to cases that were final when the rule was announced only if the rule places certain kinds of private conduct beyond the power of the government to proscribe or is a watershed rule that defines procedures implicit in the concept of ordered liberty). *Danforth* involved the retroactive effect of the holding of *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004), that the Confrontation Clause prohibits the admission of testimonial out-of-court statements unless the defendant has had a prior opportunity to cross-examine the speaker. Under the *Teague* standard, the *Crawford* rule does not apply retroactively to cases that were final when *Crawford* was decided. Whorton v. Bockting, 127 S. Ct. 1173, 1180–81 (2007). Following the Supreme Court's decision in *Danforth*, the Minnesota Supreme Court, on remand, elected not to depart from the *Teague* standard by giving broader retroactive effect to *Crawford*. See *Danforth v. State*, 761 N.W.2d 493 (Minn. 2009). Nonetheless, the Minnesota court took the position that in applying *Teague* in future cases, it was not bound by the Supreme Court's interpretation of which new rules were watershed rules and therefore retroactively applicable. “[E]ven as we formally adopt the *Teague* standard of our own volition,” the court stated, “we are not bound by the U.S. Supreme Court’s determination of fundamental fairness. Rather, we will independently review cases to determine whether they meet our understanding of fundamental fairness.” *Id.* at 500. Thus, even while adhering to the U.S. Supreme Court’s approach, the Minnesota Supreme Court recognized its space for independence. Other state courts have also asserted authority to apply independently the *Teague* framework. See, e.g., *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002) (“We adopt the general framework of *Teague*, but reserve our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity (as long as we give new federal constitutional rules at least as much retroactive effect as *Teague* does).”).

<sup>93</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (holding that because state law created a property interest in a teacher’s continued employment, that interest could not be terminated except in accordance with due process); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (“The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law . . . .”); *Vitek v. Jones*, 445 U.S. 480, 490 n.6 (1980) (“While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” (internal quotation marks omitted)); *Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972) (explaining, in a case involving a teacher’s due process challenge to the state’s decision not to rehire him, that “[i]f it is the law of Texas that a teacher in the respondent’s position has no contractual or other claim to job tenure, the respondent’s [due process] claim would be defeated.”); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (holding that the Constitution does not require an opportunity for a hearing before the nonrenewal of a teacher’s contract without a showing that the teacher had a property interest in continued employment: “Property

Incrimination Clause of the Fifth Amendment is “first of all a question of statutory construction” of the relevant state statute.<sup>94</sup> The Double Jeopardy Clause’s prohibition on being “subject for the same offence to be twice put in jeopardy”<sup>95</sup> depends upon a state legislature’s definition of each offense.<sup>96</sup> Whether there is a right to counsel under the Sixth Amendment depends on whether a state has made the offense at issue punishable by incarceration.<sup>97</sup> In Fourth Amendment cases, the Court has considered state laws in assessing what constitutes an unreasonable search or seizure.<sup>98</sup> Whether there is a procedural due process right under the Fourteenth Amendment may depend upon an individual’s legitimate expectations under state law.<sup>99</sup> And the application of the Fifth Amendment’s Takings Clause to the states, discussed later in Part III, depends upon the underlying state law property regime.

The Supreme Court has on occasion reviewed state courts’ determinations of antecedent state law questions where there are federal constitutional issues at stake.<sup>100</sup> Yet these cases are noteworthy because they are so un-

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interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”). The Court has, however, recognized that there are limitations on the kinds of state-created interests qualifying for due process protection. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005) (“[I]t is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.”).

<sup>94</sup> *Allen v. Illinois*, 478 U.S. 364, 368 (1986) (citation omitted) (upholding state court determination that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal within the meaning of the Fifth Amendment’s guarantee against compulsory self-incrimination).

<sup>95</sup> U.S. CONST. Amend. V.

<sup>96</sup> *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (explaining that determining whether two offenses are the same necessitates asking whether “each [statutory] provision requires proof of a fact which the other does not” (citation omitted)).

<sup>97</sup> *See Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972).

<sup>98</sup> *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 331–35, 355–60 (2001) (relying upon state laws of arrest to hold that the Fourth Amendment does not prohibit arrest for an offense that only carries a fine); *Tennessee v. Garner*, 471 U.S. 1, 15–20 (1985) (canvassing state statutes and practices in striking down a state statute allowing the police to use deadly force on fleeing suspects); *United States v. Watson*, 423 U.S. 411, 422–23 (1976) (invoking state law practices in determining that a warrantless arrest for a crime committed in an officer’s presence does not violate the Fourth Amendment).

<sup>99</sup> *See Susan N. Herman, The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984) (discussing and analyzing hybrid rights in the procedural due process area).

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

usual.<sup>101</sup> As Professor Ernest Young reminds us, the relevant data set is not the reported decisions in which the Court decides to construe state law issues, but all of the cases in which it exercises no review at all.<sup>102</sup> Indeed, many of the cases in which the Court has reviewed state court rulings on state law issues have involved special concerns for the adequacy or fairness of state proceedings<sup>103</sup> or concern for the interests of the state legislature.<sup>104</sup> Even in such cases, the Court has accorded some deference to the state courts.<sup>105</sup>

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<sup>101</sup> See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1193 (2005) (“State law questions are antecedent to federal ones in a vast range of cases. . . . And yet the Supreme Court refuses to accept state court interpretations of state law as binding in only a small fraction of cases.” (citation omitted)).

<sup>102</sup> *Id.* at 1193 n.210 (“[W]hen the Court determines that a state law ground blocks review of a federal issue, the ordinary result is an unexplained denial of *certiorari* rather than an opinion . . . affirming the plausibility of the state court’s interpretation of state law. . . . [B]ecause the Court only takes the cases in which it has decided *not* to respect the antecedent state law ground, simply reading the reported decisions . . . could create the impression that the Court routinely reverses state courts on state law questions. . . . But that is hardly the case.” (citation omitted)); see also Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407 (2008) (discussing how the Court’s discretionary docket raises the potential for selection bias in drawing inferences from decided cases).

<sup>103</sup> See *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (declining “[t]o attach definitive weight to the pronouncement of a state court, . . . when the very question at issue is whether the court has actually departed from the statutory meaning.”); *Bouie*, 378 U.S. at 362 (“We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause.”); *Patterson*, 357 U.S. at 457 (“Novelty in procedural requirements cannot be permitted to thwart review in this Court . . .”). *Fairfax’s Devisee*, 11 U.S. (7 Cranch) 603, arose at a time of state hostility to the Court and to the claims of British creditors. See generally Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003) (proposing that the Supreme Court has jurisdiction to review state court determinations where the state court may have improperly departed from its prior precedent).

<sup>104</sup> In *Virginia v. Moore*, 128 S. Ct. 1598 (2008), the Court held that police officers did not violate the Fourth Amendment by arresting a motorist whom they had probable cause to believe had violated Virginia law by driving with a suspended license even though under Virginia law the underlying offense was not the proper basis for an arrest. *Id.* at 1602, 1607. The Court reversed the Supreme Court of Virginia’s decision to exclude on Fourth Amendment grounds cocaine found when officers conducted a search incident to the arrest. *Id.* at 1608. Concluding that the arrest was supported by probable cause and therefore reasonable under the Fourth Amendment, the Court rejected the idea that Virginia courts could apply a more generous exclusionary rule based on the officers’ violation of state law. *Id.* at 1606. Writing for a unanimous Court, Justice Scalia explained that “incorporating state-law arrest limitations into the Constitution” would make constitutional rules “vague and unpredictable” and cause Fourth Amendment protections to “vary from place to place and from time to time.” *Id.* at 1606–07 (internal quotation marks and citation omitted). Justice Scalia found significant that Virginia did not, as a matter of state law, exclude evidence as a remedy for failure to comply with the arrest statute. *Id.* at 1606. Imposing the exclusionary rule would therefore penalize the legislature’s effort to limit the circumstances in which arrests may occur. *Id.*

<sup>105</sup> In *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944), the Court adopted a fair support standard, under which “if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the

### B. Facts and Laws

Although we tend to think of constitutional decisions as involving questions of constitutional law, many turn on factual determinations. When made by state courts, such factual determinations are reviewed, if at all, under a highly deferential standard.<sup>106</sup> In the field of criminal procedure, many issues turn on highly specific determinations of fact and applications of general standards to particularized circumstances: whether the information known to the police constituted a fair probability of criminal activity to create probable cause for a search;<sup>107</sup> whether narcotics in a vehicle are attributable to the passengers so they can be arrested;<sup>108</sup> whether police executing a search warrant waited a sufficient time between knocking and entering;<sup>109</sup> whether a suspect waived *Miranda* rights;<sup>110</sup> whether police initiated interrogation after a suspect asserted the right to counsel;<sup>111</sup> whether statements by officers constituted interrogation.<sup>112</sup> These are all issues over which state courts exercise enormous control. So, too, the Fourteenth Amendment prohibits only a purposeful denial of equal protection of the laws, an issue that requires a context-specific assessment of why the state acted as it did.<sup>113</sup> Whether a state has violated the Dormant Commerce Clause involves similar factual determinations about the benefits of the challenged state program and its effects on interstate commerce.<sup>114</sup>

The *purpose* of a state law is also important to determining many issues of federal constitutional law, including whether the statute violates the First Amendment, the Due Process and Equal Protection Clauses of the

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state court.” (quoting *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930) (internal quotation marks omitted)). The Court has, however, recognized exceptions to this approach. *See, e.g., Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring) (explaining the need for the Court to “undertake an independent, if still deferential, analysis of state law”).

<sup>106</sup> However, the Court has at times reviewed de novo “constitutional facts,” which determine the outcome of claims of individual rights. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696–98 (1996) (determinations as to probable cause and reasonable suspicion are reviewed de novo); *Miller v. Fenton*, 474 U.S. 104, 109–11 (1985) (the voluntariness of a confession is reviewed de novo); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (in defamation cases “actual malice” is reviewed de novo); *Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6 (1964) (there is de novo review of facts in obscenity cases).

<sup>107</sup> *E.g. Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>108</sup> *E.g. Maryland v. Pringle*, 540 U.S. 366 (2003).

<sup>109</sup> *E.g. Richards v. Wisconsin*, 520 U.S. 385 (1997).

<sup>110</sup> *E.g. Colorado v. Connelly*, 479 U.S. 157 (1986).

<sup>111</sup> *E.g. Minnick v. Mississippi*, 498 U.S. 146 (1990).

<sup>112</sup> *E.g. Rhode Island v. Innis*, 446 U.S. 291 (1980).

<sup>113</sup> *See City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion) (“[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment” (citation omitted)); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

<sup>114</sup> *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (providing the balancing test under the Dormant Commerce Clause).

Fourteenth Amendment, or the Dormant Commerce Clause. The Court generally defers to the state court's understanding of a state law's purpose.<sup>115</sup> Where the Court has rejected a state court's finding of purpose, it has often expressed concern with the fairness or sufficiency of state proceedings.<sup>116</sup>

### C. Preclusion

Rules of preclusion also give state courts practical autonomy. Section 1983 provides a vehicle for seeking redress of federal constitutional violations by state governmental actors.<sup>117</sup> Plaintiffs are not required to exhaust state court remedies before bringing a § 1983 claim against state governments in federal court.<sup>118</sup> However, state court proceedings are preclusive of subsequent § 1983 claims brought in federal court.<sup>119</sup>

In *Allen v. McCurry*, the Court held that a state court ruling in a criminal case had collateral estoppel effect in a later § 1983 action.<sup>120</sup> The case involved a criminal defendant who raised a Fourth Amendment objection at trial to the admission of evidence allegedly obtained pursuant to an unlawful search; the state court rejected his argument and he was convicted; he later filed a § 1983 suit against the officers who conducted the search.<sup>121</sup>

<sup>115</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (accepting state court finding in a Fifth Amendment Takings case that a city development plan did not have the "illegitimate purpose" of "benefit[ing] a particular class of identifiable individuals" (citation omitted)); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (noting that "[w]e must, of course, accept the state court's view of the purpose of its own law" when accepting a state court's analysis that the purpose of a state constitutional provision was to circumvent federal constitutional standards for eligibility for federal office and affirming the state court's invalidation of the provision); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (accepting state trial court's findings that opening exercise in public schools was intended by the State to be a religious ceremony and therefore violated the Establishment Clause).

<sup>116</sup> See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that although the state court had found a statute requiring the posting of the Ten Commandments in public schools had an avowed secular purpose, this was insufficient under the Establishment Clause where the statute had a preeminent religious purpose); cf. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." (citation omitted)). In some cases, the Court has overturned a state appellate court's decision to reject the state trial court's finding of purpose. See, e.g., *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 341–46 (1989) (reversing state supreme court ruling that reversed the trial court's finding that tax assessors had engaged in intentional and systematic discrimination in violation of the Equal Protection Clause).

<sup>117</sup> 42 U.S.C. § 1983 (2006).

<sup>118</sup> *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500–16 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961); see also *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding that the federal Anti-Injunction Act, 28 U.S.C. § 2283 (2006), does not prevent a federal court from ordering equitable relief in cases brought under § 1983 because the latter expressly authorizes such relief).

<sup>119</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>120</sup> *Allen v. McCurry*, 449 U.S. 90, 102–04 (1980) (holding that collateral estoppel precludes a § 1983 claim based on a Fourth Amendment violation following the state court proceeding).

<sup>121</sup> *Id.* at 91–93.

The Supreme Court ruled that the state court determination that the search was lawful precluded relitigation of the issue in a federal § 1983 action.<sup>122</sup> In *Migra v. Warren City School District*, the Court further held that res judicata prevents plaintiffs in § 1983 suits from raising claims that *could have* been litigated in a prior state court action.<sup>123</sup> The case involved a fired school board employee who prevailed on a state law contract claim in state court and then brought a § 1983 claim in federal court based on the First Amendment.<sup>124</sup> The Court ruled that because the plaintiff's § 1983 claim was based on the same set of facts as her state lawsuit and therefore could have been brought at the same time in state court, res judicata barred the claim.<sup>125</sup>

A § 1983 plaintiff might elect to begin in federal court and thereby avoid the preclusive effect of a state court ruling. As *McCurry* demonstrates, however, this is not likely to be a viable option for criminal defendants, who, as a result of the speedy trial requirement, will typically receive a faster resolution of the criminal case than of any related civil action.<sup>126</sup> State civil plaintiffs, like the plaintiff in *Migra*, face a separate problem. In *Pennhurst State School & Hospital v. Halderman*, the Court held that the Eleventh Amendment prohibits federal courts from hearing pendent state law claims against state officers.<sup>127</sup> Once *Pennhurst* is combined with *Migra*, a plaintiff with both state and federal claims against a state officer might choose to split the claims, but that presents the risk that the state court will decide the state claims first, precluding the federal court from deciding the federal claims.<sup>128</sup> To be sure, there is the possibility of direct review by the U.S. Supreme Court of a state court ruling on a federal constitutional issue—but not, as in *Migra*, if the claim was never decided by a state court and a dispute including federal constitutional allegations was resolved on state law grounds.<sup>129</sup> In sum, preclusion operates in many

<sup>122</sup> *Id.* at 96–98 (explaining that the language of § 1983 evinces no congressional intent to depart from common law rules of preclusion or to abrogate the full faith and credit statute, 28 U.S.C. § 1738 (2006)). Note that the question under § 1738 is whether a state court would give preclusive effect—if not, the federal court need not do so.

<sup>123</sup> *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80–87 (1984); *see also* *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982) (holding that a state court ruling that an employee's discharge was not based on national origin or religion precludes litigation of that issue in a federal Title VII suit).

<sup>124</sup> *Migra*, 465 U.S. at 78–79.

<sup>125</sup> *Id.* at 84–85.

<sup>126</sup> *Allen v. McCurry*, 449 U.S. 90 (1980). In addition, the defendant in *McCurry* could not have raised the Fourth Amendment claim in a federal habeas petition. *See Stone v. Powell*, 428 U.S. 465, 482 (1976) (holding that where the state has provided “an opportunity for full and fair litigation” of a Fourth Amendment exclusionary claim, the claim cannot be brought in a habeas petition).

<sup>127</sup> 465 U.S. 89, 120–21 (1984).

<sup>128</sup> *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 8.10, at 592 (2007).

<sup>129</sup> It is also important to note that state proceedings only have preclusive effect if there was a “full and fair opportunity” to present the federal claim. *McCurry*, 449 U.S. at 101.

circumstances to render autonomous state courts on issues of federal constitutional law.

#### D. Criminal Cases

The nature of criminal prosecutions also gives state courts authority to resolve issues of federal constitutional law without review by the Supreme Court. State courts bear primary responsibility for applying the provisions of the Federal Constitution that protect the rights of criminal defendants. They hear far more criminal cases than the federal courts. More than twenty million criminal cases are filed in the state courts each year.<sup>130</sup> Every one of these cases implicates federal constitutional rights: among other things, the state court must ensure that there is no violation of the defendant's rights against unreasonable searches and seizures, to confront witnesses, to a speedy trial, to due process, and (where applicable) to the assistance of counsel.

In contrast, the Supreme Court's small docket means that it reviews few state criminal cases on the merits.<sup>131</sup> Yet this is only the tip of a much bigger iceberg. Most convicted criminal defendants neither appeal their convictions nor seek federal habeas review.<sup>132</sup> And, in general, the only state criminal cases subject to review by the Court are those in which a defendant has been convicted at trial and has exhausted the state appellate processes. A tiny portion of criminal cases, however, go to trial. Most criminal prosecutions are resolved through a guilty plea, often as a result of a plea bargain.<sup>133</sup> Those cases—because a condition of the plea is typically

<sup>130</sup> COURTS STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS 2007, at 21 (Robert C. LaFountain et al. eds., 2007), available at [http://www.ncsconline.org/D\\_Research/csp/2007B\\_files/EWSC-2007-v21-online.pdf](http://www.ncsconline.org/D_Research/csp/2007B_files/EWSC-2007-v21-online.pdf). By contrast, in 2009, 76,655 criminal cases were filed in federal court. See ROBERTS, *supra* note 90, at 3.

<sup>131</sup> During the Court's 2008 term, it decided seventy-nine cases (with seventy-five merits opinions following argument). SCOTUSBLOG STATPACK FINAL DATA 6.29.09, at 11 (2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack.pdf>. Fifteen of those cases were from state courts. See *id.* at 10 tbl. "Circuit Scorecard OT08." Including habeas cases, sixteen of the cases the Court decided in the 2009 Term involved review of state court criminal convictions. This figure is based on the author's analysis of the cases summarized at *id.* at 13–27.

<sup>132</sup> See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2009 JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 142 tbl.C-2 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (reporting that in 2008, 21,298 habeas petitions and 192 habeas petitions in capital cases were filed in the federal district courts); JUDICIAL COUNCIL OF CAL., 2010 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1999–2000 THROUGH 2008–2009, at 24 tbl.4, 52 tbl.8, available at <http://www.courtinfo.ca.gov/reference/documents/csr2010.pdf> (reporting that in fiscal year 2008–09, 141,136 defendants were convicted of one or more felonies in the California Superior Courts and that during the same period just 6,458 criminal appeals were filed in the California Courts of Appeal).

<sup>133</sup> See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831–32 & n.195 (2003) (reporting that more than ninety percent of prosecuted defendants plead guilty). For a detailed discussion of trial rates in the state courts, see Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUDIES 755, 755–82 (2004).

an agreement not to appeal—are not reviewed by the Supreme Court. Yet they raise issues of federal constitutional law decided by state courts. The state court may have ruled on the admissibility of physical evidence, for example, or determined which witnesses could be called and what they could be asked. Once a guilty plea is entered, those rulings are not typically subject to review. State magistrate judges, moreover, routinely apply the Federal Constitution when issuing warrants—to search for and seize evidence, arrest suspects, or tap phones—before prosecution even begins. Those rulings are also not reviewed when the case is resolved by a plea bargain or other settlement.

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

An erroneous ruling by a state court is also not likely to be corrected by the Supreme Court at the time the ruling is made. The Supreme Court generally only reviews the final judgment of a state’s highest court—there is no statutory mechanism for federal interlocutory review of state court decisions.<sup>134</sup> The Supreme Court has recognized four situations where there is sufficient finality to allow review despite additional proceedings on the merits in state court, but these are of limited availability.<sup>135</sup>

One such situation arises where the state’s highest court has ruled on a federal issue, and the only opportunity for the Supreme Court to review that ruling is before remand to the lower state courts.<sup>136</sup> In a handful of criminal

<sup>134</sup> 28 U.S.C. § 1257(a) (2006) (limiting Supreme Court review to “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987) (“[T]his Court is without jurisdiction to review an interlocutory judgment . . . .”); *see also* *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (“[A] state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.”) (internal quotation marks and citation omitted).

<sup>135</sup> *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479–80 (1975). These are, first, where there are further state proceedings but where “the federal issue is conclusive or the outcome of further proceedings preordained.” *Id.* at 479. This arises when the state court has resolved the federal issue and the remaining state issues involve mere formalities, rather than the adjudication of a factual or legal dispute. *See id.* Second, where “the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.” *Id.* at 480. In other words, further state proceedings will not render the federal issue moot. Third, “where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.” *Id.* at 481. And fourth, where, after a final ruling on the federal issue in the state courts, review is necessary to prevent the “ero[sion of] federal policy.” *Id.* at 483.

<sup>136</sup> *See id.* at 481.

cases, the Court has invoked this concern and reviewed rulings by state courts in criminal cases prior to trial or retrial. For example, *Kansas v. Marsh* involved a defendant convicted by a Kansas jury of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary.<sup>137</sup> The jury sentenced him to death for the capital murder charge and to prison terms for the other crimes.<sup>138</sup> On appeal, the Kansas Supreme Court held the Kansas death penalty statute facially unconstitutional under the Eighth Amendment because the statute required a death sentence where aggravating and mitigating circumstances were in equipoise.<sup>139</sup> The Kansas Supreme Court also found that the trial court committed reversible error by excluding circumstantial evidence of third-party guilt with respect to the capital murder and aggravated arson charges.<sup>140</sup> It therefore affirmed the conviction and sentence for aggravated burglary and premeditated murder, while reversing and remanding for new trial the convictions for capital murder and aggravated arson.<sup>141</sup> The Supreme Court granted review. Writing for the Court, Justice Thomas explained why review *prior to* the disposition of the case on remand was proper:

[A]lthough Marsh will be retried on the capital murder and aggravated arson charges, the Kansas Supreme Court's determination that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its death penalty law later in this case. If Marsh is acquitted of capital murder, double jeopardy and state law will preclude the State from appealing. If he is reconvicted, the State will be prohibited under the Kansas Supreme Court's decision from seeking the death penalty, and there would be no opportunity for the State to seek further review of that prohibition.<sup>142</sup>

According to Justice Thomas, Kansas law provided no means for the state to seek review of the invalidation of the death penalty statute.<sup>143</sup> *Marsh*, then, presented the unusual confluence of the state's highest court vacating the sentence while ordering a new trial on other grounds and a state law that

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<sup>137</sup> 548 U.S. 163, 165–66 (2006).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 167.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 168.

<sup>143</sup> *See id.* at 168. Whether Justice Thomas is correct is not entirely clear. On remand, the jury could find the defendant guilty of capital murder. The prosecutor could ask for the death penalty—which the sentencing court would deny in accordance with the state court ruling. The prosecutor could then seek review of that denial. *See Johnson v. California*, 541 U.S. 428, 430–31 (2004) (per curiam) (dismissing for lack of jurisdiction a case in which the Supreme Court of California reversed the Court of Appeals decision reversing the petitioner's conviction on *Batson* grounds, because if the appellate court affirmed the conviction, "petitioner could once more seek review of his *Batson* claim in the Supreme Court of California—albeit unsuccessfully—and then seek certiorari on that claim from this Court").

limited the ability of the prosecutor to appeal.<sup>144</sup> In a small number of other criminal cases, many with unusual procedural histories, the Court has reviewed state court rulings on federal issues prior to the end of trial.<sup>145</sup> However, these cases are sufficiently uncommon that this route to review, one that some commentators find “questionable,”<sup>146</sup> does not often present itself.

In sum, we imagine that the Supreme Court decides the scope of the rights the Constitution gives criminal defendants and that state courts implement those decisions—subject to review if they stray from what the Court has required. Yet many state court rulings on federal constitutional issues in criminal cases are not subject to any kind of review. State courts often operate beyond the Court’s purview.

### *E. Independent and Adequate State Law Grounds*

The Supreme Court does not review the judgment of a state court which rests upon both federal and state law grounds if the latter are independent of federal law and adequate to support the judgment.<sup>147</sup> The doc-

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<sup>144</sup> Cf. *Florida v. Thomas*, 532 U.S. 774, 780–81 (2001) (dismissing writ of certiorari for lack of jurisdiction where state law allows the state to appeal a ruling by the trial court excluding evidence so long as the appeal is made prior to trial).

<sup>145</sup> See, e.g., *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam) (reversing pretrial ruling of the Michigan Court of Appeals affirming trial court’s suppression of evidence obtained after exigency entry into home on Fourth Amendment grounds); *Brigham City v. Stuart*, 547 U.S. 398, 405–07 (2006) (holding that regardless of their subjective motives, police officers were justified under the Fourth Amendment in entering a home without a warrant under exigent circumstances and reversing pretrial ruling of the Utah Supreme Court suppressing evidence found in home); *Pennsylvania v. Ritchie*, 480 U.S. 39, 49 (1987) (reviewing a state supreme court holding that the Sixth Amendment gave the defendant a right to examine confidential records concerning the victim because “unless we review that decision, the harm that the Commonwealth seeks to avoid—the disclosure of the entire confidential file—will occur regardless of the result on remand”); *New York v. Quarles*, 467 U.S. 649, 649 n.1 (1984) (holding that a pre-trial suppression ruling was a final judgment because “should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal” (citation omitted)); *Florida v. Meyers*, 466 U.S. 380, 381 n.\* (1984) (per curiam) (holding that the state appellate court’s decision ordering a new trial because of a Fourth Amendment violation was a final judgment because “if the State prevails at the trial, the issue will be mooted; and if the State loses, governing state law will prohibit it from presenting the federal claim for review”) (citations omitted); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983) (holding that the Court has jurisdiction to review a state court pretrial ruling on a Fifth Amendment issue because “if the state ultimately prevails at trial, the federal issue will be mooted; and if the state loses at trial, governing state law prevents it from again presenting the federal claim for review”) (citations omitted); *California v. Stewart*, 384 U.S. 436, 498, n.71 (1966) (holding that there was a final judgment because after state supreme court ordered a new trial, “[i]n the event respondent was successful in obtaining an acquittal on retrial . . . under California law the State would have no appeal”).

<sup>146</sup> See, e.g., CHEMERINSKY, *supra* note 128, § 10.4, at 693.

<sup>147</sup> See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. 590, 635 (1874).

trine applies to both substantive and procedural state law grounds.<sup>148</sup> We will explore the doctrine in the criminal context in detail below.<sup>149</sup> For now, it suffices to recognize that the doctrine permits state courts to rule on the meaning of the Federal Constitution without being subject to review as long as the judgment has an independent and adequate state law basis. Although the doctrine does not apply if the state court appears to be manufacturing a procedural device to prevent review,<sup>150</sup> in some instances, state courts have successfully deployed a state law ground *after* the Supreme Court has reviewed a decision based on federal law.<sup>151</sup>

#### F. *Below the Radar*

Finally, many state court decisions in cases involving federal constitutional issues do not attract sufficient attention to subject them to correction. State courts can obscure rulings in elaborate factual determinations, by finding mixed questions of law and fact, or by providing multiple reasons for the ultimate disposition of a case. Many state court decisions are not published or otherwise reported, and state appellate court rulings may take the form of summary orders that render scrutiny of the actual basis for the outcome difficult.<sup>152</sup> Even if the state court rules incorrectly on a federal constitutional issue, the error might be deemed harmless and therefore

<sup>148</sup> *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *See, e.g., Parker v. North Carolina*, 397 U.S. 790, 798 (1970) (holding that a state law rule deeming a federal constitutional challenge to the composition of the grand jury waived unless raised prior to the entry of a guilty plea was an independent and adequate state law ground to prevent the Court's consideration of the issue). Not all procedural rules are sufficiently adequate to fall within the doctrine. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 376 (2002) (holding that a state law requirement that motions for continuance be in writing and accompanied by an affidavit was not adequate to deprive the Court of jurisdiction and explaining that in "exceptional cases," the "exorbitant application of a generally sound rule renders the state ground inadequate"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." (citation omitted)); *Reece v. Georgia*, 350 U.S. 85, 89–90 (1955) (holding that a state law ground is not adequate if it denies due process).

<sup>149</sup> *See infra* Part III.B.ii.

<sup>150</sup> *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 233–34 (1969) (holding that a discretionary state law procedural requirement does not preclude review); *Henry v. Mississippi*, 379 U.S. 443, 447–48 (1965) (rejecting state procedural rule where the rule does not further a legitimate state interest); *Alabama ex rel. Flowers*, 377 U.S. at 301 (refusing to allow the state court to assert a novel procedural bar); *Ward v. Bd. of Comm'rs of Love County, Oklahoma*, 253 U.S. 17, 24 (1920) (finding state law basis for a decision inadequate where it was "without any fair or substantial support" in the record (citation omitted)).

<sup>151</sup> *See, e.g., Sitz v. Dep't of State Police*, 506 N.W.2d 209, 224–25 (Mich. 1993) (following the Supreme Court's decision in *Michigan v. Sitz*, 496 U.S. 444 (1990), that a sobriety checkpoint does not constitute a violation of the Fourth Amendment but holding that the checkpoint violates the state constitution).

<sup>152</sup> *See* COURTS STATISTICS PROJECT, *supra* note 130, at 67.

overlooked. State courts have authority when their decisions lie below the radar.

### G. Summary

In sum, six circumstances give state courts practical autonomy to decide federal constitutional issues: (1) constitutional decisions depend upon underlying state law; (2) state courts determine factual questions that make up important parts of constitutional rulings; (3) rules of preclusion prevent federal courts from revisiting state court decisions; (4) state courts play a larger role in criminal cases than do the federal courts; (5) an independent and adequate state law ground for a decision shields the state court's ruling on a federal issue from review; (6) some state court decisions simply fly below the radar.

## III. TAKINGS CLAIMS AND THE RIGHTS OF CRIMINAL DEFENDANTS

Statutory and doctrinal rules give state courts special autonomy in two areas of federal constitutional law: the Fifth Amendment Takings Clause and the protections afforded criminal defendants under the Fourth, Fifth, Sixth, and Eighth Amendments. This Part examines the autonomy of state courts in these areas.

### A. Takings

State courts today enjoy vast authority in cases involving the Takings Clause of the Fifth Amendment. The Supreme Court has recognized a unique relationship between federal constitutional law and state law in the takings context. Additionally, an unusual mix of ripeness and preclusion doctrines prevents most takings claims against state government agencies from being heard in any federal court.

1. *Background State Property Laws.*—A plaintiff's claim that a state has violated the Federal Constitution by taking property without just compensation depends upon the plaintiff having a right recognized under state law—the law that defines and protects property interests.<sup>153</sup> “The baseline against which any regulation is measured is . . . derived from state law: if background state law did not recognize or create property in the first in-

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<sup>153</sup> See, e.g., *Philips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (holding that interest earned on client trust funds held by lawyers in IOLTA accounts is the property of the client for purposes of the Takings Clause: “Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”) (citation omitted). See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (discussing recent constitutional jurisprudence on the Takings Clause).

stance, then a subsequent state action cannot take property.<sup>154</sup> Adjudication of takings claims against state government requires federal courts, including the Supreme Court, to look to state property law as construed by state courts.<sup>155</sup> Moreover, landowners bringing takings claims against state governments typically invoke the full array of tools state courts have developed to constrain state and local governments.<sup>156</sup> As a result, when reviewing Takings Clause claims, the Supreme Court has tended to defer to what a state court has done. As Professor Stewart Sterk notes, the Court has never invalidated a state or local government regulation under the *Penn Central* balancing test.<sup>157</sup> The effect, therefore, of the *Penn Central* jurisprudence “has been to delegate resolution of takings claims to the state supreme courts,” which are, thereby, free to “develop more stringent takings rules than those articulated by the Court.”<sup>158</sup>

2. *Ripeness and Williamson County*.—The emergence of state court autonomy in takings cases begins with the Supreme Court’s 1985 *Williamson County* decision.<sup>159</sup> The case involved a landowner who brought suit in federal court under § 1983 against a local government that took his property by applying local land use regulations.<sup>160</sup> The Sixth Circuit upheld a jury award in his favor,<sup>161</sup> but the Supreme Court reversed,<sup>162</sup> holding that his claim was not ripe for two reasons. First, because the landowner had not sought a variance that might have been available under state law, the local government had not actually “reached a final decision regarding the application of the regulations to the property at issue.”<sup>163</sup> Requiring a final decision, the Court explained, was essential to determining the economic impact of the challenged regulation.<sup>164</sup> In addition, the claim was not ripe because the landowner had not made use of judicial procedures available in state

<sup>154</sup> Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 288 (2006) (citation omitted).

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 291 (discussing how state courts can invalidate land use regulations based on inadequate statutory authority, state preemption principles, and state constitutional provisions and can review land use decisions to determine whether they are arbitrary, unreasonable, or not supported by substantial evidence).

<sup>157</sup> *Id.* at 287. The *Penn Central* decision identified “several factors that have particular significance” in the outcome of a regulatory takings challenge. These factors include “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and the “character of the governmental action.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (internal citation omitted).

<sup>158</sup> Sterk, *supra* note 154, at 287.

<sup>159</sup> *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

<sup>160</sup> *Id.* at 182.

<sup>161</sup> *Id.* at 183–84.

<sup>162</sup> *Id.* at 200.

<sup>163</sup> *Id.* at 186.

<sup>164</sup> *Id.* at 191.

court, in this case an inverse condemnation action, to obtain compensation.<sup>165</sup> Because the Takings Clause prohibits only uncompensated takings, until the landowner had actually been denied compensation he could not claim a Takings Clause violation.<sup>166</sup> This was true even though other § 1983 claims do not require exhaustion of state court remedies. Takings claims, the Court held, require the plaintiff to have made use of and been denied state avenues for relief, including those available in state court.<sup>167</sup>

3. *Preclusion and San Remo*.—Decided on ripeness grounds, *Williamson County* did not deal with an obvious additional problem. If the landowner *loses* in state court, will the claim be precluded in federal court under the federal full faith and credit statute, which requires federal courts to give preclusive effect to a state court judgment that would have preclusive effect under state law?<sup>168</sup> Seeking to head off preclusion after *Williamson County*, property owners invoked the concept of “England reservations”<sup>169</sup> to preserve their rights to litigate their claims in federal court. The Supreme Court, however, held in *San Remo Hotel v. City and County of San Francisco*<sup>170</sup> that a state court ruling precluded litigation of a takings claim in federal court.<sup>171</sup>

To appreciate the significance of *San Remo*, it is helpful to understand its procedural history. The owners of the San Remo Hotel filed a lawsuit in federal district court, asserting, among other claims, facial and as-applied Takings Clause challenges to a San Francisco city ordinance requiring payment of fees for the conversion of the hotel’s residential units to tourist units.<sup>172</sup> The district court dismissed the facial challenge as untimely under the relevant statute of limitations.<sup>173</sup> The court also dismissed the as-applied claim as unripe under *Williamson County* because the plaintiffs had failed to pursue an inverse condemnation action in state court and therefore had

<sup>165</sup> *Id.* at 194–95.

<sup>166</sup> *Id.* at 195.

<sup>167</sup> *Id.* at 192 (“The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.” (citation omitted)).

<sup>168</sup> The full faith and credit statute provides that “judicial proceedings . . . [of any court of any state] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State.” 28 U.S.C. § 1738 (2006).

<sup>169</sup> See *England v. Louisiana State Bd. of Med. Exam’rs*, 375 U.S. 411, 421–22 (1964) (holding, in a case involving a Fourteenth Amendment claim against a state board of medical examiners, that a plaintiff who brings a federal claim in federal court and, by application of abstention doctrine, who is required first to litigate state law issues in state court, may reserve the right to return to federal court on the federal issues after the state court’s decision).

<sup>170</sup> 545 U.S. 323 (2005).

<sup>171</sup> *Id.* at 337–38.

<sup>172</sup> *Id.* at 330.

<sup>173</sup> *Id.*

not yet been denied just compensation.<sup>174</sup> On appeal, the plaintiffs invoked *Pullman* abstention,<sup>175</sup> asking the Ninth Circuit to abstain from deciding their federal claims on the ground that a return to state court could moot the federal questions in the case.<sup>176</sup> The Ninth Circuit agreed to abstain on the facial challenge, which, the court reasoned, was ripe as soon as the ordinance was enacted.<sup>177</sup> However, the circuit court affirmed the district court's dismissal of the plaintiffs' as-applied claim as unripe.<sup>178</sup> The court noted that in order to retain their right to return later to federal court, the hotel owners should "make an appropriate reservation in state court" under *England*.<sup>179</sup>

Proceeding in state court, the hotel owners reserved their right to return to federal court.<sup>180</sup> In the state court litigation, however, they advanced claims that extended beyond the claims on which the federal court had abstained and framed their state constitutional claim in terms of the U.S. Supreme Court's federal takings jurisprudence.<sup>181</sup> When the case eventually reached the California Supreme Court, it held that there had been no violation of the state constitution and upheld the ordinance both on its face and as applied to the hotel owners.<sup>182</sup> The California Supreme Court noted that the hotel owners had reserved their federal causes of action and had sought no relief in state court for any violation of the Federal Constitution.<sup>183</sup> At the same time, the California Supreme Court elected to analyze the state constitution takings claim "under the relevant decisions of both this court and the United States Supreme Court"<sup>184</sup> because it had in prior decisions construed the federal and state takings clauses congruently.<sup>185</sup>

Following this ruling, the hotel owners reactivated the complaint they had filed prior to seeking *Pullman* abstention and returned to federal district court.<sup>186</sup> The district court now held that the facial claim was barred by the statute of limitations and by rules of issue preclusion.<sup>187</sup> Invoking the feder-

<sup>174</sup> See *id.*

<sup>175</sup> See *R.R. Comm'n of Texas v. Pullman*, 312 U.S. 496, 498–500 (1941) (holding that federal courts may abstain from ruling on a federal constitutional issue when the state's highest court has yet to give the challenged state statute a definitive interpretation, and that interpretation may resolve the constitutional issue).

<sup>176</sup> 545 U.S. at 330.

<sup>177</sup> *Id.* at 330–31.

<sup>178</sup> *Id.* at 331.

<sup>179</sup> *Id.* (quoting *Sam Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1106 n.7 (9th Cir. 1998)) (internal quotation marks omitted).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 333–34.

<sup>183</sup> *Id.* at 332.

<sup>184</sup> *Id.* at 332–33.

<sup>185</sup> *Id.* at 332.

<sup>186</sup> *Id.* at 334–35.

<sup>187</sup> *Id.*

al full faith and credit statute, the court stated that “[b]ecause California courts had interpreted . . . the state takings law coextensively with federal law,” under California preclusion standards, the plaintiffs were barred from litigating the claim anew in federal court.<sup>188</sup> The claim was therefore dismissed.<sup>189</sup> The Ninth Circuit agreed that California takings law was coextensive with federal takings law and that the claim was precluded.<sup>190</sup>

The Supreme Court granted review to decide whether to “create an exception to the full faith and credit statute . . . in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”<sup>191</sup> The hotel owners argued that, in light of the ripeness requirement of *Williamson County*, in order to permit federal takings claims to be decided on the merits in federal court, federal courts should apply an exception to the full faith and credit statute and review de novo a federal takings claim reserved under *England*, without regard to the decision of the state court.<sup>192</sup>

In an opinion by Justice Stevens affirming the Ninth Circuit’s decision, the Court rejected the hotel owners’ argument.<sup>193</sup> The Court held that federal courts may not ignore the full faith and credit statute in order to give takings plaintiffs a federal forum.<sup>194</sup> An exception to the statute, the Court stated, will only be recognized if created by Congress; here Congress had expressed no such intent.<sup>195</sup> Rejecting the plaintiffs’ assumption that they had a right to have their federal claims resolved by a federal court, Justice Stevens noted that “issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court.”<sup>196</sup> This was true even if the plaintiff was required to proceed in state court by operation of a statute or rules of abstention.<sup>197</sup> Whether or not the plaintiff had access to a federal forum, the only “relevant question” was “whether the state court actually decided an issue of fact or law that was necessary to its judgment.”<sup>198</sup> As to *England*, its thrust was that reservation was appropriate where the antecedent state law issue was “distinct from the reserved federal issue.”<sup>199</sup> The purpose of *Pullman* abstention was not to allow state courts “to adjudicate an issue that is func-

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<sup>188</sup> *Id.* at 335.

<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 337.

<sup>192</sup> *Id.* at 338.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 344–45.

<sup>196</sup> *Id.* at 342.

<sup>197</sup> *See id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* “‘Typical’ *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner.” *Id.* at 339.

tionally identical to the federal question,” but to allow for a state law ruling making the federal issue moot.<sup>200</sup>

In addition, the Court explained, *England* reservations are conditioned upon plaintiffs “tak[ing] no action to broaden the scope of the state court’s review beyond decision of the antecedent state-law issue.”<sup>201</sup> In this case, the hotel owners had advanced broad takings arguments in state court. Because the Ninth Circuit invoked *Pullman* abstention after determining that a ripe federal question existed as to the hotel owners’ facial takings challenge, they were entitled to insulate that issue from preclusive effect while they returned to state court.<sup>202</sup> However, by presenting in the state court action both facial and as-applied takings challenges, the hotel owners had asked the state court to resolve the very federal issue they had sought to reserve.<sup>203</sup> *England* reservations are not valid under those circumstances.<sup>204</sup> Moreover, the hotel owners were not required to ripen their facial claim in state court and could have presented it directly in federal court.<sup>205</sup> The as-applied claims were unripe under *Williamson County* and therefore properly dismissed by the district court. Because those claims were never properly before the district court, the hotel owners could not expect to be able to relitigate them in full if the claims were advanced in the state court proceeding.<sup>206</sup>

*San Remo*, combined with *Williamson County*, means that state court adjudication of a federal takings claim can simultaneously ripen and bar the claim from litigation in federal court.<sup>207</sup> Justice Stevens noted that although this result might seem “unfair,” it is what statutory law requires.<sup>208</sup> Moreover, he reasoned, there is an upside: not only are state courts “fully competent to adjudicate constitutional challenges to local land-use decisions,” but they “undoubtedly have more experience than federal courts do in resolving

<sup>200</sup> *Id.* at 339.

<sup>201</sup> *Id.* at 340.

<sup>202</sup> *Id.* at 340–341.

<sup>203</sup> *Id.* at 341.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 340.

<sup>206</sup> *Id.* at 341.

<sup>207</sup> *Id.* at 351 (Rehnquist, C.J., concurring) (“*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment’s just compensation guarantee.”). As Professor Sterk notes, the *San Remo* majority did not distinguish issue preclusion, the basis on which the Ninth Circuit had ruled, from claim preclusion. *See* Sterk, *supra* note 154, at 254, 272–73. Because the issues resolved by a state court might differ from the issues in a federal takings claim, issue preclusion alone might not bar a future takings claim from being brought in federal court. *See id.* at 254, 273–76. However, Professor Sterk reasons, the Court’s broad construction of claim preclusion principles and deference to state preclusion rules in accordance with § 1738 will inevitably close any gaps left open by issue preclusion. *See id.* at 254, 271–72, 276–84.

<sup>208</sup> *See* 545 U.S. at 347–48.

the complex factual, technical, and legal questions related to zoning and land-use regulations.<sup>209</sup>

In a separate concurring opinion in *San Remo*, Chief Justice Rehnquist, joined by three other Justices, wrote that in a future case, the Court should reconsider the rule of *Williamson County* that a plaintiff asserting a Fifth Amendment takings claim must first seek compensation in state court.<sup>210</sup> In particular, Chief Justice Rehnquist observed, the fact that state courts were competent to enforce federal rights did not “explain why federal takings claims in particular should be singled out to be confined in state court.”<sup>211</sup> So far, however, the Court has declined to hear petitions seeking reversal of *Williamson County*.

4. *Facial Challenges and Lingle*.—The *San Remo* Court emphasized one limit on the ripening–preclusion framework that flowed from *Williamson County*. In accordance with *Yee v. City of Escondido*,<sup>212</sup> the *San Remo* plaintiffs were not required to ripen their facial claim that the ordinance was invalid for failure to substantially advance a legitimate state interest.<sup>213</sup> Since a facial challenge does not depend on the extent to which a property owner has been deprived of the economic use of the property or has been compensated,<sup>214</sup> a landowner can bring that claim directly in federal court.<sup>215</sup> The *San Remo* plaintiffs could also have reserved their facial claim while they pursued the as-applied claim; what they could not do was seek a state court ruling on the claim they purported to reserve.<sup>216</sup> Moreover, the *San Remo* Court noted, state courts deciding (by application of *Williamson County*) whether a plaintiff is entitled to compensation under state law could also properly decide any claim that failure to provide compensation would be an as-applied federal takings violation.<sup>217</sup>

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<sup>209</sup> *Id.* at 347.

<sup>210</sup> *See id.* at 348, 352 (Rehnquist, C.J., concurring).

<sup>211</sup> *Id.* at 351. Moreover, Chief Justice Rehnquist observed, to the extent state courts themselves apply the *Williamson County* requirement, refusing to hear a federal takings claim until the property owner is denied compensation through all available state court procedures, litigants might be prevented from asserting the federal claim even in state court. *See id.* at 351 n.2 (collecting examples of state court decisions).

<sup>212</sup> 503 U.S. 519, 533–34 (1992) (explaining that, where petitioners have not sought and been denied compensation in state proceedings, their claim that an ordinance, as applied to their property, effects a regulatory taking is not ripe, but that a facial challenge to the ordinance, in which the petitioners claim that the ordinance does not substantially advance a legitimate state interest, is ripe because it does not depend on the extent to which they have been deprived of the economic use of their particular property or the extent to which they were compensated).

<sup>213</sup> 545 U.S. at 345–46.

<sup>214</sup> *See* 503 U.S. at 534.

<sup>215</sup> 545 U.S. at 345–46.

<sup>216</sup> *Id.* at 346.

<sup>217</sup> *Id.*

However, *San Remo*'s suggestion that property owners remained free to proceed immediately in federal court with their facial challenge soon ran into a different impediment. In *Lingle v. Chevron U.S.A., Inc.*, the Court held that the claim that a regulation failed to substantially advance a legitimate state interest did not make out a cognizable claim under the Takings Clause.<sup>218</sup> The Takings Clause, *Lingle* held, did not allow courts to review the need for state land-use regulations or the effectiveness of the regulatory scheme.<sup>219</sup> Such a claim, if brought in federal court, must be dismissed.<sup>220</sup>

Combined, then, the cases appear to foreclose takings claims against state government from being litigated in federal court. *Williamson County* was a regulatory takings case in which a showing of economic impact was essential.<sup>221</sup> But federal courts have applied *Williamson County*'s second ripeness requirement to physical takings cases as well, which do not require a plaintiff to show economic impact.<sup>222</sup> They have required that the property owner seek and be denied compensation in state proceedings.<sup>223</sup> After *Lingle*, moreover, it is unclear what kind of a claim would be cognizable as a facial takings claim and exempt from the ripeness requirement. The cases reflect the understanding that because state courts "routinely decide cases involving interpretation of state and local land use laws" and "oversee the administrations of these systems," they are better positioned than federal courts to review land use regulations.<sup>224</sup>

<sup>218</sup> 544 U.S. 528, 542–45 (2005).

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* Justice Kennedy's concurrence noted that "today's decision does not foreclose the possibility that a regulation might be so arbitrary as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry." *Id.* at 548–49 (Kennedy, J., concurring) (citation omitted).

<sup>221</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (identifying the economic impact on the claimant as the first factor in determining whether a regulatory taking has occurred).

<sup>222</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

<sup>223</sup> See, e.g., *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91–92 (1st Cir. 2003).

<sup>224</sup> J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 480 (2007). Land use regulations can also be challenged as violations of substantive due process under the Fourteenth Amendment. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (rejecting a facial challenge to zoning but explaining that particular applications of the zoning power that are "arbitrary and unreasonable" would violate due process). Here, too, there are forces that push such claims to state court. *Lingle* makes clear that in considering due process claims involving land use, courts must "defer[] to legislative judgments about the need for, and likely effectiveness of, regulatory actions." *Lingle*, 544 U.S. at 545; see also *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (rejecting a due process challenge to city's refusal to issue building permits where the plaintiff had not shown that the city's action was "egregious or arbitrary government conduct"). Accordingly, federal courts have tended to resist due process challenges to land use regulations. See, e.g., *United Artists Theater Circuit v. Twp. of Warrington*, 316 F.3d 392, 396 (3d Cir. 2003) (requiring plaintiff to show decision by regulatory officials "shock[s] the conscience"); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988) (Posner, J.) ("No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions."). Some federal courts have ruled that while land is clearly property protected under the Due Process

In sum, claims that state government has violated the Takings Clause of the Fifth Amendment are resolved by state judges. Doctrinal rules developed by the Supreme Court combined with deference to state courts on underlying state law property issues push Takings Claims out of federal and into state court.

### B. Rights of Criminal Defendants

Most criminal cases are prosecuted in state courts. Though every state court criminal prosecution raises issues of federal constitutional law, the Supreme Court reviews very few state criminal convictions. The lower federal courts, hearing habeas petitions, are potentially an important source of federal constitutional decisions.<sup>225</sup> However, Congress and the Court have increased procedural obstacles to federal habeas review, so that state petitioners face increased impediments to any kind of federal review. As a practical matter, state courts have the last word in most criminal cases.<sup>226</sup>

1. *The Limits of Habeas Review.*—The federal habeas statute, 28 U.S.C. § 2254, permits a defendant convicted in state court and held in state custody to challenge the conviction or sentence in federal court on federal constitutional grounds.<sup>227</sup> The Supreme Court has held that, because of the special purpose of federal habeas proceedings to protect federal constitutional rights, rules of collateral estoppel and res judicata do not prevent a habeas petitioner from raising a federal constitutional claim that has been ruled on in state court.<sup>228</sup> However, Supreme Court decisions and Title I of

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Clause, there is no property interest in being free from land use regulatory schemes. *See, e.g.,* *Minnetonka Moorings, Inc. v. City of Shorewood*, 367 F. Supp. 2d 1251, 1257 (D. Minn. 2005) (“[A] valid property interest exists [only] when a municipality has no discretion in the grant or denial of a permit for proposed land use.”). State courts, on the other hand, have been more willing to rely on due process to limit land use regulatory powers. *See* *Byrne, supra*, at 480–83 (arguing that state court review under due process serves as an essential check on local regulatory powers, and that because property law and local government and land use law are state law, “state courts are far better locations to conduct this judicial oversight than federal courts”). State courts have developed a variety of tools for that purpose. *See id.* at 486–91 (reporting that state courts have developed sophisticated tools to deal with outcomes that suggest the political process has not proceeded fairly, including doctrines requiring careful judicial scrutiny of spot zoning (amending a zoning classification of a single property at the owner’s behest); assessments of zoning laws that impose costs on neighboring jurisdictions; heightened review of exclusionary zoning practices; and other mechanisms to account for the impact of local decisions on a region or a state as a whole).

<sup>225</sup> Federal courts have not always played this role. They had no general authority to review habeas petitions from state prisoners until 1867. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (giving the federal courts “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States”).

<sup>226</sup> Although many observers believe state inmates bring too many habeas petitions to federal district court, the more than twenty million state criminal cases filed each year generate only around 22,000 federal habeas petitions annually. *See supra* notes 130–132 and accompanying text.

<sup>227</sup> 28 U.S.C. § 2254(a) (2006). 28 U.S.C. § 2255 provides an analogous right to federal prisoners.

<sup>228</sup> *Brown v. Allen*, 344 U.S. 443, 458 (1953).

the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have placed numerous restrictions on federal habeas review of state court convictions. As a result, state prisoners may be denied federal review of their constitutional claims.

An initial restriction is that state prisoners are given a limited time period in which to ask a federal court to hear their claims. Under AEDPA, habeas petitions must ordinarily be filed within one year of the date the conviction becomes final.<sup>229</sup> Petitioners seeking to appeal a district court's denial of a habeas petition must ordinarily file the notice of appeal within thirty days.<sup>230</sup> A failure to comply with a filing deadline will ordinarily lead to dismissal.<sup>231</sup>

State prisoners seeking federal habeas review must also have exhausted all available state court remedies with respect to every claim raised in the federal petition.<sup>232</sup> A petitioner has not exhausted state remedies if he has "the right under the law of the State to raise, by any available procedure, the question presented."<sup>233</sup> Exhaustion requires the state prisoner to have "fairly present[ed]" the legal and factual bases of all claims to the state court.<sup>234</sup> The claims must be presented as a federal constitutional claim; framing the claim as a state constitutional claim is inadequate.<sup>235</sup> The state prisoner must raise the claim on any appeal as of right to the intermediate court of the state, and on any available discretionary appeal to the state's highest court.<sup>236</sup> A federal district court is entitled to deny a mixed petition—a petition containing exhausted and unexhausted claims—on the merits,<sup>237</sup> though the ordinary procedure is to dismiss a mixed petition without prejudice.<sup>238</sup> Even so, mixed petitions present a further trap for the unwary petitioner: unless the district court holds a mixed petition in abeyance in order to per-

<sup>229</sup> 28 U.S.C. §§ 2244(d)(1), 2255 (2006); *see* *Clay v. United States*, 537 U.S. 522, 524 (2003). The period is tolled while an appeal or habeas application filed in state court is pending. 28 U.S.C. § 2244(d)(2). The Court has also held that the statutory period is subject to equitable tolling. *See* *Holland v. Florida*, 130 S. Ct. 2549 (2010).

<sup>230</sup> 28 U.S.C. § 2107(a) (2006); FED. R. APP. P. 4(a)(1)(A). A district court can, in some circumstances, reopen the filing period for fourteen days. 28 U.S.C. § 2107(c) (2006); FED. R. APP. P. 4(a)(6).

<sup>231</sup> *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (holding that appellate court lacked jurisdiction where district court, in granting habeas petitioner's application to reopen, gave petitioner seventeen days to file a notice of appeal and the petitioner filed the notice within sixteen days, because the appeal was filed beyond the fourteen days provided for under the statute and implementing rule).

<sup>232</sup> 28 U.S.C. § 2254(b)(1)(C), (c).

<sup>233</sup> *Id.* § 2254(c). The state can waive the exhaustion requirement. *Id.* § 2254(b)(3).

<sup>234</sup> *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

<sup>235</sup> *Id.* at 32–33.

<sup>236</sup> *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Castille v. Peoples*, 489 U.S. 346, 350–51 (1989).

<sup>237</sup> *See* 28 U.S.C. § 2254(b)(2).

<sup>238</sup> *See id.* § 2254(b)(3); *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982).

mit exhaustion of the unexhausted claims,<sup>239</sup> the statute of limitations may have expired by the time the petitioner returns to federal court.<sup>240</sup> Under *Wainwright v. Sykes*, a habeas petitioner must also ordinarily have complied with state procedural rules requiring that a claim be asserted in state court, normally by an objection at trial.<sup>241</sup> If, under state law, failure to raise the claim resulted in forfeiture of the claim, the petitioner cannot assert the claim in federal court except in two circumstances: if he can show cause and prejudice for the procedural default<sup>242</sup> or show that, but for the error alleged in the claim, he would not have been convicted.<sup>243</sup>

AEDPA, moreover, sharply curtails the possibility of multiple habeas petitions. District courts are required to dismiss any claim presented in a second or successive habeas corpus application that was presented in a prior federal petition.<sup>244</sup> Claims not raised in a prior petition are allowed only where the petition either relies on a previously unavailable rule of constitutional law made retroactive by the Supreme Court to cases on collateral review or raises a claim based on newly discovered evidence establishing that but for the constitutional error, the defendant would have been acquitted.<sup>245</sup>

Assuming the state prisoner complies with all of these rules and gets the petition to federal court, the federal court does not exercise plenary review of the state court conviction. Instead, AEDPA requires it to defer in important respects to the state court's decisions, both on the law and the facts. Habeas relief may not be granted for mere error. Instead, with respect to any claim adjudicated by the state court on the merits, relief must be denied unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

<sup>239</sup> See *Rhines v. Weber*, 544 U.S. 269, 277 (2005) ("Stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court.").

<sup>240</sup> See *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

<sup>241</sup> 433 U.S. 72, 85–90 (1977).

<sup>242</sup> *Id.* at 90–91; see also *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (holding that negligence by an attorney is cause for a procedural default only if it rises to the level of ineffective assistance of counsel).

<sup>243</sup> See *United States v. Frady*, 456 U.S. 152, 168–73 (1982) (discussing requirements of actual prejudice). The Supreme Court has held that a petitioner who defaulted in state court can proceed on the federal petition if forfeiture would result in a miscarriage of justice because of the petitioner's "actual innocence." *Schlup v. Delo*, 513 U.S. 298, 320–24 (1995). Actual innocence exists where the petitioner can demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," and this showing may be based on "relevant evidence that was either excluded or unavailable at trial." *Id.* at 327–28. The exception also exists if in death penalty cases, the petitioner can demonstrate "by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under . . . state law" (so that the defendant is innocent of death). *Sawyer v. Whitney*, 505 U.S. 333, 336 (1992).

<sup>244</sup> 28 U.S.C. § 2244(b)(1) (2006); see also *Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (holding that a prisoner who raises a claim prematurely in an original petition may raise the claim again in a subsequent petition when it becomes ripe without running afoul of AEDPA's ban on successive petitions).

<sup>245</sup> 28 U.S.C. § 2244(b)(2).

by the Supreme Court” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>246</sup> In other words, the habeas statute permits state courts to apply Supreme Court precedent incorrectly—just not in a way that is unreasonable. Further, habeas petitioners do not normally benefit from the Court’s announcement of new constitutional rules after the conviction became final.<sup>247</sup> Although the Court has a broad definition of what constitutes a “new rule,”<sup>248</sup> it allows for retroactive application of a new rule in just two instances: (1) where a new substantive rule places certain kinds of private conduct beyond the power of the government to proscribe; and (2) where a new procedural rule defines procedures “implicit in the concept of ordered liberty.”<sup>249</sup> A new rule satisfies the second exception if it is a “watershed” rule that implicates fundamental fairness and the accuracy of the criminal proceeding,<sup>250</sup> such that without the rule “the likelihood of an accurate conviction is seriously diminished.”<sup>251</sup> The only new rule the Court has recognized to fall within this exception is the right to trial counsel established by *Gideon v. Wainwright*.<sup>252</sup> The Court has also stated that it is unlikely there are any new watershed rules yet to be announced.<sup>253</sup>

Further, a state court’s factual findings are “presumed correct” and the petitioner has the burden to rebut this presumption by clear and convincing evidence.<sup>254</sup> AEDPA also sharply limits a petitioner’s ability to present evidence in the habeas petition that was not presented to the state court.<sup>255</sup> In order to appeal a district court’s denial of a habeas petition, in addition to complying with the thirty-day notice rule governing federal appeals,<sup>256</sup> the

<sup>246</sup> *Id.* § 2254(d)(1)–(2); see *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (construing this provision). Note also that the Supreme Court has rejected the idea that AEDPA supersedes *Teague v. Lane*. Instead, the Court has made clear, AEDPA and *Teague* are separate requirements and a court must examine both. See *Horn v. Banks*, 536 U.S. 266, 270–72 (2002) (per curiam).

<sup>247</sup> *Schiro v. Summerlin*, 542 U.S. 348, 351 (2004). Cases subject to direct review by the Supreme Court, however, are governed by new rules. *Id.*

<sup>248</sup> The Court has explained that “a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government,” or, in other words, “if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301 (1989).

<sup>249</sup> *Id.* at 307–10.

<sup>250</sup> *Id.* at 311.

<sup>251</sup> *Id.* at 313.

<sup>252</sup> 372 U.S. 335 (1963); see *Beard v. Banks*, 542 U.S. 406, 417 (2004) (identifying *Gideon* as a watershed rule).

<sup>253</sup> *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004).

<sup>254</sup> 28 U.S.C. § 2254(e)(1) (2006).

<sup>255</sup> See *id.* § 2254(e)(2) (barring a hearing on a claim in which the applicant has failed to develop a factual basis in state court unless the claim relies on a new rule of constitutional law the Supreme Court has made retroactively applicable or on facts that could not have been previously discovered through due diligence, and that would establish that, but for the “constitutional error, no reasonable fact finder would have found” guilt).

<sup>256</sup> FED. R. APP. P. 4(a)(1)(A).

petitioner must obtain a certificate of appealability from the district court or, if the district court denies the request, from the court of appeals.<sup>257</sup> The petitioner must make a “substantial showing” of a denial of a constitutional right with respect to each claim sought to be appealed.<sup>258</sup> There is no right to counsel in any stage of habeas proceedings.<sup>259</sup>

Finally, there is the problem of timing. Professors Nancy King and Joseph Hoffmann report that, given requirements that inmates exhaust state remedies, it takes on average five years following sentencing for state inmates to file habeas claims in federal court,<sup>260</sup> and the median disposition time by the courts is 7.1 months.<sup>261</sup> At the same time, sixty percent of defendants convicted of felony crimes in state court receive no prison sentence at all—and therefore cannot seek habeas relief—and the average prison sentence for the remaining forty percent is less than five years.<sup>262</sup> This means that “only inmates who receive life or other very long prison sentences will be in custody long enough even to file” a petition for habeas corpus.<sup>263</sup>

These various limitations prevent significant numbers of habeas claims from being decided on the merits by federal courts. One study of a randomly selected sample of federal habeas petitions filed during 2003 and 2004 found that forty-two percent of petitions in noncapital cases and twenty-eight percent of the petitions in capital cases were dismissed without the courts reaching the merits.<sup>264</sup> In just one out of 341 petitions studied did the petitioner receive relief; this figure represented a decrease from the pre-AEDPA rate of relief for noncapital filings of one out of 100 petitions.<sup>265</sup> Another study of death penalty cases found that prior to the 1996 law, forty percent of state capital prisoners who filed federal habeas petitions had their convictions or sentences overturned; the figure dropped to twelve percent in

<sup>257</sup> 28 U.S.C. § 2253(c)(1) (2006). If the circuit court denies the certificate, the petitioner can file a petition for certiorari with the Supreme Court from the denial. *Hohn v. United States*, 524 U.S. 236, 253 (1998) (Souter, J., concurring).

<sup>258</sup> 28 U.S.C. § 2253(c)(2). This codifies the standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983). See *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003). The standard requires the petitioner to show that the claim would be “debatable” among “reasonable jurists.” *Id.* at 337–38.

<sup>259</sup> *Murray v. Giarratano*, 492 U.S. 1, 6–7 (1989); see also *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987) (holding that there is no right to counsel in discretionary state postconviction proceedings).

<sup>260</sup> Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 807 (2009).

<sup>261</sup> *Id.* at 808.

<sup>262</sup> *Id.* at 807–08.

<sup>263</sup> *Id.* at 809.

<sup>264</sup> Nancy J. King et al., *Executive Summary: Habeas Litigation in the U.S. District Courts* 9 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

<sup>265</sup> *Id.* at 9.

2000–2006 and continues to fall.<sup>266</sup> Professors Hoffmann and King rightly conclude that “[f]or the vast majority of the more than two million people now incarcerated in America, the Great Writ is a pipe dream.”<sup>267</sup>

Habeas review is not a mechanism to correct constitutional errors by state courts in most criminal cases. Accordingly, state courts operate with practical constitutional autonomy when they apply provisions of the Federal Constitution at trial and at sentencing of criminal defendants. There is little likelihood errors they make will result in correction by a federal court in a habeas proceeding. There is also little chance any error will be corrected by the Supreme Court on direct review.

2. *Independent and Adequate State Law Grounds.*—The independent and adequate state law ground doctrine governs both state criminal cases on direct review to the Supreme Court<sup>268</sup> and habeas petitions filed by state prisoners in federal district court.<sup>269</sup> The Court’s application of the doctrine to state procedural rules in criminal cases results in many federal constitutional claims being decided conclusively in state court.

To appreciate the doctrine’s impact on state court authority, the necessary starting point is the “clear statement” requirement of *Michigan v. Long*,<sup>270</sup> which determines whether a state law ground is independent and adequate. In *Long*, the Michigan Supreme Court had reversed a criminal conviction for marijuana possession, holding that a police search of the passenger compartment of the defendant’s vehicle violated the Fourth Amendment and that the marijuana found therein had to be suppressed.<sup>271</sup> The state obtained review of the decision in the U.S. Supreme Court. The defendant argued that the Court lacked jurisdiction because the state court holding rested on an independent and adequate state law ground, the Michigan Constitution, which gave greater protection from searches and seizures than did the Fourth Amendment.<sup>272</sup> Writing for the Court, Justice O’Connor held that jurisdiction was proper because, while the Michigan Supreme Court had referred in two places to its own state constitution, it otherwise “relied exclusively on federal law.”<sup>273</sup> Justice O’Connor held that in order

<sup>266</sup> See David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, in *THE FUTURE OF AMERICA’S DEATH PENALTY* 261, 265, 267 (Charles S. Lanier et al. eds., 2009).

<sup>267</sup> Hoffmann & King, *supra* note 260, at 809 (footnotes omitted).

<sup>268</sup> See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). The doctrine derives from the Court’s jurisdiction under Article III in such cases. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). It traces to *Murdock v. City of Memphis*, in which the Court held it lacked authority to review state court decisions on issues of state law. 87 U.S. (20 Wall.) 590, 630–33 (1875).

<sup>269</sup> See, e.g., *Harris v. Reed*, 489 U.S. 255, 257 (1989).

<sup>270</sup> 463 U.S. 1032 (1983).

<sup>271</sup> *Id.* at 1035–37.

<sup>272</sup> *Id.* at 1037–38.

<sup>273</sup> *Id.* at 1037 (footnote omitted).

for the Court to deny jurisdiction, the state court must make its independent reliance upon state law clear in its opinion. Justice O'Connor explained:

When . . . a state court decision fairly appears to rest primarily on federal law . . . and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.<sup>274</sup>

In other words, the Court would resolve ambiguity in favor of jurisdiction. At the same time, the Court would not “assume” a lack of independent and adequate state grounds if the state court made it clear that it used federal case law only for “guidance” and that there were “bona fide separate, adequate, and independent grounds” under state law for the decision.<sup>275</sup> This approach, Justice O'Connor claimed, displayed “respect for state courts,”<sup>276</sup> by “avoid[ing] the unsatisfactory and intrusive practice of requiring state courts [later] to clarify their decisions to the satisfaction of this Court.”<sup>277</sup> Turning to the merits of the case, the Court held that the Michigan court had erred and that the search of the passenger compartment of the defendant's vehicle was reasonable.<sup>278</sup> *Long*, then, gives state courts authority to resolve federal constitutional questions without being subject to review so long as the courts comport with the plain statement requirement.

3. *From Substance to Procedure.*—*Long* involved a substantive state law ground. The Court applied the *Long* standard to a state law procedural ground on direct review in 1985 in *Caldwell v. Mississippi*.<sup>279</sup> Four years later, in *Harris v. Reed*, the Court held that the standard also applied to state procedural grounds in federal habeas petitions.<sup>280</sup> *Harris* involved a defendant convicted of murder in the Circuit Court of Cook County, Illinois.<sup>281</sup> On direct appeal, the defendant challenged only the sufficiency of the evidence at trial, and the Appellate Court of Illinois affirmed.<sup>282</sup> The defendant then filed a petition for postconviction relief in the Illinois Circuit Court, alleging the ineffective assistance of trial counsel, in violation of the Sixth

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<sup>274</sup> *Id.* at 1040–41.

<sup>275</sup> *Id.* at 1041.

<sup>276</sup> *Id.* at 1040.

<sup>277</sup> *Id.* at 1041.

<sup>278</sup> *Id.* at 1045–51. In light of this holding, the Court remanded the case to the Michigan Supreme Court to determine in the first instance the validity of the subsequent search by the police of the trunk of the defendant's vehicle, which turned up additional marijuana. *Id.* at 1053.

<sup>279</sup> 472 U.S. 320, 326–27 (1985) (applying, in a capital sentencing case on direct review, the plain statement standard of *Long* and concluding that the defendant's failure to raise as error on appeal his objection to the prosecutor's comments at the sentencing hearing was not an independent and adequate state law ground because the state supreme court did not rely on the failure in affirming the sentence).

<sup>280</sup> 489 U.S. 255, 255 (1989).

<sup>281</sup> *Id.* at 257.

<sup>282</sup> *Id.*

Amendment.<sup>283</sup> The Illinois Circuit Court dismissed the petition.<sup>284</sup> In affirming, the Illinois Appellate Court invoked the state law principle that issues that could have been presented on direct appeal but were not are considered waived.<sup>285</sup> Here, all but one of the defendant's claims of ineffective assistance of counsel could have been raised on direct appeal.<sup>286</sup> Nevertheless, the Illinois Appellate Court went on to consider, and deny on the merits, all of the defendant's arguments.<sup>287</sup> The defendant did not seek review in the Supreme Court of Illinois but instead filed a petition for a writ of habeas corpus in federal district court, again on the basis of ineffective assistance of counsel.<sup>288</sup> The district court began its analysis by finding that *Sykes* did not prevent consideration of the habeas petition.<sup>289</sup> Because the Illinois Appellate Court had not actually held any portion of the petitioner's ineffective assistance claim waived, there was no procedural default under *Sykes*.<sup>290</sup> On that point, the district court noted that the Illinois Appellate Court had explicitly stated that the issue that could not have been previously raised was not waived; with respect to the other allegations, the Appellate Court had ignored the waiver and addressed the claim on the merits.<sup>291</sup> Under those circumstances, the district court concluded, it was entitled to consider the claim in its entirety. After an evidentiary hearing, the district court dismissed the petition on the merits.<sup>292</sup> On appeal, the U.S. Court of Appeals for the Seventh Circuit construed the decision of the Illinois Appellate Court to hold that the petitioner had waived the claim.<sup>293</sup> The Court of Appeals therefore held the petition was procedurally barred and on that ground affirmed the judgment of the district court.<sup>294</sup>

Writing for the Court in *Harris*, Justice Blackmun emphasized that the procedural default rule of *Sykes* derives from the adequate and independent state law ground doctrine.<sup>295</sup> That doctrine, Justice Blackmun explained, applies whether a state law ground that sustains a holding is substantive or

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 258.

<sup>286</sup> *Id.* The one claim the court distinguished involved an alleged failure to present an alibi witness.

*Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 258–59.

<sup>293</sup> *Id.* at 259.

<sup>294</sup> *Id.* The court addressed neither the alibi witness issue nor whether the waiver could be excused under the exceptions *Sykes* allows where the petitioner has shown cause and prejudice for the default or a miscarriage of justice.

<sup>295</sup> *Id.* at 260.

procedural.<sup>296</sup> In either case, any ambiguities in a state court opinion are resolved by the plain statement rule of *Long*.<sup>297</sup> Accordingly, to prevent habeas review, “[t]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case . . . . [A]mbiguities in that regard must be resolved by . . . the *Long* standard.”<sup>298</sup> Further, Justice Blackmun noted, the *Long* rule applies in cases on direct review from the state’s highest court to the Supreme Court and to federal habeas review of state court convictions.<sup>299</sup>

These strands, woven together, created clear rules about when state prisoners have procedurally defaulted their federal claims. Under *Sykes* and its progeny, “an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause . . . and prejudice . . . or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice.”<sup>300</sup> In accordance with *Long*, however, “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar.”<sup>301</sup> To avoid habeas review, therefore, the state court must act with the same clarity needed to avoid direct review.<sup>302</sup> Under this approach, Justice Blackmun noted, a plainly stated state procedural bar will also insulate an *alternative* holding from review.<sup>303</sup> Applying these rules, Justice Blackmun found the Illinois Appellate Court, despite its references to the state procedural bar, did not satisfy the plain statement requirement of *Long*.<sup>304</sup> Therefore, the district court could properly consider the habeas petition.<sup>305</sup> The judgment of the Court of Appeals was reversed.<sup>306</sup>

4. *State Court Autonomy*.—We should pause to consider the implications of all of this. In *Long*, the existence of an independent and adequate *substantive* state law ground, clearly articulated in the state court opinion, precluded review of the state court holding. Specifically, the state government could not ask the Court to review the state court decision because,

<sup>296</sup> *Id.* at 261.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 261–62 (quotation and internal marks omitted).

<sup>299</sup> *Id.* at 262.

<sup>300</sup> *Id.* (internal quotation marks omitted).

<sup>301</sup> *Id.* at 263.

<sup>302</sup> *Id.* at 264.

<sup>303</sup> *Id.* at 264 n.10.

<sup>304</sup> *Id.* at 266.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*; see also *Teague v. Lane*, 489 U.S. 288, 298–99 (1989) (explaining that the *Harris* rule applies when the state court has had an opportunity to address the claim later raised in a habeas petition but does not apply when, because of procedural default, the claim was never presented to the state court).

even if the Supreme Court concluded there was no federal constitutional violation, the state court's ruling on substantive state law grounds sustained the judgment. On the other hand, a party who lost a claim against a state government in state court could seek review (on the federal constitutional ruling) in the Supreme Court. If the Supreme Court thought the state violated the Federal Constitution, no substantive state law ground, however clearly articulated, could sustain the state court decision.

Once a state law *procedural* ground is independent and adequate, these outcomes are reversed. A state law procedural bar prevents the Supreme Court on direct review or a federal habeas court from hearing a state prisoner's claim that the state has violated the Federal Constitution. Even if the federal courts were to find a constitutional violation, the state procedural rule (assuming the requirements of *Long* were met) would sustain the conviction. Even a discretionary state procedural rule can have this effect.<sup>307</sup> The independent and adequate state ground doctrine allows state courts to interpret federal constitutional provisions as broadly or narrowly as they wish. As long as there is also a state law basis for the decision, the Supreme Court will not correct the state court's ruling on federal constitutional grounds. Moreover, under *Long*, a litigant's constitutional claim might never be considered by either a state or federal court.<sup>308</sup>

5. *Fair Appearances*.—In a separate opinion in *Harris*, Justice O'Connor emphasized that while *Long* applied to state procedural default rules, federal courts could still inquire into the availability of state court remedies to determine whether the claims presented in a habeas petition had been properly exhausted in state court.<sup>309</sup> In particular, if a petitioner raises a claim never presented in any state forum, the federal court can assess the scope of state default rules and determine whether the claim has been procedurally defaulted under state law, such that a state court remedy is unavailable.<sup>310</sup> In other words, if the claim has not been presented to the state court, the state court need not have issued a plain statement of a procedural bar.<sup>311</sup>

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<sup>307</sup> *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009) (holding that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review if it is firmly established and regularly followed).

<sup>308</sup> Emphasizing "interests of comity and finality" in criminal cases, the Court has stated:

[I]f a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause for the default and actual prejudice resulting therefrom. . . . We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, . . . or on the State's interest in enforcement of its procedural rule.

*Teague*, 489 U.S. at 308 (citations omitted).

<sup>309</sup> 489 U.S. 255, 268 (1989) (O'Connor, J., concurring).

<sup>310</sup> *Id.* at 269.

<sup>311</sup> *Id.*

Justice O'Connor's more expansive approach to procedural defaults soon commanded a majority in *Coleman v. Thompson*.<sup>312</sup> *Coleman* involved a Virginia defendant convicted of rape and capital murder and sentenced to death for the murder.<sup>313</sup> After losing his appeal, the defendant filed a state habeas petition asserting ineffective assistance of counsel and other federal constitutional violations at his trial and sentencing.<sup>314</sup> The state habeas court ruled against the defendant, who then appealed to the Virginia Supreme Court.<sup>315</sup> The state moved to dismiss the appeal on the sole ground that the defendant had not filed a notice of appeal within thirty days, making the appeal untimely under the Virginia Supreme Court's procedural rules.<sup>316</sup> After receiving briefs on that motion as well as on the merits of the defendant's constitutional claims, the Virginia Supreme Court issued a three-sentence ruling that referred to the motion to dismiss and the attendant briefs, stating that "[u]pon consideration thereof," the state's motion to dismiss was granted.<sup>317</sup> The defendant then filed a habeas petition in federal court that included seven claims made in the state habeas proceeding along with four additional claims.<sup>318</sup> The district court held that, in accordance with the Virginia Supreme Court's ruling, the defendant had defaulted on the first seven claims; it then ruled against the defendant on the merits of all eleven claims.<sup>319</sup> The Court of Appeals for the Fourth Circuit affirmed, stating that, with respect to the claims filed in the state petition, the Virginia Supreme Court's order met the "plain statement" requirement of *Harris* for a procedural default, and that the defendant had not met the cause and pre-judice requirement of *Sykes* to allow the federal court to consider the defaulted claims.<sup>320</sup>

Writing for the Supreme Court, Justice O'Connor agreed that the state procedural bar prohibited consideration of the claims presented in the state habeas petition.<sup>321</sup> "This is a case about federalism," she announced, emphasizing "the respect that federal courts owe the States and the States' procedural rules."<sup>322</sup> Justice O'Connor rejected the petitioner's argument that, under *Harris*, his claims were properly presented in the federal petition.<sup>323</sup> *Harris*, she noted, requires a federal court to presume there is no independent and adequate state law ground when a state court decision appears to

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<sup>312</sup> 501 U.S. 722 (1991).

<sup>313</sup> *Id.* at 726–27.

<sup>314</sup> *Id.* at 727, 734.

<sup>315</sup> *Id.* at 727.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 727–28.

<sup>318</sup> *Id.* at 728.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 728–29.

<sup>321</sup> *Id.* at 726.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 735.

rest on or be interwoven with federal law and the adequacy and independence of the state law ground is not clear from the face of the opinion.<sup>324</sup> But that presumption applies only when the federal court has reason to question whether an independent and adequate state law ground exists in the first place—not to all cases in which a federal habeas petitioner presented federal claims to a state court.<sup>325</sup> Adopting the broader rule would allow federal courts to “review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. Any efficiency gained by applying a conclusive presumption . . . is simply not worth the cost in the loss of respect for the State that such a rule would entail.”<sup>326</sup> Whatever the ambiguities of the Virginia Supreme Court’s order, it did not “fairly appear” to rest on federal law or to be interwoven with federal law, but was instead based on the procedural default caused by the defendant’s failure to file a timely appeal.<sup>327</sup> Shoring up the Court’s precedents on the consequences of state law procedural default, Justice O’Connor announced a simple rule that governed:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.<sup>328</sup>

The petitioner had not met this test, and his claims were therefore barred.<sup>329</sup>

Justice O’Connor’s opinion cast several precedents as based on federalist principles. First, she noted, the reasons for applying the independent and adequate state law ground doctrine in federal habeas cases differed from those justifying the doctrine in cases presented to the Court on direct

<sup>324</sup> *Id.* at 735–36.

<sup>325</sup> *Id.* at 736.

<sup>326</sup> *Id.* at 738.

<sup>327</sup> *Id.* at 740.

<sup>328</sup> *Id.* at 750. This holding dispelled any residual application of *Fay v. Noia*, 372 U.S. 391 (1963). Like *Coleman*, *Noia* involved a criminal defendant who failed to appeal his state court conviction and then sought federal habeas review. The *Noia* Court held that the procedural default did not bar federal habeas review unless the petitioner had deliberately bypassed state procedures by intentionally forgoing an opportunity for state review. *Id.* at 438–39. Though *Sykes* and subsequent cases culminating in *Harris* instead applied a cause and prejudice standard, none overruled *Noia*, seemingly leaving open the possibility that the deliberate bypass rule still applied when an entire appeal had been defaulted. See *Coleman*, 501 U.S. at 749–50 (reviewing the precedents in this area). *Coleman* makes clear that the cause and prejudice standard applies to all defaulted claims. See *id.* at 750 (noting that *Noia* “was based on a conception of federal/state relations that undervalued the importance of state procedural rules”). Note also that the Court has held that a “state procedural ground is not adequate unless the procedural rule is strictly or regularly followed.” *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)) (internal quotation marks omitted).

<sup>329</sup> *Coleman*, 501 U.S. at 752–57.

review.<sup>330</sup> In the context of direct review, the Court reviews the state court *judgment*: if resolution of the federal issue will not affect that judgment, there is “nothing for the Court to do.”<sup>331</sup> By contrast, in habeas cases, the federal district court reviews not the state court judgment, but whether the petitioner’s custody is lawful.<sup>332</sup> Nonetheless, Justice O’Connor explained, by releasing a prisoner whose conviction rests on an independent and adequate state law ground, a federal court “renders ineffective the state rule” and “ignores the State’s legitimate reasons for holding the prisoner.”<sup>333</sup> Accordingly, in the habeas context, the application of the independent and adequate state law ground doctrine is “grounded in concerns of comity and federalism.”<sup>334</sup> The doctrine prevents federal courts from giving state inmates “an end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws.”<sup>335</sup> Furthermore, Justice O’Connor explained, the independent and adequate state law ground doctrine reflects federalism concerns by requiring that state courts have an opportunity to correct their own constitutional violations before federal courts get involved.<sup>336</sup> Moreover, the same rules apply even when the result of a procedural default is that no court ever decides whether a defendant’s constitutional rights have been violated.<sup>337</sup>

Turning to *Caldwell* and *Harris*, Justice O’Connor wrote that the *Caldwell* Court had appropriately extended to criminal cases on direct review *Long*’s approach to the problem of determining whether a state court judgment rests on an independent and adequate state law ground.<sup>338</sup> *Harris*, a habeas case, presented a “situation . . . nearly identical to that in *Long* and *Caldwell*: a state court decision that fairly appeared to rest primarily on federal law in a context in which a federal court has an obligation to determine if the state court decision rested on an independent and adequate state ground.”<sup>339</sup> “Faced with a common problem,” Justice O’Connor wrote, the Court “adopted a common solution.”<sup>340</sup> Accordingly:

After *Harris*, federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that

<sup>330</sup> *Id.* at 730.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 731.

<sup>336</sup> *Id.* (internal quotation marks omitted).

<sup>337</sup> *Id.* More recently, in an opinion by Justice Scalia distinguishing the cases Justice O’Connor collapsed together, the Court has explained that, in contrast to cases on direct review, the independent and adequate state ground doctrine is not jurisdictional. See *Lambrix v. Singletary*, 520 U.S. 518, 522–23 (1997) (explaining that in the habeas context the doctrine is based upon federalism and comity).

<sup>338</sup> *Coleman*, 501 U.S. at 732.

<sup>339</sup> *Id.* at 734.

<sup>340</sup> *Id.* (quoting *Harris v. Reed*, 495 U.S. 255, 263 (1989)) (internal quotation marks omitted).

there is no independent and adequate state ground for a state court decision when the decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.”<sup>341</sup>

A state court can therefore avoid review (direct or collateral) of its federal constitutional rulings if the state law ground is clear on the face of the state court’s opinion or where its decision rests primarily on state law and is not interwoven with federal law. Thus, the independent and adequate state law ground doctrine gives enormous authority to state courts. The doctrine provides the state judge with the tools to resolve federal constitutional issues without any possibility of review by a federal court. The Court’s careful specification of the circumstances in which review is and is not triggered provides a virtual instruction manual for using those tools effectively and with ease.

6. *The Special Case of Searches and Seizures.*—Apart from these procedural mechanisms, a separate rule prevents one kind of claim from being brought in a habeas petition. In *Stone v. Powell*, the Supreme Court, interpreting 28 U.S.C. § 2254, held that Fourth Amendment claims involving exclusion of evidence as a result of an unlawful search or seizure, once raised and decided in state court, cannot be reheard in the federal habeas proceeding when the state has provided an opportunity for a full and fair hearing.<sup>342</sup> The Court explained that the purpose of the exclusionary rule under the Fourth Amendment is to deter unlawful police conduct and that any marginal benefit in that respect from a federal habeas ruling does not justify the rule’s costs, including allowing guilty defendants to go free.<sup>343</sup> In addition, collateral estoppel prevents a subsequent § 1983 claim based on the Fourth Amendment violation.<sup>344</sup> AEDPA left the Court’s holding in *Stone* in place,<sup>345</sup> but the Court has not extended the *Stone* exception beyond

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<sup>341</sup> *Id.* at 734–35 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). In a footnote, Justice O’Connor, citing her concurring opinion in *Harris*, noted that the rule does not apply if the petitioner failed to exhaust state remedies and a state court would find them procedurally barred. “In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.” *Id.* at 735 n.1; *see also* *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (holding that to deal with the problem that state court orders often lack an explanation of the basis for the decision, the following presumption applies: “Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.”).

<sup>342</sup> 428 U.S. 465, 494 (1976). The Fourth Amendment exclusionary rule is, therefore, an exception to the rule of *Brown v. Allen*, 344 U.S. 443, 458 (1953). *See supra* text accompanying note 228.

<sup>343</sup> *Stone*, 428 U.S. at 490–91.

<sup>344</sup> *Allen v. McCurry*, 449 U.S. 90, 100–01 (1980) (holding that state rules of collateral estoppel preclude relitigation of a Fourth Amendment issue where the state court provided a full and fair opportunity for the issue to be heard).

<sup>345</sup> *See Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002) (interpreting AEDPA to preserve *Stone*).

the context of exclusion under the Fourth Amendment.<sup>346</sup> Although *Stone* left open the possibility of habeas review where the state did not provide an opportunity for a full and fair hearing, the Supreme Court has heard no Fourth Amendment exclusionary claim on habeas review since *Stone*.

### C. Summary

This Part has demonstrated that as a result of doctrinal and statutory rules state courts enjoy considerable autonomy in two sets of cases involving constitutional law claims. First, state courts definitively resolve most Takings Claims against state government. The Supreme Court has crafted doctrines that require plaintiffs to bring Takings Claims in state court and that shut off future litigation of those claims in federal court. State courts are also charged with resolving the state property law issues that underlie Takings Claims. Although a Takings Claim is a federal constitutional claim, there is little likelihood that such a claim will be heard in a federal forum.

Most criminal cases are brought in state court, and every criminal case involves issues of federal constitutional law. Decisions by state judges on federal constitutional issues in criminal cases face little likelihood of correction by a federal court. AEDPA and Supreme Court case law set severe limitations on the availability and scope of federal habeas review of state court criminal cases and thereby leave rulings by state judges undisturbed. In addition, the independent and adequate state law ground doctrine shields many state criminal cases from habeas review as well as from direct review by the Supreme Court.

While we imagine that state courts play a subordinate role in interpreting and applying the Federal Constitution, in Takings Cases and in criminal cases state courts often have the only word on what the Constitution means and requires. Indeed, the Supreme Court itself has given authority to the state courts in these contexts. The Court has crafted the doctrinal rules that push Takings Claims against state government to state court. Along with Congress, the Court has narrowed habeas review of state criminal convictions, and it has provided the state courts with the tools of the independent and adequate state law ground doctrine to shield their federal constitutional decisions from any kind of federal review.

## IV. (RE)FORMALIZING STATE COURT AUTONOMY

The preceding Parts of this Article have shown that, as a practical matter, state courts today have considerable authority to interpret and apply the Federal Constitution. This Part argues that the practical autonomy of state courts should be formally recognized. A sensible first step would be the

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

adoption of a rule permitting state courts, when called upon to rule on federal constitutional claims against a state government, to expand upon (but not narrow) federal constitutional rights as construed by the Supreme Court. This change would be consistent with the historical practices described in Part I of the Article. It also extends a proposal Justice Stevens has offered with respect to how the Court should exercise its power of discretionary review. After describing Justice Stevens's proposal, this Part considers the benefits and risks of formalizing state court autonomy under the Federal Constitution. It then sets forth a refined proposal to formalize state court autonomy in Takings Cases and with respect to the provisions of the Constitution that protect the rights of criminal defendants. This Part concludes by showing why formalizing state court autonomy makes sense even when state courts already have the last word on the meaning of state constitutional provisions.

### A. Justice Stevens's Docket

In three cases decided at the end of the Court's 2005 term, most notably *Kansas v. Marsh*,<sup>347</sup> Justice Stevens pushed strongly for the Court to end its practice of reviewing state court cases upholding claims of federal constitutional rights, vigorously debating the merits of this proposal with Justice Scalia. In these three cases, Justice Stevens revived and extended a proposal he first made two decades earlier in his dissenting opinions in *Michigan v. Long*<sup>348</sup> and *California v. Ramos*.<sup>349</sup> It therefore makes sense to begin with those two cases.

1. *Long and Ramos*.—In his dissent from the *Long* Court's requirement of a clear statement of any independent and adequate state law ground, Justice Stevens emphasized the importance of the case's "jurisprudential questions" over the Fourth Amendment issue.<sup>350</sup> In his view, several factors combined to counsel against exercising jurisdiction to hear the case: the Court's traditional presumption that when a state court invokes state law it is an independent basis for the state court's decision, respect for state courts, and the scarceness of federal judicial resources.<sup>351</sup> As a general matter, Justice Stevens reasoned, the Supreme Court should allow "other decisional bodies to have the last word in legal interpretation until it is truly necessary for th[e] Court to intervene."<sup>352</sup> The Court need not, he argued, be concerned with "cases in which a state court has upheld a citizen's asser-

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<sup>347</sup> 548 U.S. 163 (2006). The other two cases were *Washington v. Recuenco*, 548 U.S. 212 (2006), and *Brigham City v. Stuart*, 547 U.S. 398 (2006).

<sup>348</sup> 463 U.S. 1032 (1983).

<sup>349</sup> 463 U.S. 992 (1983).

<sup>350</sup> 463 U.S. at 1065 (Stevens, J., dissenting).

<sup>351</sup> *Id.* at 1066–67.

<sup>352</sup> *Id.* at 1067 (emphasis added).

tion of a right . . . under both federal and state law” and a state officer complains that “the state court interpreted federal rights too broadly and ‘over-protected’ the citizen.”<sup>353</sup> Therefore, he reasoned, “in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.”<sup>354</sup> This approach would be consistent with the Court’s traditions<sup>355</sup> and would shrink the docket of states’ requests for reversals of state court judgments in favor of their citizens.<sup>356</sup>

On the same day the Court decided *Long*, Justice O’Connor also wrote the majority opinion in *California v. Ramos*.<sup>357</sup> *Ramos* reversed a California Supreme Court holding that the Eighth Amendment prohibited an instruction to a capital sentencing jury that the jurors could take account of the governor’s power to commute a life sentence—an instruction which, the state court reasoned, implied that the jury did not really have the ultimate responsibility in the case.<sup>358</sup> In his dissent, Justice Stevens argued that review was unwarranted because the California court’s decision, while based on the Federal Constitution, would have no impact on other states.<sup>359</sup> According to Justice Stevens, “[n]othing more than an interest in facilitating the imposition of the death penalty in California justified this Court’s exercise of its discretion to review the judgment of the California Supreme Court,” an interest insufficient to warrant review.<sup>360</sup> The issue in the case, an application of the Eighth Amendment in the defendant’s favor, was

<sup>353</sup> *Id.* at 1068.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 1069 (“Until recently we had virtually no interest in cases of this type.”).

<sup>356</sup> *Id.* at 1070. Although *Long* is the first case in which Justice Stevens set out this view in detail, it was foreshadowed in earlier cases. See *South Dakota v. Neville*, 459 U.S. 553, 566–71 (1982) (Stevens, J., dissenting) (describing the majority’s reversal of a state court’s exclusion of blood alcohol evidence as advisory because a state constitutional provision supported the state court judgment); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 477–89 (1981) (Stevens, J., dissenting) (criticizing the majority’s review of and departure from a state court’s interpretation of the state legislative record to determine whether a statute violates the Dormant Commerce Clause); *Idaho Dep’t of Employment v. Smith*, 434 U.S. 100, 103–05 (1977) (Stevens, J., dissenting in part) (“Even though there was error in the Idaho Supreme Court’s use of the Fourteenth Amendment . . . that error is [in]sufficient justification for the exercise of this Court’s discretionary jurisdiction. . . . [T]his Court’s . . . efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the state than in vindicating individual rights.”); *Pennsylvania v. Mimms*, 434 U.S. 106, 116–17 (1977) (Stevens, J., dissenting) (arguing that the Court should not have reviewed a state court reversal of a defendant’s conviction on Fourth Amendment grounds, because the defendant had served his sentence, the state court had “afforded him greater protection than is required by the Federal Constitution,” the state court could have reached the same result on state constitutional grounds, and any error affected only that state).

<sup>357</sup> 463 U.S. 992 (1983).

<sup>358</sup> *Id.* at 1002–10.

<sup>359</sup> *Id.* at 1031 (Stevens, J., dissenting).

<sup>360</sup> *Id.*

“plainly a matter that is best left to the States.”<sup>361</sup> Indeed, even if the state court had erred in its application of the Eighth Amendment, there was no reason for the Court to review the decision.<sup>362</sup> Justice Stevens took particular issue with Justice O’Connor’s assertion that the Court “‘sit[s] as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.’”<sup>363</sup> Justice Stevens contended that the Court should have allowed “the wisdom of state *judges* to prevail in California.”<sup>364</sup>

Although Justice Stevens’s dissents in *Long* and *Ramos* did not attract a single other vote (Justice O’Connor called his argument “novel”),<sup>365</sup> in the ensuing years he continued to argue that the Court should exercise greater restraint before reviewing state court decisions.<sup>366</sup> In *Florida v. Meyers*, he was joined by Justice Marshall and Justice Brennan in dissenting from a per curiam decision overturning a state court’s reversal of a defendant’s conviction on Fourth Amendment grounds.<sup>367</sup> Given the Court’s limited resources, Justice Stevens argued, it should not supervise “the administration of justice in the state judicial systems,” thereby encouraging prosecutors to seek review in “relatively routine cases.”<sup>368</sup> He urged the Court to be “ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor” because “[t]he Framers surely feared the latter more than the former.”<sup>369</sup> In *Ponte v. Real*, the Court held that the Supreme Judicial Court of Massachusetts erred when it ruled that a prison disciplinary hearing that cancelled a prisoner’s good behavior credits without allowing the prisoner to call witnesses violated Fourteenth Amendment due process.<sup>370</sup> Justice Stevens thought the Court should not have granted review in the first place, even though the state court had gone further than Supreme Court case law required.<sup>371</sup> State courts should, he thought, be free to extend the

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 1030 (“If it were true that this [jury] instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given—not a reason for giving it.”).

<sup>363</sup> *Id.* at 1030–31 (quoting *California v. Ramos*, 463 U.S. 992, 1014 (1983)).

<sup>364</sup> *Id.* at 1031 (emphasis added).

<sup>365</sup> *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983).

<sup>366</sup> In addition to the cases discussed in the text, see *Mont. v. Hall*, 481 U.S. 400, 410–11 (1987) (Stevens, J., dissenting) (arguing against review of a state court decision prohibiting retrial of a defendant where, in its double jeopardy analysis, the state court cited state constitutional law, and where the court’s judgment rested on the alternative ground that the defendant respondent was convicted of an offense that did not exist when he committed the acts in question); *Del. v. Van Arsdall*, 475 U.S. 673, 695 (1986) (Stevens, J., dissenting) (objecting to hearing cases that “operate[] to expand this Court’s review of state remedies that overcompensate for violations of federal constitutional rights”).

<sup>367</sup> 466 U.S. 380, 383 (1984) (Stevens, J., dissenting).

<sup>368</sup> *Id.* at 385.

<sup>369</sup> *Id.* at 387.

<sup>370</sup> 471 U.S. 491, 492 (1985).

<sup>371</sup> *Id.* at 501–02 (Stevens, J., concurring in part).

Court's rulings "in the light of local conditions";<sup>372</sup> the case presented no violation of an individual right,<sup>373</sup> and the issue had no national significance,<sup>374</sup> but was merely "a controversy between the Supreme Judicial Court of Massachusetts and that State's prison officials."<sup>375</sup>

Similarly, in *California v. Carney*,<sup>376</sup> Justice Stevens dissented from the Court's reversal of a decision of the California Supreme Court extending to a mobile home the full Fourth Amendment protections that apply to a regular home, including the requirement that, absent exigent circumstances, the police obtain a warrant before conducting a search of the premises.<sup>377</sup> Justice Stevens argued that the Court's review of the state court decision undermined the role of the state courts in the constitutional system, increased the Court's workload with little payoff,<sup>378</sup> and turned the Court into the "High Magistrate for every warrantless search and seizure."<sup>379</sup> There was, Justice Stevens thought, nothing wrong with a state court making a "modest extension of [the Court's] Fourth Amendment precedents"<sup>380</sup> in a manner that did not involve a citizen being deprived of a constitutional right.<sup>381</sup> By reaching out to correct the California court's decision, the Supreme Court had shut down the contributions state courts make to the development of federal constitutional law: "Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles."<sup>382</sup> In *Connecticut v. Barrett*,<sup>383</sup> in which the Court overturned a state court decision finding a violation of the Sixth Amendment right to counsel,<sup>384</sup> Justice Stevens, joined by Justice Marshall, would have dismissed the writ of certiorari as improvidently granted because the Court should not hear a case merely because "one State Supreme Court [has] arguably granted more protection to a citizen accused of crime than the Federal Constitution requires."<sup>385</sup>

In considering *Long* and *Ramos* and the subsequent cases discussed in this section, it is important to recognize that Justice Stevens did not embrace a wholesale prohibition on the Court's review of any state court case upholding a federal constitutional claim against state government. His ap-

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<sup>372</sup> *Id.* at 502.

<sup>373</sup> *Id.* at 502 n.3.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 502.

<sup>376</sup> 471 U.S. 386 (1985).

<sup>377</sup> *Id.* at 393–94.

<sup>378</sup> *See id.* at 396 (Stevens, J., dissenting).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 397.

<sup>381</sup> *Id.* at 398.

<sup>382</sup> *Id.* at 399.

<sup>383</sup> 479 U.S. 523 (1987).

<sup>384</sup> *Id.* at 528–29.

<sup>385</sup> *Id.* at 536 (Stevens, J., dissenting).

proach in *Long* was tied closely to the fact that the case involved a close call about whether or not there was an independent and adequate state law ground for the state court's holding.<sup>386</sup> In *Carney*, where the state court decision was based entirely on federal law, Justice Stevens also did not foreclose review entirely. Rather, he thought the Court had acted prematurely because "[t]o identify rules that will endure, [the Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law."<sup>387</sup>

Also instructive is Justice Stevens's view in *Massachusetts v. Upton*.<sup>388</sup> There the Court, in a per curiam opinion, reversed a decision of the Supreme Judicial Court of Massachusetts that failed to abide by a holding from the Supreme Court's previous term—that under the Fourth Amendment a court that reviews whether there was probable cause for a magistrate judge to issue a warrant must apply a totality of the circumstances test and determine only whether there is substantial evidence in the record to support the magistrate's decision.<sup>389</sup> Justice Stevens concurred and wrote separately to explain why *Upton* did not fall within the theory of his *Long* dissent.<sup>390</sup> The Massachusetts court had specifically refused to consider whether the search at issue violated the state constitution, indicating that it would only reach that question if its approach under the Federal Constitution proved incorrect.<sup>391</sup> Under these circumstances, Justice Stevens wrote, the Massachusetts court had committed a greater error than simply applying the Fourth Amendment too generously.<sup>392</sup> Maintaining the "proper balance between the respective jurisdictions of state and federal courts"<sup>393</sup> is, he argued, "a two-way street."<sup>394</sup> Just as the Court should not infringe on the territory of state judges,<sup>395</sup> the latter should not "unnecessarily invite this Court to undertake review of state-court judgments."<sup>396</sup> Here, the state court invited such review "unwisely and unnecessarily."<sup>397</sup> By refusing to analyze the issue in the case under the state constitution and instead "strain[ing] to

<sup>386</sup> See also *Pennsylvania v. Labron*, 518 U.S. 938, 950 (1996) (Stevens, J., dissenting) ("[I]n light of my understanding of this Court's primary role—to protect the rights of the individual that are embodied in the Federal Constitution—the decision to . . . reverse state decisions resting tenuously at best on federal grounds is imprudent . . . ." (internal citation and quotation marks omitted)).

<sup>387</sup> *Carney*, 471 U.S. at 400.

<sup>388</sup> 466 U.S. 727 (1984).

<sup>389</sup> *Id.* at 728–35 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

<sup>390</sup> *Id.* at 735 (Stevens, J., concurring in the judgment).

<sup>391</sup> *Id.* at 735–36 & n.1.

<sup>392</sup> *Id.* at 735.

<sup>393</sup> *Id.* at 736–37.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 736.

<sup>396</sup> *Id.* at 737.

<sup>397</sup> *Id.*

rest its judgment on federal constitutional grounds,”<sup>398</sup> the state court “ignored th[e] fundamental premise of our constitutional system,”<sup>399</sup> that “[t]he States . . . remain the primary guardian of the liberty of the people.”<sup>400</sup> The state court’s “ill-advised entry into the federal domain” demanded correction.<sup>401</sup> There were, then, limits to Justice Stevens’s view that the Court should deny review of state court decisions in favor of federal constitutional rights.

2. *The 2005 Term.*—This brings us to the Court’s October 2005 term when, with renewed energy, Justice Stevens argued in three cases that the Court should exercise restraint in reviewing state court decisions. The most significant of these cases is *Kansas v. Marsh*.<sup>402</sup> *Marsh* involved a defendant convicted in state court of capital murder and sentenced to death.<sup>403</sup> On appeal, the Kansas Supreme Court held that the state’s capital sentencing statute violated the Eighth Amendment.<sup>404</sup> The statute required the death penalty if the jury found there were aggravating circumstances that were not outweighed by mitigating circumstances—the death penalty therefore applied where the aggravating and mitigating circumstances were in equipoise.<sup>405</sup> In his opinion for the Court, Justice Thomas first held that the state court decision was not based on an adequate and independent state law ground and therefore jurisdiction was proper.<sup>406</sup> Turning to the merits, the Court reversed the state court, holding that the Kansas statute was indistinguishable from the death penalty statute the Court had upheld in *Walton v. Arizona*<sup>407</sup> and that the statute was also constitutional under other Supreme Court case law.<sup>408</sup>

In his dissent in *Marsh*, Justice Stevens disputed the majority’s view that *Walton* governed and argued further that the grant of certiorari was “a misuse of [the Court’s] discretion.”<sup>409</sup> Whereas the petitioner in *Walton* was a convicted capital defendant, and the Court’s task was “to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution,” the petitioner in *Marsh* was the State of Kansas,

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<sup>398</sup> *Id.* at 738.

<sup>399</sup> *Id.* at 739.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> 548 U.S. 163 (2006).

<sup>403</sup> *Id.* at 166.

<sup>404</sup> *Id.* at 167.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 169.

<sup>407</sup> *Id.* at 169–73 (citing *Walton v. Arizona*, 497 U.S. 639 (1990) (upholding Arizona statute requiring a judge to impose death upon finding aggravating factors if there were no mitigating circumstances sufficiently substantial to call for leniency)).

<sup>408</sup> *Id.* at 173–79.

<sup>409</sup> *Id.* at 199 (Stevens, J., dissenting).

which asked the Court to “review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required.”<sup>410</sup> According to Justice Stevens, there was no reason under the latter circumstances for the Court to hear the case. Instead, “[a] policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind.”<sup>411</sup> Justice Stevens noted that the decision to grant review paralleled that in *Ramos*,<sup>412</sup> in which the Supreme Court had reversed a state court’s judgment while claiming that “the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.”<sup>413</sup> Justice Stevens pointed to the irony that, in both cases, the state judiciary had already decided an issue, and the Supreme Court professed to be protecting the state while interfering with the state court’s decision. “What harm,” Justice Stevens asked in *Marsh*, as he had in *Ramos*, “would have been done to the administration of justice by state courts if the Kansas court had been left undisturbed in its determination?”<sup>414</sup> As in *Ramos*, there was no “rule of law” that required the Court to grant review, and no other state was bound by the Kansas court’s holding.<sup>415</sup> “Nothing more,” Justice Stevens concluded, “than an interest in facilitating the imposition of the death penalty in Kansas justified this Court’s exercise of its discretion to review the judgment of the Kansas Supreme Court.”<sup>416</sup>

Justice Scalia, who joined Justice Thomas’s majority opinion in *Marsh*, wrote a separate concurrence in which he disputed Justice Stevens’s view that—as Justice Scalia described it—“[w]hen a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it.”<sup>417</sup> Justice Scalia agreed with Justice Stevens that no legal rule required the Court to review the case; this, however, was true of the Court’s docket in general.<sup>418</sup> And although the impact of the state court decision in favor of the defendant was limited to Kansas, this too characterizes every state court decision the Court confronts.<sup>419</sup> Justice Scalia disagreed that the Court had no interest in hearing the case: “Our principal responsibility . . . and a primary basis for the Constitution’s allowing us to be accorded jurisdiction to review state-court decisions . . . is to ensure the integrity and uniformity of federal law.”<sup>420</sup> Justice Stevens’s claim that

<sup>410</sup> *Id.* at 200.

<sup>411</sup> *Id.* at 200–01.

<sup>412</sup> *Id.* at 201.

<sup>413</sup> *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 1014 (1983)) (internal quotation marks omitted).

<sup>414</sup> *Id.* (citation and internal quotation marks omitted).

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 185 (Scalia, J., concurring).

<sup>418</sup> *Id.* at 182.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 183.

there was something ironic about a court committed to state interests reversing a state court case on a federal constitutional matter was based “on a misguided view of federalism”:

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.<sup>421</sup>

According to Justice Scalia, Supreme Court review of erroneous state court decisions on federal constitutional issues is needed because, without it, state courts would never be accountable for errors that contradicted “the duly expressed will of the people of a State.”<sup>422</sup> Once a state court invalidates state action on federal constitutional grounds, “no authority in the State—not even a referendum agreed to by all its citizens—can undo the error,” and therefore redress should lie with review in the Supreme Court.<sup>423</sup> Justice Stevens’s unwillingness to review state court decisions invalidating state laws, therefore, “display[ed] not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves.”<sup>424</sup> By contrast, if the Court corrects a state court’s errors on federal laws, “we return power to the State, and to its people.”<sup>425</sup>

Justice Scalia also thought that Justice Stevens mischaracterized the broader role of the Court. Not only must it safeguard the interests of individual criminal defendants, it must also protect the operations of a state legislature, which involve (in Justice Black’s formulation) “the right of each man to participate in the self-government of his society.”<sup>426</sup> Justice Scalia complained further that Justice Stevens’s approach would “change the uniform ‘law of the land’ into a crazy quilt.”<sup>427</sup> Moreover, given that Congress has not limited the Court’s review to state decisions disfavoring criminal defendants, the Court risked appearing partial if it elected to hear only that set of cases.<sup>428</sup> Therefore, in the absence of any federal statute limiting ju-

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<sup>421</sup> *Id.* at 184.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* (emphasis omitted).

<sup>426</sup> *Id.* at 185 (quoting *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting)) (internal quotation marks omitted).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

risdiction, the Court should grant review without regard to the party asserting the federal error.<sup>429</sup>

In response to Justice Scalia's criticisms, Justice Stevens countered that the federal interests are not equal in all cases because there is a "separate federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution—a interest entirely absent when the State is the petitioner."<sup>430</sup> Justice Stevens argued that the Court should take this interest into account in deciding whether to grant review.<sup>431</sup> Because petitions filed by criminal defendants present different interests, declining to hear petitions from the state would not undermine the Court's impartiality.<sup>432</sup>

Justice Stevens and Justice Scalia also disagreed about how the Judiciary Act of 1789 bore on this problem. According to Justice Stevens, if uniformity were important, it is hard to explain why the 1789 Act did not allow the Court to review all state court decisions on federal constitutional issues.<sup>433</sup> "Not until 1914," Justice Stevens noted, "did we have jurisdiction over decisions from state courts which arguably overprotected federal constitutional rights at the expense of state laws."<sup>434</sup> And, he observed, "[e]ven then, our review was only by writ of certiorari, whereas until 1988 [criminal] defendants had a right to appeal to us in cases in which state courts had upheld the validity of state statutes challenged on federal constitutional grounds."<sup>435</sup> Therefore, "during the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law."<sup>436</sup> Justice Scalia countered that the limitation in the Judiciary Act was "unsurprising and immaterial"<sup>437</sup> in light of the overall structure of the 1789 Constitution:

The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that

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<sup>429</sup> Justice Scalia's point that federal statutory law does not draw a distinction based on whether an individual or the government is seeking review has only limited traction. The Court controls its docket and is not required to hear a case in which a state has lost in state court. Moreover, the Court does not see its function as to do justice in individual cases by correcting errors by the lower courts. See William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) ("The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest . . .").

<sup>430</sup> *Marsh*, 548 U.S. at 202 n.\* (Stevens, J., dissenting).

<sup>431</sup> See *id.*

<sup>432</sup> See *id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* (citing Act of Dec. 23, 1914, ch. 2, 38 Stat. 790) (additional citation omitted).

<sup>435</sup> *Id.* (citing 28 U.S.C. § 1257 (1982 ed.)).

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 183 n.1 (Scalia, J., concurring).

the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States.) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds.<sup>438</sup>

More generally, Justice Scalia thought, “[t]he early history of [the Court’s] jurisdiction assuredly d[id] not support the dissent’s awarding of special preference to the constitutional rights of criminal defendants.”<sup>439</sup> Indeed, historical evidence cut the other way: “during the first 100 years of the Court’s existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond.”<sup>440</sup> “In any case,” Justice Scalia concluded, “*present* law is plain” that defendants and state government are each entitled to petition for review of adverse state court decisions.<sup>441</sup>

In addition to *Marsh*, Justice Stevens made his argument for limiting the Court’s exercise of jurisdiction in two other cases decided in the 2005 term. In *Brigham City v. Stuart*,<sup>442</sup> a unanimous court held that the Utah Supreme Court erred in applying the Fourth Amendment to exclude evidence the police found after a warrantless home entry in response to an altercation.<sup>443</sup> Chief Justice Roberts wrote that the police do not need a warrant to enter a home when they have an objectively reasonable basis for believing an occupant is seriously injured or imminently threatened with injury.<sup>444</sup> Justice Stevens’s concurring opinion called the case “an odd flyspeck” governed by “well-settled rules of federal law.”<sup>445</sup> He wrote:

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

Justice Stevens noted that the Utah Supreme Court had admonished the defendants for failing to challenge the search under the state constitution and specifically invited future litigants to bring such a challenge.<sup>447</sup> He concluded that the state court would likely reinstate its exclusionary rule under

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<sup>438</sup> *Id.* (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833)).

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* (internal quotation marks omitted).

<sup>441</sup> *Id.*

<sup>442</sup> 547 U.S. 398 (2006).

<sup>443</sup> *Id.* at 406–07.

<sup>444</sup> *Id.* at 403.

<sup>445</sup> *Id.* at 407 (Stevens, J., concurring).

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 408.

the state constitution.<sup>448</sup> The Supreme Court's own ruling would thus have no practical effect in Utah. Even if his prediction about what the state court would do proved wrong, Justice Stevens added, there was no reason for the Court to grant review because "[f]ederal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires."<sup>449</sup>

On the same day the Court decided *Marsh*, it also decided *Washington v. Recuenco*, with a majority opinion by Justice Thomas.<sup>450</sup> In *Recuenco*, the Supreme Court of Washington vacated a defendant's sentence on an assault conviction after the sentencing court, in violation of *Blakely v. Washington*,<sup>451</sup> reached its own factual findings to impose a three-year enhancement for the defendant's use of a firearm.<sup>452</sup> The Washington Supreme Court held that *Blakely* violations are never harmless and the sentence had to be vacated.<sup>453</sup> Reversing, Justice Thomas held that the failure to submit a sentencing factor to the jury in accordance with *Blakely* is not a structural error, and is therefore subject to harmless error analysis.<sup>454</sup> Justice Stevens argued in dissent that review of the Washington decision was improper, because, as in *Stuart* and *Marsh*, "this is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution."<sup>455</sup> The Court's review was particularly inappropriate, Justice Stevens wrote, because on remand, the Washington Supreme Court (as Justice Thomas himself acknowledged) might simply reinstate its prior judgment on the ground that, under state law, the *Blakely* error was not harmless, or, again under state law, that the proper remedy for *Blakely* errors is to vacate the sentence.<sup>456</sup>

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<sup>448</sup> *Id.* In fact, on remand defendants entered guilty pleas to misdemeanor charges of disorderly conduct and intoxication. *For the Record: 3 Involved in Entry Case Enter Pleas*, SALT LAKE TRIB., Oct. 17, 2006; see also Nate Carlisle, *Brigham City Police Response Case Nears End After Six Years*, SALT LAKE TRIB., Oct. 5, 2006 ("Police and prosecutors in Utah said they appealed because they were worried the rulings by the state courts set too narrow a criteria by which cops could enter dwellings and could hamper police responses to incidents such as spousal abuse.").

<sup>449</sup> *Brigham City*, 547 U.S. at 409 (Stevens, J., concurring).

<sup>450</sup> 548 U.S. 212 (2006).

<sup>451</sup> 542 U.S. 296, 313–14 (2004) (holding that the state sentencing law violated the Sixth Amendment right to a jury trial by allowing the judge to impose a sentence beyond the standard range upon finding aggravating factors); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

<sup>452</sup> *Recuenco*, 548 U.S. at 214–15.

<sup>453</sup> *Id.* at 215.

<sup>454</sup> *Id.* at 222.

<sup>455</sup> *Id.* at 223 (Stevens, J., dissenting).

<sup>456</sup> *Id.* Indeed, on remand the Washington Supreme Court held that under state law the error was not harmless and reaffirmed its earlier decision to vacate the sentence. *State v. Recuenco*, 180 P.3d 1276, 1283 (Wash. 2008).

3. *Summary.*—Justice Stevens has invited the Court to limit its review of state court cases upholding federal constitutional rights against state government. In Justice Stevens’s view, the interest in correcting state court decisions that expand federal constitutional rights is insufficient to justify expending the Court’s scarce resources. In addition, Justice Stevens argues, the Court should respect state judicial processes. Justice Stevens’s proposal is limited in its scope. In particular, it would not require the Court to renounce, in all circumstances, the power to review state court decisions invalidating state laws or state action on federal constitutional grounds. Nonetheless, Justice Stevens has set the stage for formalizing state court autonomy. Against this backdrop, the next section assesses more systematically the merits of formally allowing state courts to expand federal constitutional rights against state government.

### B. *Evaluating Unitary Authority*

State courts and federal courts once shared, as a formal matter, responsibility for interpreting the federal Constitution. Today, the authority to decide what the Constitution means is formally the prerogative of the Supreme Court—state courts must follow its determinations. This section examines the costs associated with this development and the benefits that could come from formalizing state court autonomy. It considers in particular how authority consolidated in the Supreme Court weakens protections for individual rights and undermines federalism. The next section will take up possible objections to autonomous state courts.

1. *Protection of Rights.*—The relative benefits of authority consolidated in the Supreme Court and state court autonomy can be measured in terms of their impact on individual rights. Consolidation of authority in the Supreme Court has likely weakened overall protections for constitutional rights. This is because in settling constitutional disputes, the U.S. Supreme Court typically proceeds with caution. The Court is not often ahead of the political mood.<sup>457</sup> While recent work on the Rehnquist Court indicates it was more likely to correct “liberal errors” than “conservative errors” by the state courts,<sup>458</sup> the Court’s generally cautious approach is likely independent of whether the justices are conservative or liberal. Within the range of results they find satisfactory, Supreme Court justices across the spectrum can be expected to opt for narrow rather than broad outcomes. The Justices understand that they are setting rules for a diverse nation, that those rules im-

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<sup>457</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991) (arguing that the Supreme Court’s decisions in the areas of segregated schooling, reproductive freedom, and women’s rights reflected the ways in which society was already evolving and concluding that “courts can almost never be effective producers of significant social reform”).

<sup>458</sup> John C. Kilwein & Richard A. Brisbin, Jr., *U.S. Supreme Court Review of State High Court Decisions: From the Warren Through the Rehnquist Courts*, 89 *JUDICATURE* 146, 183 (2005).

pose costs on state and local government,<sup>459</sup> and that it is normally better not to decide more than is necessary for the satisfactory disposition of the case at hand.<sup>460</sup>

Reaching this assessment is not to deny that individual rights are more secure with the incorporation of the Bill of Rights against the states; with courts, especially federal courts, holding state government accountable for violating its provisions; and with Congress empowered to enforce the Fourteenth Amendment's requirements. Nonetheless, some rights are likely less protected than they might be because the state courts lack formal authority to expand federal rights beyond the parameters set by the Supreme Court.

Allowing state courts hearing cases against state government to expand upon the Supreme Court's understanding of federal constitutional rights would allow constitutional rules to be more carefully tailored to local circumstances. In applying the federal Bill of Rights, state courts would have greater latitude to consider whether local conditions merit more expansive protections than the Supreme Court, setting rules for the nation as a whole, is inclined to enforce. For example, in a state with a long history of abusive searches and seizures by the police, state courts might insist the police follow more stringent procedural requirements under the Fourth Amendment and impose more severe remedies for violations. If a state has a disadvantaged religious minority, the state court can apply First Amendment protections that exceed those the Supreme Court has adopted. In deciding whether a state's punishment is cruel and unusual under the Eighth Amendment, a state court can look to the sensibilities of the state's residents. In a state with persistent racial or other biases in its criminal justice system, the state court could impose stronger safeguards to protect constitutional rights. At the same time, the U.S. Supreme Court would set minimum standards of protection for the nation as a whole, ensuring that interpretations of rights by state courts never drop below a national floor.

Application of a rule that the U.S. Supreme Court will not review state court holdings that a state government has violated a federal constitutional right requires addressing the issue that there are cases in which *both* parties claim a constitutionally protected interest. Some commentators assert that any constitutional claim to X can be presented as somebody else's claim to be free from X.<sup>461</sup> That claim is surely too broad—unless one takes the

<sup>459</sup> See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1042 n.115 (1985) ("Due to the size and diversity of the country, the Court must limit its decisions to constitutional norms capable of achievement nationwide.").

<sup>460</sup> See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001) (arguing for minimalistic, case-specific constitutional law decisions in order to avoid the extremes of judicial "activism" by both conservatives and liberals).

<sup>461</sup> See, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1530–31 (1990) (arguing that because any decision upholding one party's right can be framed by the losing party (including the state) as the state court's failure to protect it from application

view that the general public has a right to have the Constitution enforced in a certain way.<sup>462</sup> Yet there are clearly instances where one right implicates another right or important interest.<sup>463</sup> For example, strong protections for one person's free exercise of religion could undermine others' religious freedom or become an unconstitutional establishment of religion.<sup>464</sup> The right of the public to attend or the press to cover a criminal trial can interfere with the defendant's right to a fair trial.<sup>465</sup> Broad protections for an author's copyright can undermine the free speech of other people, and vice-versa.<sup>466</sup> Giving somebody a strong right of association can undermine others' associational rights.<sup>467</sup> Strong due process protections for one party can undermine rights belonging to other parties.<sup>468</sup> According somebody parental rights can weaken somebody else's rights to control the upbringing of children.<sup>469</sup> Recognizing constitutional rights of unborn children would in-

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of the federal right enforced, Section 25 of the Judiciary Act of 1789 did not limit the Court's ability to hear state court cases).

<sup>462</sup> For example, if a court holds that a certain punishment is cruel and unusual in violation of the Eighth Amendment, only the defendant's constitutional rights are implicated—unless one takes the position that the people of a state (or victims of crimes, perhaps) have a constitutional right to have punishments imposed.

<sup>463</sup> See, e.g., MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 100 (1999) (“[A]ny discussion of rights must include other compelling constitutional and personal values. Any invocation of ‘rights’ by one person, or one group, affects and perhaps diminishes other individual or collective interests, broadly conceived.”); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) (“We have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have. . . . [R]ights are conceptually interconnected with, and occasionally even subordinate to, governmental powers.”); Matasar & Bruch, *supra* note 64, at 1387 (“Decisions favoring assertions of rights frequently benefit one group of citizens, but do not always come without costs to others. . . . [O]ver protection of one class amount[s] to underprotection of another.”).

<sup>464</sup> See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (invalidating statute that allowed employees not to work on their Sabbath because an accommodation is invalid if it has “a primary effect that impermissibly advances a particular religious practice”); *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970) (upholding a New York City tax exemption for religious property and explaining that the “Religion Clauses . . . , if expanded to a logical extreme, would tend to clash with the other” and that the task is to find the “play in the joints”).

<sup>465</sup> See SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL 31–75 (2006) (discussing this tension and the courts' efforts to resolve it in interpreting the Sixth Amendment right to a “speedy and public trial, by an impartial jury”).

<sup>466</sup> See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1032–33 (2006) (discussing the “uneasy relationship” between copyright and the First Amendment).

<sup>467</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding unconstitutional a state law requirement that the Boy Scouts allow a homosexual to be a scout leader); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995) (holding unconstitutional a state law requirement that parade organizers include a gay organization).

<sup>468</sup> For example, if state courts impose very strong procedural requirements before the entry of a divorce decree, a custody determination, or a foreclosure, more than one party's interests (in marriage, child rearing, or property) are implicated.

<sup>469</sup> See, e.g., *Troxell v. Granville*, 530 U.S. 57, 67 (2000) (invalidating the application of a state statute which authorized state courts to grant visitation rights to anyone when visitation served a child's

terfere with a pregnant woman's right to seek an abortion. Broad understandings of state action and equal protection can undermine property or contract rights.<sup>470</sup> Strengthening a witness's right to assert the Fifth Amendment privilege against self-incrimination could undermine a criminal defendant's right to confront the witness. Giving people strong constitutional rights to travel could interfere with the ability of property owners to exclude others from their land.<sup>471</sup>

If state courts autonomously interpret the Federal Constitution, a mechanism is needed to address cases where there are rights on both sides. One possibility is to give the Supreme Court power to review, at the request of a party, any state court ruling on federal constitutional grounds that could reasonably be construed as infringing a constitutional right or interest, whether at issue in the state court case or not. The Court could then take into account any negative impact of the decision on the rights of the parties in the case and the constitutional rights or interests of the general citizenry.<sup>472</sup> This freewheeling approach, however, would subject too many cases to the possibility of review, undermining the benefits of state court autonomy. If the Justices wanted to correct a state court decision, they could assert that some constitutional right had been impacted negatively. If they did not want to exercise review, they could contend that no such rights were at stake. Given this kind of uncertainty, state courts would be reluctant to expand federal constitutional protections, fearing the Court would review their decisions.

A better approach would be for the Court, in deciding whether to exercise review, to look only to the four corners of the state court case. The Court would review a state court decision if, and to the extent that, the state court had denied relief to a party invoking a federal constitutional right. Accordingly, the Court would deal with conflicts between rights only when presented concretely through litigation. The party that had lost on the federal constitutional ruling could ask the Court to reverse.

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best interest, and allowed grandparents to visit their grandchildren over the objection of the custodial mother); *Michael H. v. Gerald D.*, 491 U.S. 110, 124–30 (1989) (holding that a natural father has no constitutionally protected liberty interest in the relationship with his child, whose mother is married to another man).

<sup>470</sup> See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (upholding, as a proper exercise of Congress's power under the Thirteenth Amendment, a federal statute prohibiting private racial discrimination in housing); *Shelley v. Kramer*, 334 U.S. 1, 20–23 (1948) (holding that the Fourteenth Amendment prohibits state judicial enforcement of covenants prohibiting ownership or occupation of real property by members of a designated race).

<sup>471</sup> Imagine, for instance, that a court held that the beachgoers in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), had a right to travel to the beach by any route, including across the Nollans' property. See *id.* at 841–42 (holding unconstitutional an exaction of a public easement across beachfront land as a condition for approval of permit to expand a beachfront home).

<sup>472</sup> Note that since we are only talking here about whether the Court should exercise the jurisdiction it already possesses and hear a case, no constitutional difficulty arises of taking into account rights not presented in the case.

2. *Federalism.*—Consolidation of authority in the Supreme Court can also be measured in terms of its impact on federalism. The formal rule that the Supreme Court is authoritative on issues of federal constitutional law is arguably inconsistent with federalism because it displaces the role of state courts in the federalist scheme. Though they apply federal law, state courts are no more lower federal courts<sup>473</sup> than the state legislatures are subunits of Congress<sup>474</sup> or the state governors agents of the federal executive branch.<sup>475</sup> The historical practice of allowing state courts leeway to interpret the federal Constitution recognized the importance of state courts in our constitutional design. The impact on federalism of consolidating authority to interpret the Federal Constitution has some negative consequences. As discussed above, federalism allows local governments to develop and implement rules that best suit their own conditions. In the antebellum era, for example, state courts were free to apply federal constitutional protections against state government more stringently in light of local needs. Today, they lack this freedom.

Moreover, federalism does not value local authority merely for its own sake, but for the benefits diversity can bring. Allowing state courts to adopt more expansive readings of constitutional rights generates information about the effects of construing rights in different ways. There are, therefore, gains to the system as a whole: Approaches and outcomes in one state can be observed by others, and federal courts can also draw upon the lessons of localized experimentation.<sup>476</sup> Consolidated authority undermines the benefits of experimentation that are a feature of American federalism. Professors Michael E. Solimine and James L. Walker summarize the problem:

[T]he Supreme Court cannot pick and choose among the states. . . . It cannot say, “Mississippi, why can’t you behave like Massachusetts in your handling of tainted evidence?” Or, “Florida, go check with Oregon on giving people

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<sup>473</sup> But see JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES* 89–92 (2009) (arguing that with the Supreme Court’s modern powers to review the final judgments of state courts on federal issues, the state courts *are* properly viewed as equivalent to inferior federal courts).

<sup>474</sup> Cf. *New York v. United States*, 505 U.S. 144, 149 (1992) (invalidating a provision of the federal Low-Level Radioactive Waste Policy Amendments Act because the Constitution prohibits commandeering state legislatures).

<sup>475</sup> Cf. *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act because the Constitution prohibits commandeering state executive officials to enforce federal law).

<sup>476</sup> See, e.g., Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505 n.116 (1987) (“[D]isuniformity created by various judges applying federal law . . . inform[s] and enrich[es] the uniform interpretation ultimately supplied by the Supreme Court.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1251 (1978) (“A number of ‘reforms’ in criminal procedure imposed as a matter of federal constitutional law by the Warren Court were already well established as a matter of state law in a significant number of states.”).

adequate representation at trial.” It must, instead, proclaim a national rule and then require all the states to observe it. States are thus marginalized: That is, they must tinker with policies, if they wish to, at the margins. . . . With the end of experimentation comes the end of creativity and responsibility.<sup>477</sup>

To be sure, state courts can act independently when it comes to interpreting their own state constitutions, on which they are already authoritative. However, for reasons that are explored below,<sup>478</sup> the Federal Constitution offers unique opportunities for state courts to act expansively. Independence under state constitutions is not, therefore, a good substitute for obtaining the benefits that could arise from formalizing state court autonomy with respect to federal constitutional issues.

In addition to curtailing the benefits of localized experimentation, our modern practice represents an unusual interference in the structure of state government. It permits the executive branch of state government to enlist the help of federal judges to overturn a decision of the judicial branch of state government. As Professor Hartnett observes, “deciding such cases at the request of state officers . . . changes the balance between the branches of state government,”<sup>479</sup> and this occurs without even a “plain statement of assent by the state authorizing some of its officers to seek review of a decision by other of its officers in the Supreme Court.”<sup>480</sup> The criticism does not challenge *individuals’* ability to seek review of state court decisions or contest the actions of other branches of state government in federal court. Rather, it is directed at the ability of one state official to come before the Supreme Court, as an aggrieved party, and challenge what another state official has done.<sup>481</sup> We would surely find it strange if a state judge were to ask a federal court to force the state legislature to repeal a statute, or to tell the state executive to stop enforcing it—and stranger still if the state judge were to make the request to the Congress or the President. Yet we take for granted that a state executive official can challenge the decisions of a state judge in federal court. Allowing state courts to interpret federal constitutional protections broadly without being checked by the Supreme Court would promote regard for state courts as part of state government.<sup>482</sup>

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<sup>477</sup> SOLIMINE & WALKER, *supra* note 463, at 24–25.

<sup>478</sup> *See infra* Part IV.E.

<sup>479</sup> Hartnett, *supra* note 20, at 968.

<sup>480</sup> *Id.* at 970.

<sup>481</sup> *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 456 (1995) (noting how in the modern period the “distinction between public power and private right” has been obscured, with government power becoming “roughly equivalent” to the liberty interests of individuals and therefore a basis to seek redress in the courts of another sovereign).

<sup>482</sup> *See* Thomas H. Lee, *Counter-majoritarian Federalism*, 74 FORDHAM L. REV. 2123, 2123 (2006) (describing the defense of the autonomy of state judges, such as Justice Stevens’s focus in *Long*, as “countermajoritarian federalism”).

### C. Formalization and Its Limits

Having examined the costs of consolidated authority, this section examines two possible objections to authorizing state courts to expand federal constitutional rights: (1) constitutional rights will vary around the country and (2) state judges will become unaccountable. A careful consideration of these objections shows that there are mechanisms to guard against any ill-effects and that on balance the benefits of state court autonomy outweigh possible downsides.

1. *Crazy Quilts.*—Variation among state courts is not necessarily a good thing when it comes to implementing federal law, particularly federal constitutional law.<sup>483</sup> From a modern perspective, a deficiency of the early courts was that individual federal constitutional rights varied around the country—turning uniform law into what Justice Scalia referred to in *Marsh* as a “crazy quilt.”<sup>484</sup> Today, a single body of federal constitutional law generated by the U.S. Supreme Court means that citizens do not live with different federal constitutional rights depending on the decisions of their state courts.<sup>485</sup> Uniformity within each state is also promoted when, rather than generating their own rules, federal diversity courts determine how a case would be adjudicated in state court.<sup>486</sup> Justice Scalia cautions that if the Court cannot today correct state court decisions erroneously expanding federal constitutional rights, federal constitutional law will again vary, with residents of some states enjoying stronger federal protections than residents of other states.<sup>487</sup> This seems contrary to the Constitution of “the People of the United States,”<sup>488</sup> which guarantees the “equal protection of the laws.”<sup>489</sup>

Justice Scalia’s objection, however, is less powerful than it might first appear. It is clear that formalizing state court autonomy would allow for

<sup>483</sup> See, e.g., THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”). Modern commentators emphasize the value the Framers placed on uniformity. See, e.g., Friedman, *supra* note 91, at 1218 (“Although the Convention split on the necessity of establishing lower federal courts (resolved by giving Congress the power to decide), there was widespread agreement on the need for a federal Supreme Court to ensure the supremacy and uniformity of federal law.” (citations omitted)).

<sup>484</sup> *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring).

<sup>485</sup> See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 911 (1984) (“Although the uniformity-assuring function of the Court does not strike me as a constitutionally mandated one, as a matter of policy, our system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.”).

<sup>486</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938) (explaining that the defect of applying general law in diversity cases was that “[i]n attempting to promote uniformity of law throughout the United States,” it “prevented uniformity in the administration of the law of the State”).

<sup>487</sup> See *Marsh*, 548 U.S. at 185 (Scalia, J., concurring).

<sup>488</sup> U.S. CONST. pmbl.

<sup>489</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

constitutional protections to vary from one state to another. However, because state courts could not cut back on rights as recognized by the Supreme Court, there would be equality in the sense that everyone would be protected by a core set of federal rights.<sup>490</sup> Above this common floor the degree to which protections will vary depends, of course, on the willingness of state judges to expand on what the Supreme Court itself requires. Yet even assuming very substantial variations among state court rulings, the inconsistency is not likely to outweigh the benefits of state court autonomy. Our legal system already tolerates a good deal of inconsistency and nonuniform outcomes, even as to matters of federal constitutional interpretation. Everyone knows that the Fourth Circuit is not the Ninth Circuit, and it is probably no coincidence that, in the War on Terror, enemy combatants have been held in Charleston and Norfolk rather than in San Francisco.<sup>491</sup> The U.S. Supreme Court hears only a tiny fraction of cases presented to it<sup>492</sup> and decides far fewer cases than it heard at the close of the nineteenth century and the first decades of the twentieth century.<sup>493</sup> Therefore, a conflict among the holdings of circuit courts does not necessarily lead to Supreme Court review, and federal constitutional law can vary around the nation.<sup>494</sup>

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<sup>490</sup> See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Incorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 65 (1996) (identifying equality in the form of “uniform treatment of defendants throughout the United States” as the principal benefit of the incorporation of criminal procedural provisions of the Bill of Rights).

<sup>491</sup> See Susan N. Herman, *Yasser Hamdi and the Fourth Circuit’s Legal No-Man’s Land*, JURIST, Jan. 13, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew84.php> (suggesting, in a discussion of the detention of Yasser Hamdi at a naval brig in Norfolk, Virginia, that “the government . . . anticipated that this most conservative federal Court of Appeals would defer to its claim of executive prerogative”).

<sup>492</sup> See ROBERTS, *supra* note 90, at 2 (reporting that during the Supreme Court’s 2008 Term, 7738 cases were filed; 87 cases were argued; and 83 were disposed of in 74 signed opinions); David M. O’Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134, 134–135 (2005) (“A major legacy of the Rehnquist Court . . . will remain a sharply diminished plenary docket.”).

<sup>493</sup> See EPSTEIN ET AL., *supra* note 27, at 225–31 tbl.3-1 (2007) (reporting more than two hundred cases decided in each term from 1875 to 1896 and between 166 and 285 cases per term in each term from 1897 to 1930). Epstein and her coauthors count only cases with signed opinions. If all cases disposed of by the Court are counted, the figures are higher. See FRANKFURTER & LANDIS, *supra* note 19, at 295 tbl.1 (reporting 3321 cases for the terms 1916 to 1925, an average of 332 cases per term).

<sup>494</sup> See John Harrison, *Federal Appellate Jurisdiction Over Questions of State Law in State Courts*, 7 GREEN BAG 353, 356 (2004) (“Federal law is notoriously non-uniform among the different circuits, and the Supreme Court is apparently sufficiently indifferent to this fact that it leaves many inter-circuit conflicts unresolved.”); Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 145–57 (2001) (analyzing conflicts among circuit courts and the circumstances under which the Supreme Court resolves them); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1483 (2005) (“Even narrowly focused federal rights often have nonuniform application, simply by virtue of various federal district courts, and federal appellate courts . . . coming to different conclusions on the same issue. Circuit splits on federal law are not an uncommon phenomenon, and not all such splits are . . . resolved by[] the Supreme Court.”). *But see* COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 43–44 (1995) (“Current empirical data on the number, frequency, tolerability, and persistence of unresolved inter-circuit conflicts (i.e., those not heard

Though the Court itself has emphasized that uniformity is one of the benefits of federal question jurisdiction,<sup>495</sup> in practice, there remains scope for variation.<sup>496</sup> So too, even in our current system, differences among state supreme courts in their interpretations of the federal Constitution might not be immediately resolved.<sup>497</sup> Members of the Supreme Court have themselves recognized this feature of the modern judicial system.<sup>498</sup> More generally, even if doctrinally everyone is assigned the same set of rights, in practice, those rights can vary depending on the facts, context, and court.<sup>499</sup> While formalizing state court autonomy might increase the degree of variation around the nation, there is little reason to imagine that the result would be unmanageable. Indeed, as noted, variation—where state courts are innovat-

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by the Supreme Court) indicate that intercircuit inconsistency is not a problem that now calls for change.”); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 777, 792 (1995) (concluding, based on an analysis of 226 cases involving circuit conflicts that the Supreme Court did not review during the 1984 and 1985 terms, that most conflicts were eventually resolved by subsequent decisions or litigation or otherwise do not persist).

<sup>495</sup> See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg. Co.*, 545 U.S. 308, 312 (2005) (stating that federal question jurisdiction gives litigants access to judges more experienced on issues of federal law and more solicitous of federal claims and promotes uniform interpretations of federal law).

<sup>496</sup> See CHEMERINSKY, *supra* note 128, § 5.2.1, at 272 (writing that “[i]t is not clear that ninety-four federal judicial districts will produce more uniformity than fifty state judiciaries” and that even thirteen federal courts of appeals will not produce more uniformity than state courts on controversial issues). In addition to constitutional issues, variation also exists with respect to issues of federal statutory law, and such variations may be followed by federal agencies. For example, the IRS has adhered to adverse circuit court rulings only within the applicable circuits. After the U.S. Court of Appeals for the Tenth Circuit held in *Pollei v. Commissioner of Internal Revenue*, 877 F.2d 838, 842 (10th Cir. 1989), that vehicle maintenance and operating costs incurred by police captains traveling to and from work were deductible business expenses, the IRS announced that it “views the Pollei decision as incorrect and will not follow Pollei other than in the Tenth Circuit” and that “[c]onflicts with the Pollei decision will be sought in other circuits.” IRS Action on Decision CC-1990-031 (Dec. 17, 1990). Relatedly, the Tax Court views a circuit court’s precedent as binding only in cases appealable to that circuit. See *Golsen v. Commissioner*, 54 T.C. 742, *aff’d* 445 F.2d 985 (10th Cir. 1971).

<sup>497</sup> See LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 98 (1944) (“[T]he Supreme Court no longer has the capacity to sit as a court of error in routine cases.”); Friedman, *supra* note 91, at 1241 (noting the “Supreme Court’s limited capacity to superintend the fifty state court systems”); Solimine, *supra* note 88, at 359 (noting that severely downsizing the docket might limit the Supreme Court’s ability to monitor state courts, but that “available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out its monitoring function”).

<sup>498</sup> For example, Justice Brennan wrote:

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

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

<sup>499</sup> SOLIMINE & WALKER, *supra* note 463, at 25.

ing—can benefit the system as a whole by introducing different perspectives and experiences.

Many commentators take the position that federal issues should be decided by federal judges because, compared to state court judges, federal judges have greater expertise on issues of federal law<sup>500</sup> and are more sympathetic to federal claims.<sup>501</sup> Whether these claims are accurate is not clear. State courts share general federal question jurisdiction with the federal courts, and state courts decide large numbers of criminal cases that involve federal constitutional rights. One recent study demonstrates that while federal judges hear more civil cases involving federal issues, state courts have significant experience adjudicating federal questions involving the provisions of the Federal Bill of Rights and the Fourteenth Amendment, but less experience interpreting federal statutes.<sup>502</sup> More generally, relying on federal courts because they have greater expertise is something of a self-fulfilling prophecy: if state courts were given greater authority, they would soon develop the expertise to use it properly.

2. *Accountability.*—A further objection to formalizing state court autonomy is that it would render state judges unaccountable. The mechanism for correcting erroneous state court interpretations of the Federal Constitution is recourse to the Supreme Court. If the Supreme Court applies the Constitution in a way that is sufficiently unpopular, recourse lies in the amendment processes of Article V. If a state court has the last word on a federal constitutional issue, however, there is no recourse to the Supreme Court. Article V is also unlikely to deter or provide a remedy for erroneous state court decisions. This is because ratification is deliberately cumbersome, requiring supermajorities in both chambers of Congress and three-fourths of the states. An amendment reversing a state court decision, even one provoking intense opposition from most of the state's residents, would be unlikely to make it over Article V's hurdles. Although based on the Federal Constitution, the state court ruling would affect only the citizens of one state. The rest of the nation would have little incentive to mobilize to pass a constitutional amendment. While multiple state courts ruling in a highly unpopular way on a constitutional issue might provoke an amend-

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<sup>500</sup> See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2 (2d ed. 1990) (“[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has . . . devoted the bulk of its efforts to the evolution and refinement of state law and policy.”).

<sup>501</sup> See, e.g., *Merrell Dow*, 478 U.S. at 827 n.6 (Brennan, J., dissenting) (writing that one “reason Congress conferred original federal-question jurisdiction on the [federal] district courts was its belief that state courts are hostile to assertions of federal rights”); see also CHEMERINSKY, *supra* note 128, § 1.5, at 35-40 (discussing parity, a concept that includes consideration of expertise and receptiveness to federal claims, along with the psychological disposition to enforce federal rights).

<sup>502</sup> See John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 282-86 (2007) (reporting and discussing the results of an empirical study of federal issues decided in state and federal courts).

ment, such instances are likely to be very rare. Thus, the objection is that state judges, freed from the possibility of correction, will be at liberty to do anything they please in the name of the Federal Constitution.<sup>503</sup> The quilt really could become crazy.

Modern mechanisms can both preserve accountability and do so without unduly deterring state judges from making use of the power to expand federal constitutional rights. Perhaps the most important such mechanisms are those within individual states. State judges operate under political and institutional constraints that are often more severe than those faced by federal judges. Empirical evidence confirms that “political, institutional, and other conditions” constrain the activities of state court judges.<sup>504</sup> Most state judges are elected to fixed terms of office,<sup>505</sup> and even where state court judges are not elected, appointment processes tend to screen out mavericks.<sup>506</sup> Fixed terms limit the mischief any individual judge can cause and allow for mistakes to be overturned when new personnel take office. Notably, within a few years of the *Ives* decision, the New York case that is often cited as the impetus for the 1914 expansion of the Supreme Court’s jurisdiction to review state court decisions,<sup>507</sup> a change in personnel on the New York Court of Appeals caused it to change course and uphold a workers’

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<sup>503</sup> For an insightful account of the plain statement rule of *Michigan v. Long* as promoting “clear state and federal lines of accountability” to serve popular sovereignty in a way similar to the anticommandeering rules of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), see Vikram David Amar & Alan Brownstein, *When Avoiding Federal Questions Shouldn’t Evade Federal Review*, 12 GREEN BAG 2D 381, 385-86 (2009). Professors Amar and Brownstein contend that “by grounding their decisions on an unclear mix of federal and state law, state courts may shield their rulings from both federal court review and political oversight within their respective states.” *Id.* at 384.

<sup>504</sup> Robert M. Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 LAW & SOC’Y REV. 845, 865 (2006).

<sup>505</sup> See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063 (2010) (“Almost ninety percent of state judges face some kind of popular election.”) (citing Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 7 (Matthew J. Streb ed., 2007)). Methods of judicial election vary and the degree and type of accountability likely also varies as a result. In some states, elections involve multiple candidates, while in other states judges run only for retention; some elections are partisan (i.e. the judge is affiliated with a political party), while other states prohibit party affiliation. Terms of service also vary among states. See American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us/> (last visited Aug. 19, 2010) (providing state-by-state information on selection of judges and terms of service). I recognize also that other differences among state courts, such as judicial salary, the size and nature of the docket, the backgrounds of the judges, and whether opinions are published, could also impact the extent to which state judges exercise independence.

<sup>506</sup> Some commentators suggest that state court judges rarely deviate from the decisions of the U.S. Supreme Court because state court judges have, on the whole, adopted the conservatism of the Burger and Rehnquist Courts. See Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 JUDICATURE 190 (1991).

<sup>507</sup> See *supra* note 64 and accompanying text.

compensation statute.<sup>508</sup> Various studies have also demonstrated that judicial elections produce some measure of accountability.<sup>509</sup> For example, outcomes in tort cases and in criminal cases differ in states where judges are elected rather than appointed,<sup>510</sup> and state supreme court justices subject to reelection are less likely to hear and uphold challenges to state abortion statutes.<sup>511</sup> At the same time, the effects of judicial elections on judicial behavior should not be overstated.<sup>512</sup> Because most of the day-to-day business of a court does not attract public attention, a likelihood of voter backlash may be limited to hot-button issues<sup>513</sup> and even then might not material-

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<sup>508</sup> Hartnett, *supra* note 20, at 978 (citing and discussing *Jensen v. Southern Pac. Co.*, 109 N.E. 600, 604 (N.Y. 1915)). *Jensen* distinguished *Ives* and rejected a Fourteenth Amendment due process challenge to a statute creating a compensation scheme for injured railroad workers. See *Jensen*, 109 N.E. at 603.

<sup>509</sup> See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001) (conducting an empirical study concluding that judicial elections produce substantial accountability); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009) (“[V]oting of state supreme court judges is strongly associated with the stereotypical preferences of the retention agents.”). To be sure, many observers have criticized judicial elections on the ground that they undermine judicial independence. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 697 (1995) (describing judicial elections as “irreconcilable with . . . the fundamental principles underlying constitutionalism”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 969 (2002) (“Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place.”). Since her retirement from the Supreme Court, Sandra Day O’Connor has been an outspoken critic of judicial elections. Jennifer Sullivan, *Ex-Justice O’Connor: Electing Judges Puts Courts at Risk*, SEATTLE TIMES, Sept. 15, 2009, [http://seattletimes.nwsourc.com/html/politics/2009866692\\_justice15m.html](http://seattletimes.nwsourc.com/html/politics/2009866692_justice15m.html).

<sup>510</sup> See, e.g., DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME COURT POLICY* (1995) (reporting that appointed judges are more likely to favor criminal defendants than are elected judges); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. L. & ECON. 157, 162–170 (1999) (reporting that tort awards are higher in electoral states than in nonelectoral states).

<sup>511</sup> See Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1290-94 (1999) (providing empirical evidence of the effects of judicial selection methods in abortion cases). Some of the effects of elections on judicial behavior result from judges’ perceptions of their vulnerability. See *id.* at 1271 n.34 (“While voters in judicial elections generally are uninformed, research demonstrates that judges nonetheless perceive their positions to be at risk, and therefore adjust their behavior when deciding controversial cases.”).

<sup>512</sup> See Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. LAW, ECON. & ORG. (forthcoming 2010) (manuscript at 38), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008989) (“[T]he conventional wisdom that appointed judges are more independent than elected judges is a simplification and probably an exaggeration.”).

<sup>513</sup> The best-known example is the 1986 defeat of Chief Justice Rose Bird and two of her colleagues on the California Supreme Court who set aside death penalties. See Croley, *supra* note 509, at 737–38 & n.144.

ize.<sup>514</sup> In addition, the judge who serves for a lengthy term may be insensitive to public criticism during much of his time on the bench: studies demonstrate that judges tend to adjust their rulings to conform to public opinion only around the time they are facing reelection.<sup>515</sup> Nonetheless, judicial elections, particularly as they are conducted today, do provide an opportunity to draw attention to a sitting judge's record.<sup>516</sup> Indeed, formalizing state court autonomy could produce *greater* overall accountability. Federal judges do not serve for fixed periods and are not subject to reelection. They are thus the *least* accountable of all judges. Shifting authority to state courts would put decisionmaking in the hands of the judges who have to answer to the electorate. Judicial elections allow "voters and the community as a whole to become engaged in the legal process"<sup>517</sup> in ways that may serve popular constitutionalism.<sup>518</sup>

More generally, formalizing state court autonomy would open up the rulings of state judges to greater public scrutiny. With specific authority to apply constitutional provisions more generously than does the Supreme Court, the state judge would bear responsibility for a decision to expand rights and for a decision refusing to do so. A state judge could therefore no longer defend decisions on constitutional claims by saying, in essence, "The Supreme Court made me do it." To be sure, the state judge freed from reversal by the Supreme Court, could (and would) defend novel rulings on the ground that they are required by the Federal Constitution. There is, however, a considerable difference between the state judge who claims he is merely following Supreme Court precedent and the state judge who rules in a certain way because of the requirements of the Constitution itself. The rul-

<sup>514</sup> See JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 252 (2008) (reporting on an absence of backlash when state courts invoked state constitutional provisions to expand abortion rights and invalidate restrictions on same-sex intimacy).

<sup>515</sup> Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 485–503 (1995) (conducting an empirical study concluding that judges take more conservative positions in criminal cases where they face reelection); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 427–46 (1992) (reporting that judges deviate from past voting patterns at the time of reelection); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (conducting an empirical study concluding that judges alter their behavior when faced with reelection pressures).

<sup>516</sup> See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267–68 (2008) ("[W]e are in a new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; salience is at an all-time high. Campaign rhetoric has changed dramatically, becoming more substantive in content and negative in tone." (footnotes omitted)).

<sup>517</sup> *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

<sup>518</sup> See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. \_\_\_ (forthcoming December 2010) (arguing that judicial elections promote popular constitutionalism by providing citizens with an opportunity to engage with constitutional decisions and to keep judicial decisionmaking in check).

ings of the latter judge are open to public scrutiny in a way that adherence to precedent is not. Members of the public who lack legal training cannot easily determine whether a state court judge is faithfully following Supreme Court precedents or not. Assessing what the state court has done in such cases requires understanding the case law—which is likely to be complex and voluminous—and determining how the precedents apply or do not apply to the case the judge decided. By contrast, a state court ruling based not on the application of Supreme Court precedent but on a new interpretation of the Constitution can be more easily accessed and reviewed by people who lack specialized legal training. A judge's claim that "The Constitution made me do it" is uniquely open to public scrutiny. Consider in this regard the Supreme Court's 2008 decision in *District of Columbia v. Heller*,<sup>519</sup> holding that the Second Amendment confers an individual right to possess a firearm at home for self-defense. The majority and dissenting opinions in *Heller* are accessible to an educated reader without the need for legal training. The reason is simple: with little relevant case law bearing on the issue in *Heller*, the opinions are based on the text of the Second Amendment, historical materials on the meaning of its provisions, and (in the case of the dissents) policy concerns. Ordinary people can read the opinions in *Heller* and offer views on whether they are persuasive.<sup>520</sup> Although rulings on new issues of constitutional law can also be complex, freeing a state judge from Supreme Court review would, in many cases, open up the judge's rulings to greater public scrutiny.

A risk, of course, is that faced with elections and public review of their decisions, state court judges might be disinclined to make any use of the authority to expand upon federal constitutional protections. In other words, formalizing state court autonomy might have no effect on how state court judges decide federal constitutional issues. This outcome is, however, unlikely. Some expansions of constitutional rights will not trigger public protest and may receive little attention at all. In other cases, an expansion will be greeted with approval, perhaps because the people of a state are unhappy with how the Supreme Court has decided an issue. State judges will also be responsible for both expanding and refusing to expand constitutional protections. A refusal to rule more broadly will in some circumstances trigger criticism from the citizenry or from vocal interest groups.

Beyond judicial elections and public criticism of rulings, a different potential check on state courts is more intriguing. If formal state court autonomy were to become a reality, the people of a state could amend their *state* constitution to limit how state judges apply the Federal Constitution.

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<sup>519</sup> 128 S. Ct. 2783 (2008).

<sup>520</sup> Anecdotal evidence suggests that because it is accessible, *Heller* is, increasingly, assigned as the first case in Constitutional Law courses in law schools. I assign it on the first day of class. I also use *Heller* when I teach constitutional law classes to visiting parents of law school students and to prospective law students.

Two states have already limited how state judges can interpret state constitutional provisions. Following an unpopular ruling by the Florida Supreme Court in a search and seizure case,<sup>521</sup> in 1982 Florida amended its constitution to provide that, in interpreting the state constitutional search and seizure provision, courts must follow the Supreme Court's reading of the Fourth Amendment.<sup>522</sup> A different provision of the Florida Constitution, also added in response to judicial rulings, requires state judges to construe the state prohibition on cruel or unusual punishments in the same way the U.S. Supreme Court construes the Eighth Amendment ban on cruel and unusual punishments.<sup>523</sup> In 1979, after the California Supreme Court held that the equal protection clause of the California Constitution required public schools to remedy de facto as well as de jure racial segregation,<sup>524</sup> California voters approved by initiative an amendment specifying that with respect to student assignment and transportation, the state constitution imposed no obligations on state government beyond those imposed by the Fourteenth Amendment.<sup>525</sup> In 1990, in response to state court rulings perceived to expand the rights of criminal defendants at the expense of crime victims, California voters also sought by initiative to amend the state constitution to tie its criminal procedural protections to the Federal Constitution.<sup>526</sup> However, the California Supreme Court held the change to be so far-reaching that it

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<sup>521</sup> The Florida constitutional amendment was a response to *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981), in which the Florida Supreme Court declined to follow *United States v. White*, 401 U.S. 745 (1971), and held that the state constitution prohibited an informant from using an electronic surveillance device in a suspect's home without judicial authorization. *Sarmiento*, 397 So. 2d. at 645; see Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence From The Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701, 701-02 (2003).

<sup>522</sup> FL. CONST. art. I, § 12. The Florida Constitution provides:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

<sup>523</sup> FL CONST. art. I, § 17.

<sup>524</sup> *Jackson v. Pasadena City School Dist.*, 382 P.2d 878, 881-82 (Cal. 1963)

<sup>525</sup> CAL. CONST. art. I, § 7(a).

<sup>526</sup> The provision read:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

*Raven v. Deukmejian*, 801 P.2d 1077, 1086 (Cal. 1990).

could only be accomplished by the more burdensome constitutional revision process and not by initiative.<sup>527</sup>

A state might therefore amend its constitution to provide that, when a state court interprets a provision of the Federal Constitution protecting an individual right, the court can go no further in protecting that right than is required by the decisions of the U.S. Supreme Court.<sup>528</sup> Such an amendment might be made prospectively if the people of a state, getting wind of a proposal to formalize state court autonomy, fear it might make state judges uncontrollable. It could be a wholesale amendment or limited to issues of particular concern, such as Eighth Amendment protections in capital cases. Alternatively, the state constitutional amendment might respond to a particular controversial state court decision. A state constitutional amendment provides a possible means to curtail judges otherwise inclined to expand federal rights beyond the rulings of the Supreme Court and in ways not approved by the citizens of a state.

In considering amendments of this kind, the goal should be to give state courts some autonomy while preserving also mechanisms for accountability. Amending state constitutions to specify how state judges are to rule on federal constitutional issues risks nullifying state court autonomy. But without the availability of a state constitutional amendment, state court decisions could be shielded from redress. Here, the Supremacy Clause of the Constitution could do some work in striking an appropriate balance. The Supremacy Clause could be understood to permit state constitutional amendments overturning specific state court decisions on federal constitutional issues. However, state constitutional amendments could not specify how state judges must rule in the future or provide wholesale that state judges must adhere to the interpretations of the U.S. Supreme Court. This approach would allow the people of a state to undo an unpopular state court decision that is not subject to review in the Supreme Court while also allowing state courts to consider fresh questions in the future without being told in advance how to decide them.

Finally, the federal removal statute also provides something of a check on state judges. The federal removal statute allows defendants in civil cases to remove certain cases from state court to federal court if the case could have been filed originally in federal court.<sup>529</sup> A state government can, therefore, avoid expanded constitutional rulings in civil cases by removing cases

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<sup>527</sup> *Id.* at 1089.

<sup>528</sup> In their study of state court search and seizure decisions, Robert Howard and his colleagues find that state provisions tying the interpretation of state rights to the interpretation of coordinate federal rights curtail the development of independent state law doctrines. Howard et al., *supra* note 504, at 865.

<sup>529</sup> See 28 U.S.C. § 1441(a) (2006). Accordingly, if the only federal issue is a federal defense, the case cannot be removed. Diversity cases cannot be removed from state to federal court if any of the defendants are residents of the state where the action was filed. *Id.* § 1441(b). Additional federal statutes also limit removal in specific kinds of cases. See, e.g., *id.* § 1445(a) (prohibiting removal in actions for damages under the Federal Employers' Liability Act).

brought against it to federal court. Of course, even if the state can remove a case, it might have good reasons to keep the case in state court. For example, the state might believe that state judges (or juries) are overall more favorable to it than are federal district judges. State rules of procedure might be more palatable. Government litigators might have greater experience in state court. State courts might resolve cases faster or on a more predictable schedule.<sup>530</sup> Nonetheless, removal is available as a safety valve for unduly expansive state court decisions in civil cases. Indeed, the availability of removal can serve to head off criticism of state judges when they rule expansively on federal constitutional issues. If a state government chooses to remain in state court when removal is available, then criticisms of the state court's ruling become less powerful.

#### *D. A Refined Proposal*

The previous sections have set out the benefits and objections to giving state courts authority to expand upon federal constitutional protections without review by the Supreme Court. In light of these considerations, I offer a refined proposal: state courts will have formal authority to apply expansively against state government the Fifth Amendment Takings Clause and the provisions of the Fourth, Fifth, Sixth, and Eighth Amendments that protect the rights of criminal defendants. This refinement makes sense for two reasons. As we have seen, in these areas, state courts are already largely responsible for applying federal constitutional rights. This responsibility would therefore be formalized. Granting state courts formal authority in these two areas also avoids many of the difficulties identified in the preceding discussion. In takings cases and criminal cases, the state government is always a party; such cases do not typically pose the problem of rights presented on both sides of the dispute, and only on rare occasions will a state court's decision to construe a federal constitutional right broadly risk diminishing a right held by somebody else. Formalizing state court autonomy in criminal cases and takings cases also requires no change to rules of removal. Under current removal rules, state law criminal cases that raise federal constitutional issues cannot ordinarily be brought in or removed to federal

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<sup>530</sup> Moreover, not all cases in which a state court ultimately rules against a state government on a federal constitutional issue are cases that could have been removed to federal court. The federal courts have broad jurisdiction, concurrent with the state courts, to hear cases involving federal questions. 28 U.S.C. § 1331 (2006). But the federal issue must be presented in the plaintiff's well-pleaded complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that federal question jurisdiction cannot be based on a defense or anticipated defense); *see also Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950) (holding that if the complaint would not state a federal question, the plaintiff cannot proceed in federal court by seeking a declaratory judgment that a federal law is unconstitutional or inapplicable because that is merely an anticipation of a defense). Nor can cases be removed when federal issues arise only after the litigation has begun.

court.<sup>531</sup> Federal courts also cannot ordinarily intervene in pending state criminal prosecutions.<sup>532</sup> So, too, as we have seen, the Court's exhaustion requirement prevents most takings cases from being brought in or removed to federal court.<sup>533</sup> For each of these reasons, takings cases and criminal cases present the best opportunity to capture the benefits of formal state court autonomy while minimizing its downsides. In formalizing state court autonomy, it therefore makes sense to begin with these two sets of cases. This is not to say that the approach could not be extended to other areas of constitutional law. There are likely good arguments in favor of allowing state courts to rule more generously under the Equal Protection Clause, the First Amendment, and other provisions of the Constitution. Nonetheless, these other areas present additional challenges which would need to be addressed.

State court autonomy with respect to the provisions of the Constitution protecting criminal defendants should extend to civil cases brought in state court under § 1983<sup>534</sup> or a state law analog.<sup>535</sup> When a state court determines under § 1983 or an analogous state statute whether a state official has violated a plaintiff's federal constitutional rights, the state court should be permitted to interpret the meaning of the relevant federal constitutional pro-

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<sup>531</sup> See 28 U.S.C. § 1441 (providing for removal only in civil cases). The Civil Rights Removal Act allows a defendant to remove civil actions or criminal prosecutions if the defendant can show that the state court proceeding will deny rights protected by a federal civil rights law or if the defendant's defense is that the action that is the basis for the state court action was required by federal civil rights laws. *Id.* § 1443. However, the Supreme Court has interpreted this first provision very narrowly to require a deprivation of rights that are secured by a federal law protecting racial equality and a deprivation that results from a formal expression of state law, such as a state statute or state constitutional provision. See *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975).

<sup>532</sup> See *Younger v. Harris*, 401 U.S. 37, 43 (1971) (holding that federal courts can enjoin state criminal prosecutions only in extraordinary circumstances, where there is a substantial and imminent risk of irreparable injury to those being prosecuted). *Younger* identified three circumstances in which abstention would not apply: where the prosecution was brought in bad faith, where the relevant state statute was patently unconstitutional, or where the state forum was inadequate to protect federal rights. See *id.* at 48–49, 53–54. The Court extended *Younger* to civil litigation where the state is a party in *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), and to cases between private parties where there are sufficiently important state interests at stake in *Moore v. Sims*, 442 U.S. 415, 423 (1979).

<sup>533</sup> See *supra* Part III.A.

<sup>534</sup> See 42 U.S.C. § 1983 (2006) (providing a federal cause of action against persons who, acting under color of state law, violate federal constitutional rights). State courts have concurrent jurisdiction to hear § 1983 claims. See *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. State of Cal.*, 444 U.S. 277, 283–84 n.7 (1980). See also 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS 9.2 § 2.39 (2007) (reporting “the volume of state court § 1983 cases is increasing rapidly” and “resemble[s] the federal court caseload with the exception of pro se prisoner cases”).

<sup>535</sup> Many states have mini § 1983 statutes that provide an alternative remedy against state actors for violations of federal constitutional rights and, in some instances, against nonstate actors for interfering with the exercise of those rights. See, e.g., CAL. CIVIL CODE § 52.1 (West 2005); MASS. GEN. LAWS ANN. ch. 12 § 11H (West 2005); N.J. STAT. ANN. § 10:6-2(c)–(d) (West 2005).

vision more broadly than the Supreme Court. The Supreme Court should not review such decisions.<sup>536</sup>

As a practical matter, there are two ways to formalize state court autonomy in the manner I have proposed. The first is for Congress to pass a statute akin to Section 25 of the Judiciary Act of 1789 limiting the Supreme Court's jurisdiction: the Supreme Court would, as a statutory matter, have power to review state court decisions that deny a claim of a federal constitutional right in a takings cases or a criminal case, but there would be no statutory power of review if the state court held the state government violated a federal constitutional protection. A second way of accomplishing the proposal is for the Supreme Court to hold that state courts have the authority to expand federal constitutional rights against state governments in takings cases and in criminal cases. Concurrently, the Court would announce that in controlling its own docket, it will no longer grant petitions for review in cases where a state court has upheld a claim of a federal constitutional right against a state government and the only challenge to the state court decision is that the state court has overprotected a federal constitutional right.

#### E. State Courts and State Constitutions

State courts are already free to expand constitutional rights under their own state constitutions. There are many examples of state courts ruling more generously on state constitutional grounds than the Supreme Court when it interprets the Federal Constitution;<sup>537</sup> scholars have dubbed these state court rulings instances of “new judicial federalism.”<sup>538</sup> However, the overall evidence of the willingness of state courts in interpreting their own constitutions to depart from Supreme Court interpretations of the federal Constitution is mixed.<sup>539</sup> Michael Solimine reports that “systematic studies

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<sup>536</sup> State court defendants are entitled to remove § 1983 claims to federal court. 28 U.S.C. § 1441(a)–(b). Some defendants in § 1983 cases filed in state courts will remove the case to federal court to avoid state court autonomy. Altering the removal rules to prohibit removal of § 1983 cases is a possible, though likely excessive, response to this issue.

<sup>537</sup> See JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* 243 (2008) (collecting and discussing cases that show that “[a] significant number of states have . . . create[d] a substantial body of state constitutional law that goes well beyond the federal doctrine to establish rights of the individual that flow from state constitutions.”).

<sup>538</sup> The new judicial federalism traces to the argument of Justice Brennan that in the post-Warren Court period state constitutions are important sources to protect individual liberty. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For a summary of the vast literature on new judicial federalism, see ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–34 (2009).

<sup>539</sup> See WILLIAMS, *supra* note 538, at 194 (reporting that in the “clear majority of cases,” state courts follow federal constitutional doctrine when interpreting state constitutional provisions); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 28 (1994) (reporting from a study of state supreme court decisions between 1981–1986 on self-incrimination that “state high courts

demonstrate that most state courts, when presented with the opportunity, have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. . . . [T]he majority of state courts, on most issues engage in an analysis in lockstep with their federal counterparts.<sup>540</sup> This assessment raises an obvious question: if state courts tend to adhere to the rulings of the Supreme Court when they interpret their own state constitutions, why would they be inclined to depart from Supreme Court rulings when authorized to do so when applying the federal Constitution? Put differently, allowing state courts to rule expansively under the Federal Constitution might produce no benefits that could not already be achieved by state courts interpreting state constitutional provisions.

There are compelling reasons to believe that state courts would indeed make use of formal authority to depart from Supreme Court rulings under the Federal Constitution—even if they have shown reluctance to rule expansively under the state constitution. State constitutional law is relatively undeveloped not simply because state judges, who may fear voter backlash, are disinclined to interpret state constitutional provisions independently, but because state judges are not well-positioned to take full advantage of the authority they already possess to apply the state constitution. In many cases brought in state court, attorneys rely exclusively on federal constitutional arguments and do not brief issues of state constitutional law.<sup>541</sup> When state

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seldom developed their state's law in ways that would establish it as a viable alternative to federal law"); Patricia Fahlbusch & Daniel Gonzalez, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAAMI L. REV. 159, 159–60 (1987) (reporting no increased reliance on state court grounds after *Long*); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1481 & n.4 (1990) (collecting cases showing that “for more than 100 years the Texas criminal courts have interpreted the state and federal constitutions identically” (citations omitted)); Latzer, *supra* note 506, at 192–94 (reporting that one-third of state high court criminal procedure decisions based on state constitutional law in a twenty-year period expanded rights beyond the federal requirements and that only four state courts consistently went beyond the rulings of the Supreme Court). Invoking the concept of parity, scholars have also vigorously debated whether federal and state courts are equally well suited to enforcing federal constitutional rights. *See, e.g.*, MICHAEL E. SOLIMINE & WALKER, *supra* note 463, at 34–62 (arguing that empirical evidence shows that federal rights are as likely to be protected in state court as in federal court); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts do not protect federal constitutional rights as forcefully as do federal courts).

<sup>540</sup> Solimine, *supra* note 88, at 338 (collecting studies).

<sup>541</sup> *See* WILLIAMS, *supra* note 538, at 130–31 (“[L]awyers still fail to argue properly the state constitutional grounds where available. In many states, the courts refuse to reach the state constitutional argument under such circumstances.”); Esler, *supra* note 539, at 31 (“[A]ttorneys often do not argue state grounds before state courts. . . . Most state supreme courts refuse to base their decisions on legal grounds *sua sponte* as a matter of principle.” (footnote omitted)). One likely reason that lawyers, particularly those who practice in multiple jurisdictions, focus on federal constitutional law is that it is uniform (or at least more uniform than the laws of different states). Impact litigators may also select federal law because a favorable ruling in one jurisdiction can be exported elsewhere. Allowing federal constitutional law to vary as a result of state court independence might alter the advantage of pursuing federal claims over state claims. I am grateful to Rob Mikos for bringing these points to my attention.

constitutional law arguments are made, they are often limited to a reminder that if the state court rejects the party's federal constitutional claim, it is free to depart from Supreme Court precedent and decide the issue under the state constitution.<sup>542</sup> Without arguments made and briefed, state judges have largely lacked the tools to develop an independent body of state constitutional law. As David Souter observed when a member of the New Hampshire Supreme Court, the development of a coherent body of state constitutional law apart from federal constitutional doctrine requires "developed advocacy from those who bring the cases."<sup>543</sup> More generally, federal constitutional law dominates state constitutional law in state courts. In part, this is a legacy of the historical trends examined in this Article. Incorporation, coupled with expansive Supreme Court review, has turned state judges into expert and busy administrators of the Federal Constitution and pushed aside state constitutional law as the basis for protecting individual rights.<sup>544</sup>

Further, state judges and their law clerks are often more knowledgeable about the Federal Constitution,<sup>545</sup> in part because state constitutional law is not emphasized in law schools.<sup>546</sup> State judges may also lack the time and resources,<sup>547</sup> and even the confidence, to independently develop doctrines

<sup>542</sup> Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 853 (2007) ("The most common state constitutional 'argument' . . . seems to be that the state court is free to provide greater rights under the state constitution . . . . But this truism . . . is typically not followed by any well-developed rationale explaining why the state court should do so in the particular case.").

<sup>543</sup> *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

<sup>544</sup> See, e.g., Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 388, 402–03 (Paul Finkelman & Stephen E. Gottlieb eds., 2009) (arguing that the decline in the vibrancy of state constitutions coincided with the rise of federal constitutional law in the post-Civil War era); Althouse, *supra* note 476, at 1490 ("As long as state courts were engaged in absorbing these new standards [incorporated by the Fourteenth Amendment], they left analogous provisions in state constitutions unexplored." (footnotes omitted)); Esler, *supra* note 539, at 31 ("As the number of incorporated provisions . . . reached its peak during the Warren years, the dominance of federal law became practically complete." (footnote omitted)). One sign of this effect is the shadow the Federal Constitution casts even when state courts do rely upon state constitutional provisions to invalidate state laws. Professor Robert Williams reports that in such cases, state judges typically act on the presumption that the federal doctrine is correct for resolving the state law issue and therefore explain why they are not following it—rather than begin from the premise that they have power to interpret the state constitution and provide a "reasoned elaboration of state constitutional doctrine." WILLIAMS, *supra* note 538, at 137. For a critique of the claim that incorporation displaced state constitutional law, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 805–10 (1992).

<sup>545</sup> See Bonventre, *supra* note 542, at 852 ("[M]any state court judges and justices, as well as their law clerks and the lawyers who argue the cases in state court, know virtually nothing about state constitutional law and adjudication.").

<sup>546</sup> *Id.* at 853.

<sup>547</sup> Esler, *supra* note 539, at 31 (reporting that time constraints and the lack of historical records on the development of state constitutional provisions impede the development of state constitutional law).

based on state constitutional provisions.<sup>548</sup> Moreover, existing state constitutional law precedents may impede state constitutional innovations.<sup>549</sup> Accordingly, “[e]ven when state supreme courts are otherwise receptive to basing decisions on state grounds, institutional factors largely beyond their control often present significant obstacles to the development of state law.”<sup>550</sup>

In light of these factors, evidence of how state courts have interpreted state constitutional provisions may shed little light on the question of whether state courts would depart from Supreme Court precedents if formally authorized to do so under the Federal Constitution.<sup>551</sup> More significant is how often state courts have ruled on the basis of state constitutional provisions at all. Large majorities of state cases involving constitutional claims are decided exclusively on the basis of the Federal Constitution.<sup>552</sup> State court decisions based on state law are comparatively rare.<sup>553</sup> Put differently, state courts have likely followed the Supreme Court not because they are incapable of developing an independent approach to constitutional problems, but because the bulk of their constitutional decisions involve federal issues presented to them. State court interpretations of state constitutions do not, therefore, provide a solid basis from which to draw conclusions about how state courts would interpret provisions of the Federal Constitution once freed from Supreme Court review. Indeed, regularity and experience in deciding issues of federal constitutional law likely put state courts in a stronger position from which to exercise independence un-

*But see* WILLIAMS, *supra* note 538, at 319 (“Despite complaints that state constitutional history is scarce, it is certainly much more available than federal constitutional history.” (footnote omitted)).

<sup>548</sup> Esler, *supra* note 539, at 31 (“[A]fter so many years of neglect, some state courts lack the self-confidence to embark on an independent interpretation of their own law.” (footnote omitted)).

<sup>549</sup> Gardner, *supra* note 544, at 763 (“[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”).

<sup>550</sup> Esler, *supra* note 539, at 31.

<sup>551</sup> Indeed, the fact that state courts have followed in lockstep with the Supreme Court on state constitutional issues might suggest that state judges are actually more inclined to expand rights than is the Supreme Court. *See* Latzer, *supra* note 490, at 66 (“Unlike federal constitutional law, which is imposed upon the state courts, state constitutional law is a matter of choice. Whereas state courts *must* enforce federal . . . rights incorporated into due process, they need not provide equivalent state constitutional rights.”).

<sup>552</sup> *See* Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 44 tbl.2 (1992) (reporting that 14.4% of state supreme court cases from 1981–1985 involving challenges to state statutes were decided exclusively on the basis of state law); Esler, *supra* note 539, at 28 (reporting that twenty-two percent of state supreme court decisions between 1981–1986 on self-incrimination were based on state law); Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, 17 PUBLIUS 53, 61 (1987) (reporting that fewer than seven percent of state supreme court cases in 1975–1984 raising equal protection claims were decided exclusively on the basis of state law).

<sup>553</sup> Many state court decisions since *Michigan v. Long* have not supplied the plain statement. WILLIAMS, *supra* note 538, at 123–24; Felicia A. Rosenfeld, Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988).

der the Federal Constitution than they currently occupy in deciding issues under the state constitution.

Further, even state courts reluctant to expand rights by interpreting the state constitution might be more inclined to do so under the Federal Constitution. The state court might, for example, believe that state government will be more likely to accept and comply with a ruling based on the Federal Constitution than on the state constitution, which is more likely to be amended in response to an adverse state court ruling. Likewise, the state court might reasonably expect that state residents will show greater deference to and more readily accept a ruling under the Federal Constitution than under the state constitution because the Federal Constitution commands greater respect.<sup>554</sup> In some cases, state courts might expand rights because there is a stronger textual or historical basis in the Federal Constitution than in the state constitution for doing so. For example, just fifteen state constitutions contain a provision that, like the Federal Constitution, guarantees the equal protection of the law.<sup>555</sup> While many (but not all) other state constitutions contain provisions protecting specified forms of equality,<sup>556</sup> it is not difficult to imagine a state court, given a choice, electing to rely upon the Federal Equal Protection Clause and to extend the well-developed federal doctrines rather than craft new rules under a state constitutional provision with a different text and history.<sup>557</sup>

#### CONCLUSION

Federal constitutional law has a robust existence beyond the U.S. Supreme Court. It is time to recognize more fully how state courts make federal constitutional law and how, as a result, they support and enrich our constitutional government. In the law, formal rules should reflect actual practices. In practice, the Supreme Court is not always supreme because state courts bear a large responsibility for interpreting and applying the Federal Constitution.

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<sup>554</sup> James Gardner argues that the reason state constitutional doctrine remains undeveloped is that state constitutionalism itself no longer plays a useful role: “Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.” Gardner, *supra* note 544, at 818.

<sup>555</sup> SHAMAN, *supra* note 537, at 41.

<sup>556</sup> See, e.g., OR. CONST. art. I, § 20 (“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”).

<sup>557</sup> For example, the Oregon Supreme Court has emphasized how the historical origins of the state constitution’s equality provision, adopted in 1859, differ from those of the Fourteenth Amendment. See *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 975 (Or. 1982) (“The Reconstruction Congress . . . was concerned with discrimination against disfavored groups or individuals, specifically, former slaves. . . . When article I, section 20, was adopted as a part of the Oregon Constitution . . . in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few.”).

In a sense, it should be no surprise that authority today to determine the meaning of the Federal Constitution is shared. We are accustomed to governmental powers being divided between the national government and those of the states. When, as today, federal constitutional questions arise in or bear on a large number of civil and criminal cases, it is inevitable that no single court will be in a position to resolve them all.

Formalizing state court autonomy will recognize, legitimize, and celebrate the important role of state courts in our constitutional system. The Court's recent decision in *Danforth v. Minnesota*<sup>558</sup> is a small step in this direction. The *Danforth* Court, in an opinion by Justice Stevens, held that state courts, in their own postconviction proceedings, were entitled to give broader retroactive effect to new rules of federal constitutional criminal procedure announced by the Supreme Court than would be available to state inmates on federal habeas review under the restrictive standards of *Teague v. Lane*.<sup>559</sup> After *Danforth*, state courts can give state inmates the benefit of a constitutional rule—and, where warranted, overturn a conviction, even though the same inmate would not receive the benefit in a habeas proceeding in federal court.<sup>560</sup>

*Danforth*, of course, does not foretell the success of this Article's proposal.<sup>561</sup> Justice Stevens emphasized that the question involved not the substance of a federal constitutional right but only the remedy available for a violation of that right.<sup>562</sup> State courts were entitled in their own habeas proceedings to craft a more generous remedy than is available in federal court.<sup>563</sup> This does not imply that the Court's general trajectory is to recognize greater state court authority. Even if *Danforth*'s distinction between the right and the remedy is untenable, as Chief Justice Roberts thought in

<sup>558</sup> 552 U.S. 264 (2008).

<sup>559</sup> 489 U.S. 288, 307–13 (1989) (plurality opinion) (explaining that a new rule applies retroactively to cases final at the time the rule is announced only if the rule places certain kinds of private conduct beyond the power of the government to proscribe or is a watershed rule defining procedures implicit in the concept of ordered liberty).

<sup>560</sup> *Danforth*, 552 U.S. at 282 (“[T]he *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.”).

<sup>561</sup> Indeed, the ultimate disposition of the case on remand to the Minnesota Supreme Court represented a mixed outcome. See *supra* note 92.

<sup>562</sup> *Danforth*, 552 U.S. at 280.

<sup>563</sup> *Id.* at 280–81 (*Teague* “was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court’s authority to grant relief for violations of new rules of constitutional law when reviewing its own State’s convictions.”). *Danforth* involved the application of *Crawford v. Washington*'s holding that the Confrontation Clause prohibits the admission of testimonial out-of-court statements unless the defendant has had a prior opportunity to cross-examine the speaker. 541 U.S. 36, 68–69 (2004). Under the *Teague* standard, the *Crawford* rule does not apply retroactively to cases that were final when *Crawford* was decided. *Wharton v. Bockting*, 549 U.S. 406, 414–16 (2007). The Minnesota Supreme Court, asked to apply *Crawford* retroactively, had considered itself bound by *Teague*. The *Danforth* Court disagreed.

his dissent,<sup>564</sup> the case does not invite state courts to construe federal constitutional rights more generously than does the Supreme Court. Nonetheless, the Court is clearly interested in the respective roles of state and federal courts in our constitutional system. The time is therefore ripe to examine those roles and reassess the division of judicial labor in the twenty-first century.

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<sup>564</sup> See *Danforth*, 552 U.S. at 303 (“When this Court decides that a particular right shall not be applied retroactively, but a state court finds that it should, it is at least in part because of a different assessment by the state court of the nature of the underlying federal right—something on which the Constitution gives this Court final say.”) (Roberts, C.J., dissenting).

