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State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions

JAMES A. GARDNER*

INTRODUCTION

Constitutions govern governments: they create governments, grant them powers, and impose limits on the exercise of granted powers. In the American legal order, constitutional rights are conventionally understood to apply to and restrain the level of government created by the constitution in which those rights appear. Rights appearing in a national constitution thus restrain the national government, rights enumerated in a state constitution restrain the state government and so on. Occasionally, a constitution also contains rights that restrain lower levels of government. The Fourteenth Amendment of the United States Constitution, for example, creates individual rights that restrain state governments, and rights identified in state constitutions typically constrain the exercise of power by county and municipal governments. However, it is conventionally understood that individual rights in a lower-order constitution apply solely to the lower level government and thus have no relevance to the actions of any higher level of government.

In this Article, I challenge this conventional understanding. Individual rights in state constitutions, I argue, can in many circumstances restrain the exercise of national power. State constitutional rights do not, of course, constrain the national government as a matter of positive law; the Supremacy Clause of the U.S. Constitution subordinates state law to national law as a matter of positive...
political authority. Nevertheless, the identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power. State constitutional rights, that is to say, can be weapons of state resistance to national tyranny in a federal system of divided power.

To see how state constitutional rights serve this purpose, we must make a small but significant shift in how we conceptualize state power. Conventionally, we tend to understand the purposes for which any government’s powers exist to be given by the constitution that creates the government in question.5 This understanding follows naturally from the Lockean conception of constitutions that dominates our legal system.6 According to that conception, a constitution is a deliberate, foundational act of an independent polity asserting its natural right to self-governance.7 In creating its constitution, that polity—and no other—establishes its governmental institutions in the way it thinks best, for purposes it, and it alone, thinks appropriate.8

This model works well enough for national constitutions. Nation-states often relate to one another in a real-world approximation of the Lockean (or perhaps Hobbesian) state of nature,9 and national polities occasionally coalesce and create national governments in acts of more or less genuinely independent self-creation. The same model, however, does not apply equally well to sub-

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5. See, e.g., U.S. Const. pmbl:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.


8. See, e.g., The Declaration of Independence para. 2 (U.S. 1776):

Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

9. See Locke, supra note 7, § 14:

It is often asked as a mighty objection, where are, or ever were there any men in such a state of nature? To which it may suffice as an answer at present, that since all princes and rulers of independent governments all through the world, are in a state of nature, it is plain the world never was, nor ever will be, without numbers of men in that state.

national constitutions created by states or provinces that are subdivisions of more comprehensive nations. In the American setting, the Lockean model of independent political self-creation does not adequately describe state-level constitutional processes because it ignores the fact that American states are part of a nationwide federal system of dispersed power—a system created at the national level by, and to a considerable extent managed under the auspices of, the U.S. Constitution. Because states are in some ways cogs in a national apparatus, the purposes for which state power exists are not given exclusively by a state polity in the state's constitution, but are also determined to some extent by the national polity in the national constitution. State power, in other words, exists not only to serve the state polity in the achievement of state goals, but also to serve the national polity in the achievement of national goals. States are part of an interlocking plan of federalism devised collectively by the people of the nation and maintained by them as part of a comprehensive plan designed to serve the overriding national purpose of protecting the liberty of all Americans. From this perspective, elaborated further below, it becomes possible to see that individual rights granted in state constitutions serve the purpose not only of protecting individuals against tyrannical acts of state governments, but also against tyrannical acts of the national government.

This view of state power and state constitutional rights provides an additional benefit: it points toward a fuller and more satisfying account of state constitutional interpretation than do the models that currently dominate this now long-standing jurisprudential debate. The principal reigning theories of state constitutional interpretation decree, roughly speaking, that state constitutions be interpreted either completely independently of national constitutional law, or in nearly complete dependence upon it. Both of these prescriptions flow from erroneous understandings of the nature of state power in a federal system. To urge that state constitutions be interpreted completely independently from the U.S. Constitution is to treat states as truly independent Lockean sovereigns. Conversely, to urge that state constitutions be interpreted whenever possible in agreement with national constitutional law treats states as mere decentralized administrative subdivisions of a national governing apparatus. Neither view incorporates the complexities—and ambiguities—that characterize the nature of states and the functions of state power in a truly federal system of divided sovereignty. The approach to state power I advocate here takes a more realistic


step toward capturing this complexity in a functional jurisprudence of state constitutional interpretation. Specifically, the functional approach developed here leads to the perhaps paradoxical conclusion that state courts may in some circumstances be fully justified in interpreting provisions of state constitutions for the express purpose of disagreeing with, undermining, and attempting actively to ameliorate any harm caused by decisions of the U.S. Supreme Court that, in the state courts’ view, do not adequately protect rights secured by the national constitution.

Part I of this Article sets out what I call a “functional” account of state power within the American system of federalism. This account stresses the role that federalism contemplates for state power as a means of monitoring the exercise of power by the national government and restraining its abuse. In this account, national power and state power are divided in pursuit of a common goal: the protection of liberty for all Americans. In the course of this account, Part I describes the various tools available to the national and state governments to check abuses by the other.

Part II fits state constitutional rights into the framework of federalism’s system of mutual governmental checking. It explains how individual rights found in state constitutions can be invoked by state courts not only to counteract abuses of power by the state government actors directly restrained by such rights, but also—perhaps counterintuitively—to resist abuses of power by the national government itself. This conception of state constitutional rights has its greatest application in checking abuses of national judicial power by the United States Supreme Court. Specifically, I argue in Part II that state judicial rejection of and divergence from purportedly incorrect or abusive Supreme Court precedents concerning the scope of individual rights helps to check national power in at least four ways. First, whenever a state court dissents from the reasoning of a U.S. Supreme Court decision, it offers a forceful and very public critique, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of that federal ruling. Second, state constitutional rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor that the Supreme Court sometimes considers in the course of its own constitutional decisionmaking. Third, generous state interpretations of individual rights can check national power more directly, by prohibiting state and local governments from exercising authority permitted them under the U.S. Constitution to suppress certain kinds of private behavior. In so doing, state courts create spaces in which otherwise prohibitable behavior may flourish. Finally, rights-protective rulings by state courts can help ameliorate the harm to liberty caused by narrow national rulings by providing protection for second-best alternatives to the types of behavior that such national rulings permit governments to suppress.

Part III concludes by sketching out briefly some of the consequences of this approach to state constitutional rights for the interpretation of state constitu-
tions. First, application of the functional approach suggests that state courts construing their state constitutions must conceive of federal constitutional law as nearly always highly relevant to the interpretation of state constitutional rights, but rarely conclusive for it. Second, the functional approach reveals that an appropriate and, indeed, necessary function of state courts when construing their state constitutions is actively to monitor and, when necessary, to attempt to resist and undermine constitutional constructions by federal courts that fail adequately to secure rights protected by the national document.

I. A Functional Account of State Power

A. The Basic Mechanics of Federalism

"The accumulation of all powers... in the same hands," wrote Madison "may justly be pronounced the very definition of tyranny." To protect liberty, then, power must be divided. Federalism serves this guiding principle of American constitutional design by parceling out government powers among different levels of government. Federalism, it must be borne in mind, is a creation of the national Constitution, not state constitutions. It is not the result of a fortuitous series of agreements reached one by one by the separate peoples of the original thirteen states; on the contrary, federalism represents the deliberate decision of a single national polity to divide governmental power for the purpose of protecting the liberty of all.

Federalism protects liberty by giving the state and national levels of government substantial powers sufficient to allow each to monitor and check the abuses of the other. As with the horizontal separation of powers that divides governmental power into legislative, executive, and judicial branches, each level of government in this vertically fragmented system is given the power and incentive to struggle against the other: "Ambition," as Madison put it, "must be made to counteract ambition." The result is a compound federal republic in which power is deeply fragmented, reducing as far as possible by structural means the likelihood that a tyrannical measure of power can be accumulated in a single set of hands:

13. See, e.g., Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 1-2, 20-21 (1993); William P. Murphy, The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Making of the Constitution (1967). This position, of course, rejects the compact theory of the Constitution. One would have thought this point uncontroversial and well-documented. See, e.g., Beer, supra; Murphy, supra; Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987). Recently, however, four justices of the U.S. Supreme Court have flirted with a conception of American nationhood that looks considerably like the compact theory. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.").
In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself. 16

The multiplicity of power centers in the American scheme can create the impression that the system is chaotic—a pure, Hobbesian war of all against all without any purpose other than the accumulation of power. This is not the case—or at least need not be the case. In the Framers' view, what unifies the dispersion of governmental power is the people, for the entire system is designed to assure as far as possible that their wishes be done and their liberties left intact. 17 “The Federal and State Governments,” Madison observes, “are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” 18 Federalism is thus more than a passive institutionalization of social conflict; it is a dynamic system that is designed to be manipulated by the people to produce results they desire. Hamilton put this point clearly:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress. 19

Thus, the Framers expressly contemplated that popular allegiances to any government would not be fixed organically, but would ebb and flow according to that government's instrumental value to the populace at any given time. Each

16. Id. at 351.
19. THE FEDERALIST No. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also THE FEDERALIST No. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961), in which Madison, after remarking that Americans place their faith and trust primarily in their state governments, observed:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .
level of government would have sufficient power to check any tyrannical
tendencies of the other level, but the people would decide when and whether to
activate this checking power. The "double security" of which Madison spoke,
then, does not arise so much from some complicated scheme of complementary
powers, as is so often supposed, but from a much simpler arrangement in which
the state and national governments independently police much of the same
turf. To protect that turf, the people make use of whichever level of govern-
ment is more capable and accommodating at any particular moment.

Historically, federalism seems to have worked in much the way that the
Framers anticipated. In the early days of the republic, the people identified far
more strongly with their states than with the nation and looked predominantly to
the states when government power was needed. The Civil War disrupted this
pattern by enhancing national power and prestige throughout the North and
among blacks and white unionists in the South, while driving most white
Southerners to significantly distrust national power. Trust in state governments
enjoyed a resurgence during the late Nineteenth Century, particularly after
public opinion turned against the northern occupation of the South and the
Union programs of Reconstruction. The Progressive reform movement of the
early Twentieth Century, followed quickly by the Great Depression, two world
wars, and the Civil Rights Movement, set the nation on a path in which national
power was typically far more respected and trusted than state power. By the
1980s, however, resentment against national power seemed to rise once again.

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20. See Beer, supra note 13, at 300–07.
21. See Thomas R. Dye, American Federalism: Competition Among Governments 6 (1990); Amar,
supra note 13, at 1429–66; Akhil Reed Amar, Some New World Lessons for the Old World, 58 U. Chi.
L. Rev. 483, 498 (1991); Martin Landau, Federalism, Redundancy and System Reliability, 3 PUBLIUS
No. 2, 1973, at 173; Todd B. Pettys, Competing for the People’s Affection: Federalism’s Forgotten
23. See Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863–1877, at 23–24
(1988) (describing rise of national consciousness following the Emancipation Proclamation, which
“clothed national authority with an indisputably moral purpose”); Larry Kramer, Understanding
Federalism, 47 Vand. L. Rev. 1485, 1557–58 (1994) (listing “the fact that the South lost the Civil War”
among factors that “helped to make national identity more important than state identity”).
24. See, e.g., Foner, supra note 23, at 582 (“1877 marked a decisive retreat from the idea, born
during the Civil War, of a powerful national state protecting the fundamental rights of American
citizens.”); Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776–1876, at
208–21 (2000) (describing the rise of states’ rights ideology during the 1870s); id. at 223 (“For six
decades after the end of Reconstruction, [intrusion by the federal government into exercise of state
power] was, except during World War I, rare and ineffective; attempts to encroach upon the powers
reserved to the states were struck down by the Supreme Court and were disapproved by the vast
majority of Americans.”); Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitu-
tional History of the United States 477 (2002) (describing the abandonment of the Republican
Party’s commitment to national authority after 1877).
25. See Keith E. Whittington, Dismantling the Modern State? The Changing Structural Foundations
26. See id. at 503–22.
Today, we may well live in an age in which the people are as close to true
difference between national and state power as they have ever been, and are
willing to contemplate the exercise of power by either level of government,
depending upon which level can more persuasively demonstrate that it can do
the better job.  

B. HOW FEDERALISM WORKS IN PRACTICE

1. How the National Government Protects Liberty

State power is a vital element in federalism's design. To put the exercise of
state power in context, however, I begin by examining the ways in which
federalism contemplates that national power may be deployed to protect liberty.
In conducting this analysis, I shall use the term "liberty" in a broad sense. The
concept of "liberty" is often equated with the restraint of government power—
the kind of "negative" liberty that Isaiah Berlin defined as freedom from
government interference with private decisionmaking. Although this understand-
ing of liberty captures much of what federalism operates to protect, it is
incomplete. If private decisionmaking were the sine qua non of collective life,
no government would be necessary whose powers would then require restraint.
Government is created and granted powers in the first instance to help citizens
achieve some kind of good life, a good life they are by hypothesis incapable of
achieving on their own, either individually or collectively, in the absence of
governmental organization. To fulfill this function, government needs affirm-
ativa powers, not only restraints on its powers. Thus, although federalism
contemplates the division of power to protect "liberty," I shall treat this conven-
tional use of the word as a kind of synecdoche that names only one part of the
broader notion of achieving, or creating the conditions that enable citizens to
achieve, a substantively desirable way of life. Under this broad definition of
liberty, the national government of the United States contributes to and protects
the liberty of American citizens in at least three distinct ways: (1) by using its
affirmative powers in pursuit of the good, (2) by practicing self-restraint, and
(3) by restraining state governments from impairing the ability of citizens to
achieve the good.

27. The events of September 11, 2001 may have changed the balance once again, shifting the focus
of trust to the national government. See Linda Greenhouse, Will the Court Reassert National Author-
ity?, N.Y. TIMES, Sept. 30, 2001, at 4:14; David Lightman, Poll Tracks National Growth in Trust; A
Strong Majority Likes and Trusts the U.S. Government for the First Time Since the Vietnam Era,
HARTFORD COURANT, Nov. 29, 2001, at A1; John Nienstedt, Social Values Emerging from the Rubble of

28. ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 122-31 (Oxford U.

29. This is the standard Enlightenment account of government: individuals trade a life lived
individually, outside of government, for one lived collectively as a way of improving their position. See
LOCKE, supra note 7, §§ 4, 77, 87-89, 95-99.

30. I would include in this category maintenance of physical order, see U.S. CONST. pmbl., although
that function might also be viewed as a precondition for the existence of liberty in any social setting.
First and foremost, the national government protects liberty by using its affirmatively granted powers for the good of the citizenry. This conception of governmental power is broad enough to embrace any conception of the state, from a minimalist, night-watchman state\(^3\) to the contemporary European-style social welfare state. Whatever version of the state a society chooses to adopt, a government must exist and must possess certain powers that enable the polity collectively to achieve the goals that it sets for itself. Under the U.S. Constitution, the national government has many powers that fit this description. The commerce power,\(^3\) spending power,\(^3\) and various military powers\(^3\) have all been used many times to achieve through direct action by the national government objectives that the American polity has collectively decided will make it better off. The commerce power alone, for example, has given us environmental regulation; social, health, and welfare programs; most of the administrative state; and even much of our civil rights legislation, to name only a few of its principal uses.\(^3\)

Second, in the American scheme, the national government protects the liberty of the citizenry by practicing a kind of institutionalized self-restraint. By so doing, government protects the nation's citizens from itself.\(^3\) The U.S. Constitution contains several mechanisms that restrain the national government's ability to do things that would make society worse off. Horizontal separation of powers, for example, restrain the amount of harm the government can do by dividing power among three branches and pitting those branches against one another.\(^3\) This arrangement restricts the government's ability to take any action that does not have the broad and overlapping approval of several distinct and important constituencies. The enumeration of specific individual rights in the Bill of Rights and elsewhere in the Constitution further restrains the scope of

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32. U.S. Const. art. I, § 8, cl. 3.
33. Id., cl. 1. The power to spend for the general welfare, although not explicitly mentioned in the text, has been inferred from the explicit power to raise revenue. United States v. Butler, 297 U.S. 1, 65 (1936).
34. U.S. Const. art. I, §§ 11 (power to declare war), 12 (power to raise and support armies), 13 (power to provide and maintain a navy), 14 (power to regulate the armed forces).
36. As Madison stated, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 322 (James Madison) (Jacob E. Cooke ed., 1961).
government activity. In addition, an independent judiciary armed with the power of judicial review helps to assure that constitutional restraints are effectively observed.

Of course, these restraints are purchased at the price of limiting the amount of good the national government can do; only in virtue of the grant to government of affirmative powers to do good in the first instance does it become necessary to restrain the use of those powers through institutionalized forms of self-restraint. At work here is a presumption that certain kinds of private activities do not violate liberty—in fact, that they amount to an exercise of it. Constitutional self-restraint protects these kinds of activities, to the extent they can be identified in advance, by taking from government the power to interfere with them.

The third way in which the American national government protects the liberty of its citizens is by using its powers to prevent state governments from impairing the good of the citizenry. To accomplish this purpose, the U.S. government has several tools at its disposal. Bounding the spectrum of available means for restraining state power are two methods that are perhaps best thought of as extra-constitutional: force and talk.

At one extreme, the national government may use force against the states to defend the liberty of its citizens. The Constitution specifically authorizes the national government to use force to defend states, but nothing in the Constitution provides similar authorization for the use of force against them. Nevertheless, the principle that the national government is entitled to enforce its laws against violations and interference has long been taken to support the proposition that the use of force against states may be justified when necessary to enforce federal law. This approach has been invoked on several occasions, including, most notably, during the Civil War. In the Twentieth Century, the armed enforcement of desegregation in Little Rock, Arkansas, stands out as a prominent example of the national government’s use of force to enforce federal laws against the states. Although the national government has seldom used force against a state government, the threat of it surely lurks meaningfully in the background as a reason for states to avoid persistent violations of, or interference with, national law.

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38. U.S. Const. amends. 1–8, 14.
41. U.S. Const. art. IV, § 4 (“The United States shall... protect each [state] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).
42. See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958) (affirming requirement that Arkansas comply with federal judicial order to desegregate Little Rock public schools); The Prize Cases, 67 U.S. (2 Black) 635 (1863) (upholding President Lincoln’s imposition of a blockade on southern ports).
43. See Taylor Branch, Parting the Waters: America in the King Years, 1954–63, at 222–24 (1989) for a description of events now known as “the Little Rock Crisis.”
At the other end of the spectrum lies the entirely peaceful method of political negotiation. Through political contacts and negotiation, national officials can attempt to persuade or induce state officials to act in desirable ways. Such a dialogue occasionally happens at the highest levels, as when President George H.W. Bush convened an “education summit” with state governors in 1989 to persuade them of his ideas concerning public education reform. More commonly, negotiation and persuasion occur constantly at low levels of government administration. Such negotiation may involve anything from the simple communication of pertinent information, to persuasion and argument, to dealmaking in which each party seeks its own advantage.

Between the extraconstitutional extremes of force and talk, the national government has at its disposal at least three constitutionally authorized methods of influencing state behavior. First, and least intrusively, the national government can use its spending power to offer states financial rewards for engaging in behavior that the national government wishes to induce or for refraining from behavior that it wishes to discourage. For example, Congress has on numerous occasions used the federal highway funding system to induce states to enact legislation that Congress thought desirable by conditioning the distribution of federal funds on the state’s enactment of the desired legislation. These conditions have included adjusting the state speed limit to conform to national guidelines, raising the state drinking age to twenty-one, requiring drivers to wear seat belts, and lowering the blood alcohol level required for a drunk driving conviction under state law.

A second, and considerably more intrusive, mechanism for restraining
state power is the displacement of state law through the national power of preemption. Under the Supremacy Clause, valid national legislation automatically displaces and invalidates inconsistent state law, from the lowliest administrative regulation to the most exalted state constitutional provision. The power to preempt state law allows Congress not only to enact national legislation that it believes promotes the public good, but simultaneously to invalidate state laws and programs which, in the opinion of Congress, either are harmful to the public good or do not promote it as efficaciously as the national program.

Yet another mechanism that the national government uses to restrain states from using their powers in harmful ways is judicial invalidation of state law under the national Constitution. By invoking the power of judicial review, national courts may strike down state laws or invalidate state actions that violate provisions of the United States Constitution that apply to the states, and may issue orders forbidding state officials from repeating such violations in the future. Aside from judicial enforcement of preemptive federal law, the most common circumstance in which national courts strike down state law is when the state law violates an individual right protected by the Equal Protection or Due Process Clause of the Fourteenth Amendment. For example, federal courts charged with enforcing national constitutional rights against the states have on numerous occasions invalidated state laws or actions that infringe upon nationally-guaranteed freedoms of speech or religion, that discriminate on the basis of race or gender, or that violate restrictions governing the investigation, arrest, detention, or trial of criminal suspects. In a well-known remark, Justice Oliver

51. U.S. CONST. art. VI, § 2, supra note 4.
52. For example, when Congress enacted the Employee Retirement Income Security Program (ERISA) in 1974, it stated explicitly, in laying out its statutory findings, that its reasons for enacting the statute included “the inadequacy of current minimum standards” under state law governing the soundness and stability of employee benefit plans. 29 U.S.C. § 1001(a) (2000); see also NORMAN J. SINGER, 2 STATUTES AND STATUTORY CONSTRUCTION § 44A:5, at 707 (1991) (“The reason for ERISA is that before ERISA the regulation of plans—both federal and state—was fragmentary and weak.”). ERISA contains an explicit preemption provision, 29 U.S.C. § 1144(a), that courts have construed to be extremely broad in scope. See N.Y. State Conference v. Travelers Ins. Co., 514 U.S. 645, 655 (1995); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
53. One of the earliest and most significant examples of national courts' authority to invalidate state laws is McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 329-30 (1819) (invalidating state tax on national bank).
54. This has become so commonplace that it is routine. For some significant examples, see Craig v. Boren, 429 U.S. 190, 204 (1976) (invalidating state law that barred only males aged 18-20 and not females of like age from purchasing 3.2% beer); Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (invalidating state law requiring compulsory public education without any exception for alternative religious education); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (invalidating state law prohibiting speech that advocates violence as a means of social reform); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (invalidating de jure racial segregation of state public schools); Rochin v. California, 342 U.S. 165, 173 (1952) (reversing state conviction obtained using evidence that had been pumped from the defendant’s stomach without his consent).
Wendell Holmes claimed that this kind of judicial review is of the utmost importance to the proper working of the federal scheme: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”

2. How State Governments Protect Liberty

In the American federal system, state governments protect the liberty of the citizenry in much the same way as the national government, although of course the influence of any individual state will be felt for the most part only within its own geographical territory and predominantly by its own citizens. First, like the national government, state governments possess significant powers that they can use affirmatively to pursue the public good. Indeed, the scope of state power tends to be (although it need not be) broader than the scope of national power, reaching many areas of ordinary life that the national government is usually understood to lack the power to regulate. For example, state law overwhelmingly provides the controlling substantive rules in the laws of torts, contracts, commercial transactions, crimes, property, wills, and family formation. Although the national government has made limited forays into all of these areas, they are most often understood to be beyond the national government’s power to regulate to any great degree. Thus, states have extensive resources to achieve or promote the public good directly through the exercise of affirmatively granted powers.

Second, state governments, like the national government, protect the liberty of their citizens by exercising a constitutionally imposed self-restraint by which the state government protects its own citizens from itself. Like the national government, every state government has horizontally divided powers. Every state has its own bill of rights. Every state has an independent judicial branch authorized to enforce against the other branches those provisions of the state constitution that limit state power. These restrictions are intended to make the state government less dangerous to its own people.

The degree to which a state polity chooses to restrain its own state government is, moreover, entirely independent of the level of restraint that the national

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55. Oliver Wendell Holmes, Collected Legal Papers 295-96 (1920).
56. Unlike the national government, which is one of limited and enumerated powers, state governments are typically said to be governments of general power. See Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 87 (1868); G. Alan Tarr, Understanding State Constitutions 7-8 (1998).
57. This is especially the case after United States v. Lopez, 514 U.S. 549 (1995), in which the Court curbed congressional use of the commerce power for the attainment of noneconomic goals.
58. See Tarr, supra note 56, at 14 (explaining that “forty state constitutions expressly mandate a separation of powers” while in other states, separation is treated as “implicit in the constitutional design”); Robert F. Williams, State Constitutional Law 649-871 (3d ed. 1999) (collecting cases and materials on horizontal separation of powers under state constitutions).
The polity has imposed upon the national government. The people of a state are free to subject their government to more or fewer restrictions than the national constitution imposes on the national government. They may do so, for example, by constructing a system of separation of powers that is stricter or looser than the national model. Or they may create a state bill of rights that establishes a more or less extensive set of rights that restricts the scope of state power to a greater or lesser degree than the U.S. Bill of Rights restricts the national government. Or they may adjust the powers of judicial review held by state courts, or give state judges greater or lesser independence from the other branches than federal judges possess under the national Constitution. In all these cases, states are completely free to make independent determinations concerning the degree to which the state government must practice self-restraint.

59. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that states may exceed the level of protection for individual rights set by the Fourteenth Amendment of U.S. Constitution).


62. For example, many state constitutions provide looser standing rules than does the U.S. Constitution, making it easier for litigants to get into court to challenge state laws or actions. Thus, where the U.S. Constitution denies standing to people merely on the basis of their status as taxpayers, Warth v. Seldin, 422 U.S. 490, 509–10 (1975), many state constitutions follow a more liberal rule of standing. See, e.g., Mich. Const. art. 9, § 32 (explicitly granting taxpayers standing); Nuckols v. Lyle, 70 P. 401, 401 (Idaho 1902) (interpreting state judicial power to extend to claims raised by taxpayers).

63. For example, some state judges are independently elected, bypassing any need for legislative confirmation. See Council of State Governments, 33 The Book of the States 137–39 (2000–01). Some state courts have independent rulemaking authority of a type that federal courts do not possess. See generally Williams, supra note 58, at 702–18 (providing examples of state courts exerting their rulemaking authority); Jeffrey A. Parness, Public Process and State-Court Rulemaking, 88 Yale L.J. 1319, 1320–22 (1979) (examining the scope of judicial rulemaking powers in various states). In some instances, state courts even have some binding authority to set their own budgetary allocations. See Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971).

64. A few provisions of the U.S. Constitution may restrict a state’s freedom to structure its own government in some ways, but this influence is mostly theoretical, extremely limited at best, and probably nil in practice. For example, the Guarantee Clause of the U.S. Constitution, U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”), requires states to have republican governments. This is probably a very minor requirement, easily satisfied by every state constitution. It is also very likely a moot requirement because the U.S. Supreme Court has generally refused to adjudicate questions of state government structure under the Guarantee Clause on the grounds that such questions are inherently political and therefore not amenable to judicial decision. See, e.g., Colegrove v. Green, 328 U.S. 549, 556 (1946); Pac. Tel. Co. v. Oregon, 223 U.S. 118, 142–43 (1912); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). Congress has never shown much interest in taking up such questions, and it is difficult to imagine Congress ever generating any particular enthusiasm for such a project. The U.S. Constitution also contains a provision barring states from creating hereditary titles, U.S. Const. art. I, § 10, cl. 1 (“No State shall . . . grant any Title of Nobility”), apparently intended to prevent states from establishing monarchical or aristocratic forms of government. Not surprisingly, no state has ever shown such an inclination. Various other
Finally, in a mirror image of the national function, state governments protect liberty by restraining the national government from undertaking actions that state officials or the state polity believe to be tyrannical or otherwise harmful to the public good. The symmetry between national and state roles in this federal function, however, is limited. Unlike the national government, which has numerous, directly authorized legal means at its disposal for checking abusive exercises of state power, state governments, because they are subject to the Supremacy Clause, have fewer obviously legal avenues of redress to check or impede exercises of national power that they consider detrimental to the public welfare.

a. Illegal and Quasi-legal Means for Checking National Power. Like the national government, state governments have at their disposal certain illegal, or at least extraconstitutional, methods for checking abusive exercises of federal power. The most potent of these options is the use of force, and the most dramatic use of state force to resist national power is undoubtedly the act of secession. Although the threat of state secession has not played a significant role in American politics since the Civil War, it has played an extremely potent role in many federal nations around the globe in the last few decades, including Canada, the former Yugoslavia, and the former Soviet Union. The contemporary relevance of secession in global politics, often accompanied by extreme violence, suggests that its lack of relevance in the United States ought to be treated more as a fortunate historical contingency than as evidence that secession is structurally irrelevant to American intergovernmental relations.

The use of force is not, of course, limited to outright secession: states may employ force by threatening or engaging in limited armed resistance short of secession. Although it occurred against a backdrop of threatened secession, the Nullification Crisis may serve as an example of this more limited kind of resort

provisions of the national Constitution refer to state legislatures, executives, and judges. E.g., U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"); art. IV, § 4 ("The United States shall . . . protect [the States] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence"); art. VI, cl. 3 ("[T]he Members of the several State Legislatures, and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution"). These provisions suggest that the national Constitution contemplates at least a minimal separation of powers in the structure of every state government. Again, no state government is structured in a way as to raise the slightest hint of impropriety under these clauses, even if the federal courts were to show any inclination to enforce them, which seems doubtful in light of their approach to the Guarantee Clause.

65. Amar, supra note 21, at 501–03.

66. One fortuitous factor that may account for the relative peacefulness of contemporary American federalism is the lack of a genuine homegrown ethnic nationalism. American nationalism tends to be ideological and inclusive rather than ethnic and exclusive. See, e.g., Walker Connor, Ethnonationalism: The Quest for Understanding 95 (1994); Hans Kohn, American Nationalism: An Interpretive Essay 8–9 (1957).
In 1832, the national government enacted a protectionist tariff that many Southerners felt benefited northern industrial interests at the expense of the southern economic interest in agricultural exports. The tariff caused an especially strong political reaction in South Carolina. Among the many steps it took to resist the tariff, South Carolina raised a small army, which it threatened to deploy to block any effort by national customs officials to collect the tariff in the port of Charleston. The U.S. government responded by preparing for possible military action to enforce the tariff law. The national government eventually defused the threat of violence when it took careful steps to avoid any outright provocation, and South Carolina ultimately backed down from its threat to use force. Nevertheless, shortly after resolution of the crisis, Congress in 1834 enacted the Compromise Tariff, which phased out over a nine-year period the provisions to which South Carolinians objected. Although South Carolina was not able to obtain precisely what it wanted as quickly as it wanted, its threatened use of force influenced the content of national law.

Another more recent example of a state's threatened use of force is Arkansas's 1957 saber-rattling in response to national efforts to implement a federal judicial order requiring the desegregation of Central High School in Little Rock, the state capital. Arkansas Governor Orval Faubus, vowing to resist federal enforcement of the desegregation order, deployed the National Guard at the school to forcibly prevent the student plaintiffs from entering the building. As a confrontation brewed, the governor withdrew the troops, leaving the students to face a white mob. President Eisenhower then sent in one thousand troops from the 101st Airborne Division, a regular United States military unit, to enforce the court order and keep the peace. As in the Nullification Crisis, a direct, armed conflict between state and national military forces never materialized, although the threat of such a conflict was taken seriously by all sides.

Even more recently, states have threatened physical confrontation with the national government over issues of environmental policy. Prompted largely by national legislation that restricted grazing on public lands, legislatures in several western states contemplated legislation in the late 1970s and early 1980s that would have declared nationally-owned lands to be the property of the state in which the land was located. In 1979, Nevada went so far as to enact legislation "declaring state sovereignty over 49 million acres of Nevada territory" owned by the national government and managed by the Bureau of Land Management.

68. See Branch, supra note 43, at 222.
69. Id. at 224.
Management. Although this so-called “Sagebrush Rebellion” never led to organized violence against the national government by any state, a more serious incident occurred in 1988 when Idaho Governor Cecil Andrus deployed state police to seize at the state border a railway shipment of radioactive waste generated at a federal nuclear facility in Colorado. Andrus had the shipment seized pursuant to a state-declared policy of refusing to accept additional nuclear waste from out-of-state. As recently as last year, the Governor of South Carolina made a similar threat to block at the border trucks containing weapons-grade plutonium destined for a federal storage site in the state.

States determined to defy national law need not, of course, do so through violence or the threat of violence. Defiance can be accomplished by more peaceful means and, indeed, examples of such peaceful illegal defiance are as abundant as examples of the violent variety are rare. Once again, state resistance to the national enforcement of the rights of African-Americans furnishes numerous instances, particularly in the area of political rights. The Fifteenth Amendment prohibits states from denying the right to vote on account of race, yet many states during the late Nineteenth and early Twentieth Centuries adopted “grandfather clauses,” which sought to disenfranchise black citizens by granting the right to vote only to citizens whose ancestors enjoyed that right. States also engaged in numerous actions designed to avoid registering black

71. PAUL WALLACE GATES, PRESSURE GROUPS AND RECENT AMERICAN LAND POLICIES 3 (1980); see also “Sagebrush Rebels” Are Reveling in Reagan, N.Y. TIMES, Nov. 24, 1980, at D9 (reporting that the legislatures of Nevada, Utah, Arizona, and Wyoming had passed resolutions “laying claim to Federal lands within their boundaries”).

72. It did, however, lead to organized violence by at least one county government. In 1995, Nye County, Nevada, a sparsely populated but geographically immense jurisdiction, declared its ownership over thousands of square miles of federal land within its borders, a claim that it made good when it bulldozed a trail through a closed area of the Toiyabe National Forest and when it threatened to arrest federal parks officials for trespassing. See Gary Andrew Poole, Hold It! This Land Is My Land!, L.A. TIMES, Dec. 3, 1995, Magazine, at 28. The federal government declined to respond with force, however, resorting instead to judicial proceedings in which a federal district court affirmed the obvious fact of federal ownership over the “disputed” territory. United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996); see also United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997) (also holding that U.S. government holds title to public lands within Nevada).


75. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).
voters. Similarly, in a notorious string of equal protection cases known as the White Primary Cases, Texas political officials continued to disenfranchise blacks first by making them ineligible to vote in Democratic primaries, and then by constructing sham parties and "private political clubs" that did the real work of nominating Democratic candidates and excluded blacks.

There is little question but that the Framers of the U.S. Constitution fully expected states to express their disapproval of national policies through precisely this kind of outright defiance of national law, including resort to threats of force. This was, after all, the model of decentralized resistance to tyrannical central power that the Framers knew best—the model of the Revolution itself. Madison, for example, acknowledged this directly:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

Although Madison was reluctant to paint a picture of state resistance to national power that crossed the line from mere denunciation and uncooperative defiance to violence, Hamilton, characteristically, was not so squeamish:

76. See, e.g., Guinn v. United States, 238 U.S. 347, 363–67 (1915) (describing Oklahoma literacy test, which required descendants of anyone who was not allowed to vote in 1866 to be able to "read and write any section of the [state] constitution" as a precondition to voter registration).
79. Later in The Federalist No. 46, Madison goes so far as to compare the size of armed forces that could be raised by the state and national governments, but thought that loud public criticism of the
It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

... If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.80

In addition to these outright illegal means of resisting national power, states also have at their disposal a number of what might be termed “quasi-legal” strategies for thwarting uses of national power that they consider inimical to the public good. One such strategy is deliberate failure fully to comply with or to enforce binding federal law. Here, the state does not defy national law, but nevertheless attempts, in the guise of implementing it, to undermine it with half-hearted or inappropriate measures. For example, in 1975, as part of an energy policy designed to conserve oil, Congress lowered the speed limit on all roads to fifty-five miles per hour.81 Most states responded by complying with the new speed limit; they issued speeding tickets as usual to drivers who exceeded this new speed limit and levied their usual fines for violations. Montana, however, complied in an extremely half-hearted way. Instead of treating violations of the fifty-five-mile-per-hour speed limit as traffic infractions, it issued five-dollar “environmental” citations to drivers traveling above fifty-five miles per hour, but below what Montana police considered a safe speed.82 Violations were not charged against drivers’ insurance records. This


82. According to news accounts, the “conventional wisdom” was that no serious infractions would be charged for daytime driving below about eighty-five miles per hour in good weather conditions. Tom Kenworthy, New Life in the Fast Lane: Wide-Open Throttles in Wide Open Spaces, WASH. POST, Dec. 9, 1995, at A3.
kind of "enforcement" worked to undermine the congressional objective since it both declared quite plainly the state's continuing opposition to the national policy, and all but invited the public to exceed the national speed limit with impunity within the borders of the state—an invitation that drivers, predictably, took up with enthusiasm.\textsuperscript{83}

A similar kind of state response is to engage in deliberate foot-dragging on national initiatives that require the cooperation of state officials. A good example of this process is the continuing failure of states to comply with federal environmental laws requiring states to address the problem of "nonpoint source" water pollution. The federal Clean Water Act\textsuperscript{84} divides the sources of water pollution into two types: point sources and nonpoint sources. A point source is a discrete and identifiable "conveyance," such as a drainpipe, ditch, or seagoing vessel, that discharges pollutants into the water.\textsuperscript{85} Nonpoint source pollution, in contrast, refers to pollutants that enter waters from widely diffused or not clearly identifiable sources, typically as the result of rainfall runoff, snowmelt, or agricultural irrigation.\textsuperscript{86} Of the two, nonpoint source pollution is by far the more serious problem nationally for water quality.\textsuperscript{87}

The Clean Water Act deals with the problem of point source pollution by delegating to the federal Environmental Protection Agency (EPA) the primary responsibility for setting standards and issuing permits for point sources. However, Congress decided to leave the larger problem of nonpoint source pollution to the states. Under Section 319 of the Act, "The Governor of each State . . . shall . . . prepare and submit to the Administrator [of the EPA] for approval a management program which such State proposes to implement . . . for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters."\textsuperscript{88} The Act goes on to provide specifications for the content of any state management program, deadlines for state compliance, and compliance incentives that include grants of federal funds and the provision by the national government of technical support.\textsuperscript{89}

State cooperation with the Clean Water Act's nonpoint source management program has been inconsistent. A summary report prepared by the EPA in 1992 found, for example, that few states had included in their management plan programs addressing nonpoint source pollution of wetlands.\textsuperscript{90} Several states had

\textsuperscript{85} Id. at § 1362(14).
\textsuperscript{88} 33 U.S.C. § 1329 (b)(1).
\textsuperscript{89} Id. at §§ 1329 (b)(2), (c)(2), (e), (f), and (h).
failed altogether to develop satisfactory plans long after the initial congressional
deadline passed. Others complained that full compliance was impossible until
the EPA provided better empirical monitoring data. In the years following
enactment of Section 319, some state governments evidently devoted more
energy to finding ways to avoid implementing the Act’s mandate than they
devoted to compliance. As a result, little substantive progress has been made
nationally in dealing with the environmental hazards of polluted runoff.

Madison predicted in The Federalist that the national government would
require the assistance and cooperation of the states to accomplish its more
ambitious goals. Environmental regulation seems to be one area in which
Madison has been proven correct. In consequence, the refusal of states to
provide the needed cooperation can be an effective means of thwarting the
national government’s achievement of its objectives. Where such cooperation is
withheld because of a state’s belief that the program for which state cooperation
is sought is an abuse of national power, withholding cooperation is also a way
for states to protect the liberty of the nation’s citizens.

b. Legal Means for Checking National Power. In addition to the illegal and
quasi-legal methods discussed above, states have at least four fully legal
avenues of recourse to thwart exercises of national power: (1) the use of
political pressure, (2) the exercise of ordinary state power where it is not
preempted, (3) refusal of national financial incentives, and (4) lawsuits against
the national government in federal court. It is the purpose of this Article to add
to this list a fifth method: granting more generous state constitutional rights.
Discussion of this last method is deferred to Part II.B. The present discussion
provides context by focusing on the four methods listed above.

Much has been written about the ways in which the states may influence
national legislation through political means. State officials often have the
capacity, for example, to press the state’s congressional delegation to work for
the enactment at the national level of policies favored by the state. For a

91. Id. at 43.
93. See Jeffrey S. Hill & Carol S. Weissert, Implementation and the Irony of Delegation: The
Politics of Low-Level Waste Disposal, 57 J. Pol. 344 (1995) (arguing that states have structural
incentives to use delay as a form of strategic noncompliance while hoping for an intervening change of
federal policy).
94. Among the classic works written about the way in which states may influence national
legislation through political means are JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL
PROCESS (1980); and Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States
in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).
95. Under the original Constitution, state legislatures had considerable leverage over U.S. Senators
because they elected them. U.S. CONST. art. I, § 3, cl. 1. After the Seventeenth Amendment instituted
direct popular senatorial elections, states pursued a variety of less reliable, but still effective means of
influencing national political actors. In addition to informal cooperation among state officials and
members of Congress from their states, each state maintains a Washington lobbying office on Capitol
Hill in the aptly named Hall of the States on North Capitol Street. State officials have also formed
decade, this view of state influence induced the U.S. Supreme Court to abandon any attempt to enforce constitutional limits on the national commerce power, a position from which it has since retreated.\textsuperscript{96} In an important recent study, Larry Kramer has suggested that political negotiation coordinated under the auspices of the national political parties has evolved into the single most important mechanism by which states influence the behavior of national officials.\textsuperscript{97} Through such means, state officials may head off legislation of which they disapprove before it is enacted, or obtain modifications of proposed national policies that eliminate or moderate provisions to which they object.

Another way in which states may check federal abuses is by using their ordinary affirmative powers when they are not preempted from doing so. Power can be tyrannical not only when it is used affirmatively for tyrannical ends, but also when it is withheld in circumstances that either perpetuate an unjust status quo or passively permit some individuals to behave unjustly toward others. When national power is invoked affirmatively in abusive ways, it nonetheless preempts contrary exercises of state power. In contrast, when national power is abusively withheld rather than invoked, states are often free to take corrective action.\textsuperscript{98} For example, state legislatures may use their affirmative powers to create state-level programs to address wrongs that the national government refuses to redress.\textsuperscript{99} State legislatures and courts may also create liability rules numerous organizations that lobby Congress formally on an institutional rather than state-by-state basis. These include the National Governors’ Association, the National Council of State Legislatures, and the National Association of Attorneys General. For a discussion of the lobbying role and efforts of these and other similar groups, see \textit{Anne Marie Cammisa}, \textit{Governments as Interest Groups: Intergovernmental Lobbying and the Federal System} (1995); \textit{Donald H. Hadier}, \textit{When Governments Come to Washington: Governors, Mayors, and Intergovernmental Lobbying} (1974); \textit{John Dinan}, \textit{State Government Influence in the National Policy Process: Lessons from the 104th Congress}, 27 \textit{PUBLIUS} 129 (1997).


\textsuperscript{97} Larry Kramer, \textit{Putting the Politics Back into the Political Safeguards of Federalism}, 100 \textit{COLUM. L. REV.} 215, 278–82 (2000).

\textsuperscript{98} In some limited circumstances, even the national government’s decision \textit{not} to invoke its powers may have preemptive effect. The most notable example is the Dormant Commerce Clause, in which the U.S. Constitution prevents states from regulating certain kinds of interstate economic relations when Congress itself has declined to do so.

\textsuperscript{99} It is entirely subjective, of course, what specifically constitutes a wrong that the national government refuses to address, but partisans of all stripes can easily find their favorites. One of the most significant areas of state activity in which the national government has been inactive is that of gay and lesbian rights. Congress has refused thus far to extend the proscriptions of national civil rights law to discrimination based on sexual orientation, \textit{see}, \textit{e.g.}, 42 U.S.C. § 2000e-2 (2000) (Title VII list of unlawful employment practices limited to discrimination based on race, color, religion, sex, and national origin), and has even enacted legislation purporting to authorize states to refuse to grant full faith and credit to gay marriages that are valid in other states, \textit{see} Defense of Marriage Act, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (2000). Many states, by contrast, have enacted legislation prohibiting discrimination based on sexual orientation in employment, education, and housing, or have extended the statutory definition of hate crimes to include those committed because of the victim’s sexual orientation. \textit{See}, \textit{e.g.}, \textit{CONN. GEN. STAT. ANN.} § 46a-81c (West 2002) (employment); \textit{MD. ANN.
that allow individuals who are victimized by unjust private behavior to obtain injunctions against such behavior or to recover compensation for the harms it causes.\textsuperscript{100} Individual states may even coordinate informally\textsuperscript{101} with one another to create regional coalitions dedicated to correcting national omissions that rise to the level of abuses of national power.\textsuperscript{102}

Even where the national government has exercised its power, however, states often are not deprived entirely of the means to ameliorate what they perceive to be negative influences of that power on the state’s citizenry. As the Framers anticipated, the successful invocation of national power sometimes requires the cooperation of state officials.\textsuperscript{103} In recognition of this requirement of intergovernmental cooperation, Congress has frequently structured national programs so as to delegate to state officials a crucial role—the implementation and enforcement of the programs. All of the largest and most costly nonmilitary domestic national programs—social security, welfare, food stamps, and so on—delegate much of the responsibility for the day-to-day operation of the programs to the states.\textsuperscript{104} State responsibility for these programs may include setting eligibility requirements, determining benefit levels, or enforcing compliance with programmatic requirements, functions that require the exercise of a significant amount


A third example is legal protection for persons with disabilities whose disabilities can be diminished by medication or corrective devices. After the U.S. Supreme Court ruled that the federal Americans with Disabilities Act, 104 Stat. 328 (1990), codified at 42 U.S.C. § 12101 (2000), did not apply to such persons unless they were still substantially limited in one or more major life activities when employing corrective measures, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), Rhode Island enacted a statute extending protection against discrimination in the workplace to those with such correctable disabilities. \textit{R.I. Gen. Laws} § 11-24-2.1(a)(1)(ii) (Supp. 2001).

\textsuperscript{101} This is, of course, the classic function of tort law.

\textsuperscript{102} For example, the Council of Great Lakes Governors is an informal partnership of the governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, as well as the premiers of Ontario and Quebec. The organization’s primary task is to facilitate policy coordination among the Great Lakes states concerning issues of environmental quality and economic growth. \textit{See generally} Council of Great Lake Governors, \textit{at http://www.cglg.org} (last visited Aug. 26, 2003).

\textsuperscript{103} \textit{The Federalist} No. 27, at 174-75 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

\textsuperscript{104} See, e.g., 42 U.S.C. §§ 601-04 (2000) (providing federal grants to states for welfare programs and delegating to states substantial discretion as to how to meet programmatic goals); \textit{id.} §§ 1397-1397a (2000) (establishing federal social security block grants and setting out goals that states should meet when administering grants).
of official discretion.\textsuperscript{105}

When the national government grants states this kind of significant responsibility for implementing national initiatives, it often does so by establishing parameters that define the outer boundaries of state discretion.\textsuperscript{106} Nevertheless, within these boundaries, state officials often have room to bend their implementation of national policy in ways that also serve state interests, even when those interests are opposed to successful implementation of the national program.\textsuperscript{107} For example, if state officials think a national program is contrary to the public good, they might set eligibility requirements as restrictively as possible to minimize the scope and impact of the program.\textsuperscript{108} Conversely, if they believe some national program is insufficient in scale to combat effectively some unjust feature of the status quo, and they are preempted from developing an independent state program of sufficient magnitude, they may be able to set eligibility requirements and benefit levels within the national program much more expansively than the national government requires.\textsuperscript{109} Thus, states may prevent what

\textsuperscript{105} See generally Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (1977) (describing the process of state implementation of federal programs). Bardach calls policy implementation "the continuation of politics by other means." Id. at 85.

\textsuperscript{106} For example, in 1987 the federal Medicaid program permitted states the option of covering thirty-two different kinds of medical services beyond the required minimum, ranging from services provided by optometrists, to podiatrists, to Christian Science nurses. Saundra K. Schneider & William G. Jacoby, Influences on Bureaucratic Policy Initiatives in the American States, 6 J. of Pub. Admin. Res. & Theory 495, 502 (1996).

\textsuperscript{107} According to one study:

Washington has had, and continues to have, tremendous difficulty in executing even relatively straightforward policies precisely because state and local governments enjoy such wide latitude in deciding how best to translate federal policies into action, or whether, in fact, to follow federal policies at all. The empirical evidence on this point is simply overwhelming.


\textsuperscript{108} For example, in exercising their discretion to set eligibility requirements for federal welfare programs, midwestern and southern states "took a harder line [than federal parameters required], reflecting a tougher work ethic." Lawrence M. Mead, The New Politics of Poverty: The Nonworking Poor in America 191 (1992). About half the states have exercised federally delegated discretion to exclude from the federal food stamp program persons convicted of a drug felony. Herman Schwartz, A Prohibition That Frustrates the People's Will, L.A. Times, May 20, 2001, at M2. A classic example of how this process works is the local subversion of federal housing initiatives described in Martha Derthick, New Towns In-Town: Why a Federal Program Failed (1972).


The scope of federal programs can be expanded in many other ways. For example, several states resisted the Reagan Administration's efforts to cut back on enforcement of the Occupational Health and Safety Act (OSHA). During the period when the federal government gave states more authority to
they perceive as public harm at the hands of the national government by doing good on the state level.

Not all methods of state resistance to abuses of national power are so complex. For example, when the national government uses its spending power rather than its commerce power to enact nationwide programs, it induces states to participate in its programs by conditioning financial rewards on state participation and compliance. In these situations, states may resist abuses of national power by simply refusing the financial incentives. Although it is much more common for states to accept than to reject conditioned national funds, states have occasionally sacrificed such funds for the sake of rejecting policies that they viewed as inimical to the public good. For example, New Hampshire has refused repeatedly to enact a mandatory seatbelt law, thereby forgoing a portion of its allocation of federal highway maintenance and construction funds. Nevada and Wisconsin have sacrificed federal highway funds by refusing to lower their statutory threshold for drunk driving convictions to a blood alcohol level of 0.08 percent, in defiance of federal law requiring the adjustment. Kentucky recently abolished state vehicle emission standards, threatening its ability to meet federally mandated pollution limits, which could lead to the loss of nearly two billion dollars in federal highway funds.

Yet another way in which states can check abuses of power by the national legislative and executive branches is by invoking the power of the national judicial branch against them. States have often successfully sued the federal government in federal court over alleged abuses of national authority. In 1992, for example, New York successfully sued the United States in federal court and obtained a ruling that invalidated a portion of the federal Low-Level Radioact-
ative Waste Policy Amendments Act of 1985 on the ground that one of its provisions exceeded national authority under the Commerce Clause. In subsequent years, federal courts have, at the behest of states or state agencies, invalidated numerous other federal statutes on similar grounds. In each of these cases, a federal court held that some piece of national legislation exceeded the limits of enumerated national powers.

II. HEIGHTENED PROTECTION OF INDIVIDUAL LIBERTY

In this Part, I argue that protecting individual liberties under a state constitution, like using political pressure, refusing financial incentives, filing lawsuits, and so on, can serve as a method by which states may resist national tyranny. Before turning to that topic, however, I begin with an overview of the ways in which state constitutions protect individual liberties.

A. STATE CONSTITUTIONAL RIGHTS: AN OVERVIEW

Every state in the union has its own constitution. In many of their most fundamental aspects, the constitutions of the states resemble one another and the federal constitution. Each state constitution, for example, was ratified by the people of that state. Each state constitution contains a preamble setting out its goals; lays out the powers of government; distributes those powers among a legislative, executive, and judicial branch; and establishes a process for constitutional amendment.

One of the most prominent features that all state constitutions share is some kind of declaration of rights which, like the federal Bill of Rights, identifies and protects a set of basic individual liberties against governmental infringement. Virtually every state constitution, for example, recognizes a right to free speech. Each document protects the rights to freedom of religion, freedom from unreasonable searches and seizures, and a jury trial. State constitutions almost universally establish rights against self-incrimination, double jeopardy, and the taking of private property without just compensation. In addition to these rights, which parallel rights appearing in the U.S. Constitution, state constitutions also typically contain rights that have no explicit federal counterpart, such as the

117. For example, in the last several years alone, states have successfully persuaded federal courts to invalidate on sovereign immunity grounds federal statutes creating private causes of action against the state. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (invalidating a portion of the Americans with Disabilities Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000) (invalidating a portion of the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706, 759 (1999) (invalidating a portion of the Fair Labor Standards Act).
118. Only Delaware lacks a provision explicitly protecting this freedom.
right to vote\(^{120}\) and the right to a basic education.\(^{121}\)

The similarities among the various state and federal constitutions go beyond often overlapping coverage, however: the texts of the state constitutions are, at many critical points, similar or even identical to one another and to parallel provisions of the U.S. Constitution.\(^{122}\) For example, the constitutions of thirty-two states contain due process clauses identical to the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.\(^{123}\) The constitutions of thirty-seven states contain language identical to the Speedy Trial Clause of the federal Sixth Amendment.\(^{124}\) Nineteen state constitutions contain a Warrant Clause identical to that found in the Fourth Amendment of the U.S. Constitution.\(^{125}\) Seven state constitutions word their protections of religious liberty identically to their federal counterpart,\(^{126}\) and many more contain wording that is very similar.\(^{127}\) Moreover, nearly every new state admitted to the Union has been required to present to Congress, as a condition of admission, a proposed state constitution.\(^{128}\) Congress has always felt free to demand that proposed state constitutions contain particular language or provisions that, in the judgment of Congress, have proven their value in the experience of states

\(^{120}\) E.g., Minn. Const. art. VII, § 1; Miss. Const. art. 12, § 241.


\(^{122}\) State constitution drafters have traditionally used prior constitutions as models and have borrowed freely from them. See Tarr, supra note 56, at 50–55.


\(^{127}\) See, e.g., Ala. Const. art. I, § 3 (providing that "no religion shall be established by law"); Fla. Const. art. I, § 3 ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof.").

\(^{128}\) Tarr, supra note 56, at 39–41.
previously admitted,\textsuperscript{129} thus ensuring a good degree of similarity among the constitutional documents Congress has chosen to approve.

Despite the often great similarity between state and national protections for individual liberty, there is a significant difference—or at least a significant potential difference—between state and federal versions of protected rights: state constitutions may offer a level of protection for such liberties that exceeds the level of protection afforded by the U.S. Constitution. Before the ratification of the Fourteenth Amendment, the Supreme Court’s decision in \textit{Barron v. Baltimore}\textsuperscript{130} controlled the question of state authority to establish constitutional standards for the protection of individual liberties. Under \textit{Barron}, constraints in the federal Constitution established the relevant levels of protection against encroachment by the federal government, and constraints in the individual state constitutions established the levels of protection against encroachment by individual states—the two were entirely independent of one another as a matter of positive law.\textsuperscript{131}

The Fourteenth Amendment complicated matters. By introducing into the federal Constitution a broad set of constraints on state power, and by incorporating into those constraints many of the limitations that the federal Bill of Rights already applied to the federal government,\textsuperscript{132} the Fourteenth Amendment appeared to extend to all levels of government a single standard of constitutional protection for individual rights. This appearance was deceiving. In fact, the Fourteenth Amendment established a mandatory level of protection for individual rights which states were constrained to observe and which was enforceable by federal judicial power. However, so long as states complied with federal standards, the structure described in \textit{Barron} remained undisturbed: states could do as they pleased. The practical consequence of this duality is that federal standards for protecting individual rights under the Fourteenth Amendment now provide a minimal level of protection—a “floor.”\textsuperscript{133} States remain free, however, to \textit{exceed} the federal floor by providing protections for individual rights

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} 32 U.S. (7 Pet.) 243 (1833).
\textsuperscript{131} \textit{Id.} at 247.
\textsuperscript{133} I describe this as the “practical consequence” because it is not quite an accurate description of the technical legal situation. Technically, states are as free now as they were before the Fourteenth Amendment to establish whatever level of constitutional protection for civil liberties they deem appropriate, including no protection at all. After the Fourteenth Amendment and the incorporation doctrine, however, when federal standards conflict with state law, the standards set by the Fourteenth Amendment control because of the Supremacy Clause. Therefore, state protections of individual rights that fall below federal standards conflict and are preempted, but state standards that exceed federal minima do not conflict and thus control.
and liberties that exceed the federally-mandated minima. States, then, may accord as much or more protection to individual rights as does the U.S. Constitution, but they may not accord less.\textsuperscript{134} To this extent, states are entirely free to develop a body of independent state constitutional law.

To a limited extent, states have done so. The present era in state constitutional jurisprudence can be traced to Justice William Brennan’s 1977 article in the \textit{Harvard Law Review} calling upon state high courts to “step into the breach” left by the Supreme Court’s conservative turn in constitutional decisions concerning the protection of individual liberties.\textsuperscript{135} Brennan urged state courts to use their state constitutions to continue the expansion of constitutional protections for individual rights. Soon liberals, who previously saw federal constitutional law as a ceaseless engine for expanding the rights of individuals against government, began turning to state courts instead. State courts have since been deluged with claims that provisions of state constitutions should be interpreted to provide broader protection for liberties than does the federal constitution.\textsuperscript{136}

Many state courts have responded positively to Brennan’s call, a phenomenon sometimes called “the New Judicial Federalism.”\textsuperscript{137} For example, state courts have sometimes asserted their independence in the interpretation of state constitutional protections against unreasonable searches and seizures, rejecting narrow federal rulings and, in some cases, adhering to Warren Court decisions that the Rehnquist Court has since repudiated.\textsuperscript{138} State courts have done so, moreover, despite the fact that these rulings hold state police officers to a higher standard than federal FBI or DEA agents operating alongside them within the state.

This judicial independence extends across the spectrum of constitutional liberties. In the area of free speech, for example, the Oregon Supreme Court has departed from the federal path by holding that the Oregon Constitution provides direct and substantial protection for obscenity.\textsuperscript{139} In the area of personal privacy, the Kentucky Supreme Court has rejected the federal approach set out in \textit{Bowers v. Hardwick}\textsuperscript{140} and has held that the Kentucky Constitution provides heightened protection for gay and lesbian intimate associations.\textsuperscript{141} Since the publication of Justice Brennan’s article, state supreme courts have decided hundreds of cases in which they interpret the state constitution to provide more

\begin{itemize}
\item \textsuperscript{134} See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Brennan, supra note 61, at 500.
\item \textsuperscript{135} See Brennan, supra note 61.
\item \textsuperscript{136} See generally James A. Gardner, \textit{Introduction to I STATE EXPANSION OF FEDERAL CONSTITUTIONAL LIBERTIES: INDIVIDUAL RIGHTS IN A DUAL CONSTITUTIONAL SYSTEM}, at xxiv–xxvi (James A. Gardner ed. 1999) (describing Justice Brennan’s call to state high courts and the movement that it spawned).
\item \textsuperscript{137} See, e.g., Tarr, supra note 56, at 161–70.
\item \textsuperscript{138} For numerous examples, see Barry Latzer, \textit{STATE CONSTITUTIONAL CRIMINAL LAW} (1995); 2 Friesen, supra note 119.
\item \textsuperscript{139} State v. Henry, 732 P.2d 9 (Or. 1987).
\item \textsuperscript{140} 478 U.S. 186, 191–92 (1986).
\item \textsuperscript{141} Commonwealth v. Wasson, 842 S.W.2d 487, 493–94 (Ky. 1992).
\end{itemize}
generous protection for individual liberties than similar provisions of the U.S. Constitution.\textsuperscript{142}

B. STATE CONSTITUTIONAL RIGHTS AS CHECKS ON NATIONAL POWER

I argued in Part I.B.2 that state power can be deployed to protect liberty in three ways: by the use of affirmative powers to pursue the good; by deployment against itself in the form of self-restraint; and by protecting liberty from invasions at the hands of the national government. Within this framework, it might seem that a state constitutional provision protecting individual liberty ought to be understood solely as a straightforward example of state self-restraint. An individual right protected by a state constitution is enforceable only against the state. It ought to follow, then, that state constitutional liberties are to be classified, along with any separation of powers or judicial review established by the state constitution, simply as another method by which the state’s people protect themselves from their own state government by restraining the scope of its powers. Unquestionably, state constitutional liberties serve exactly this purpose. Yet this view of state constitutional protection of liberty is incomplete. Heightened state constitutional protection of individual liberty does more than merely restrain state governments from invading the liberties of their citizens. It is also a potentially significant method by which state power can be deployed to check and counteract abuses of power on the national level—particularly abuses by the U.S. Supreme Court of national judicial power.

When we think about tyranny perpetrated by the national government, we tend to think about rights-invasive congressional measures, such as the Alien and Sedition Acts of 1798,\textsuperscript{143} or presidential high-handedness, such as the military internment of Japanese-Americans during World War II\textsuperscript{144}—abuses, that is to say, by the legislative and executive branches. But liberty can also be abused by the judicial branch, most notably when federal courts refuse to acknowledge and protect individual rights. Abusively stingy readings of the U.S. Constitution not only may deny litigants their rights in individual cases, but generally also authorize other organs of government to invade liberties that they should be required to respect. While a state might combat this brand of judicial tyranny by invoking any of the forms of resistance mentioned earlier, state courts are especially well-suited to play a role in resisting abuse of national judicial power, and to do so through entirely peaceful and fully legal means. A powerful weapon state courts may wield in such a struggle is their authority to interpret state constitutions to provide more generous protection for individual rights than the U.S. Supreme Court has chosen to provide under the national Constitution.


\textsuperscript{144} See Korematsu v. United States, 323 U.S. 214 (1944).
State judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power in at least four ways. First, whenever a state court dissents from the reasoning of a U.S. Supreme Court decision, it offers a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling. Second, state rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor which the Supreme Court sometimes considers in the course of constitutional decision making. Third, generous state interpretations of individual rights can more directly check national power by prohibiting state and local governments from exercising authority permitted them under the U.S. Constitution to suppress certain kinds of private behavior. In so doing, state courts create spaces in which otherwise prohibited behavior may flourish. Finally, rights-protective rulings by state courts can help ameliorate the harm to liberty caused by narrow national rulings by providing protection for second-best alternatives to the types of behavior that such national rulings permit governments to suppress.

1. Public Dissent

Whenever a state's highest court, by constitutional ruling, recognizes a level of protection for individual rights that exceeds levels of protection for those rights established under parallel provisions of the national Constitution, it registers a forceful and often very public dissent from rulings of the U.S. Supreme Court. This kind of state constitutional rejectionism makes news—not merely among members of the bar or those who follow legal affairs, but in the mainstream press as well—and such publicity inevitably influences long-term public understandings of the appropriate content of constitutionally guaranteed rights.

A particularly vivid example of the newsworthiness of state constitutional rejectionism is the extensive press coverage devoted to the Georgia Supreme Court's 1998 ruling in *Powell v. State*.145 *Powell* made news because it rejected in a highly dramatic as well as ironic fashion the U.S. Supreme Court's ruling in *Bowers v. Hardwick*.146 In *Bowers*, the U.S. Supreme Court sustained a Georgia statute prohibiting the practice of sodomy.147 Georgia authorities had invoked the statute to prosecute a gay man for engaging in consensual, homosexual sodomy in his own home.148 The defendant challenged the constitutionality of the state law on due process grounds, arguing that established federal constitutional rights of privacy and sexual autonomy prohibited the criminalization of

145. 510 S.E.2d 18 (Ga. 1998).
146. 478 U.S. 186 (1986).
147. Id. at 189.
148. Id. at 187.
sodomy between consenting adults. The Supreme Court chose to interpret the defendant's attack upon the statute in narrower terms, as seeking a judicial declaration of a substantive due process right to engage in homosexual sodomy.\(^\text{149}\) The Court declined to issue such a ruling, applied a deferential standard of review, and sustained the Georgia law, holding along the way that nothing in the Due Process Clause prohibits states from enacting into law their moral condemnation of homosexuality and of gay sexual practices.\(^\text{150}\)

In *Powell*, the Georgia Supreme Court entertained a challenge to the very same law at issue in *Bowers*. This time, the defendant was a heterosexual male who had been convicted of engaging in sodomy with a female within the home. The defendant challenged the constitutionality of the statute under the Due Process Clause of the Georgia Constitution\(^\text{151}\)—a provision worded identically to the Due Process Clause of the U.S. Constitution, and which the Georgia Supreme Court had construed, like its federal counterpart, to embody a constitutional right to privacy.\(^\text{152}\) Rather than follow the U.S. Supreme Court's reasoning in *Bowers*, however, the Georgia Supreme Court simply brushed it aside. Pointing out that it was not bound by parallel constructions of the U.S. Constitution and could construe Georgia's Due Process Clause more generously than the U.S. Supreme Court had construed the federal Due Process Clause in *Bowers*,\(^\text{153}\) the Georgia Supreme Court invalidated the challenged statute. "We cannot think," the court said, "of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity."\(^\text{154}\)

As it did in *Bowers*, the State attempted to justify in moral terms its invasion of the privacy interest identified by the court, but this time without success: "'[I]t does not follow,'" said the court, "'that simply because the legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce.'"\(^\text{155}\) Finally, the Georgia Supreme Court could have attempted to harmonize its ruling with *Bowers* by invalidating the law only as applied to consensual heterosexual sodomy, preserving the statute for use against homosexuals. Instead, in what appears to be a deliberate rebuke to the U.S. Supreme Court, the Georgia court seemingly invalidated the state statute on its face, an action that dramatically underscored the greater rights-protectiveness of its ruling.\(^\text{156}\)

The ruling in *Powell* prompted an explosion of news reports, editorials, and opinion pieces. The decision was reported not only in the usual legal specialty

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149. Id. at 190.
150. Id. at 196.
152. Id. at 21–22.
153. Id. at 21 n.1, 22 n.3.
154. Id. at 24.
155. Id. at 25 (quoting Gryczan v. State, 942 P.2d 112, 125 (Mont. 1997)).
156. Id. at 24–26.
publications such as the *National Law Journal* and *Texas Lawyer*, and not only in local newspapers such as the *Fulton County Daily Report* and Georgia's leading paper, the *Atlanta Journal and Constitution*, but also in print media all across the nation. National publications such as the *New York Times*, *Los Angeles Times*, *Washington Post*, *Chicago Tribune*, and *Boston Globe*. The Powell ruling also received extensive coverage in newspapers serving much smaller markets. Stories about the ruling appeared in newspapers in Houston, New Orleans, St. Louis, Seattle, Minneapolis, Baltimore, Bergen County (New Jersey), Memphis, Austin (Texas), Jacksonville (Florida), Greensboro (North Carolina), Palm Beach; and Chattanooga (Tennessee), among many others.

The media response was not, however, limited merely to reporting. Editorial writers took to the editorial pages, largely to praise the Georgia Supreme Court's action. The *St. Petersburg Times*, for example, likening the U.S. Supreme Court's decision in *Bowers* to its notorious decisions in *Dred Scott*


Plessy v. Ferguson, praised the Georgia Supreme Court for “grant[ing] Georgia residents a protection the U.S. Supreme Court should have granted all of us 12 years ago: privacy in the bedroom.” The Charleston Gazette (West Virginia) gave a “hurrah” for Powell, expressed the wish that “this policy becomes standard throughout America,” and took the opportunity to criticize “age-old attempt[s] by severe moralists to control how others make love.” In a particularly sophisticated editorial, the Pittsburgh Post-Gazette observed that:

A generation ago, it was some state supreme courts that winked at fundamental violations of human rights while the U.S. Supreme Court acted boldly to correct injustices. . . .

In an ironic turnabout, the Supreme Court of Georgia recently invalidated a criminal law against sodomy that the U.S. Supreme Court allowed to stand by a 5–4 vote in a notorious 1986 decision.

According to the paper, the “overriding issue” in both cases “was privacy, not sex. And now, Georgia’s Supreme Court has grasped that fact, putting the U.S. Supreme Court to shame.” The Norfolk Virginian-Pilot likewise called for the government to get “out of the bedroom,” and urged the Virginia Legislature to take inspiration from the Georgia ruling and “get rid of Virginia’s antiquated, pernicious antisodomy law.”

By 2003, this kind of criticism of Bowers had found a new and receptive audience—on the United States Supreme Court itself. In Lawrence v. Texas, the Court overruled Bowers by a six-to-three vote, invalidating on due process grounds a criminal defendant’s conviction under a Texas sodomy law for engaging in sex with another man. In reaching this decision, the majority expressly noted that “[i]n the United States criticism of Bowers has been substantial and continuing, disapproving of its reasoning in all respects.” It also cited the Georgia Supreme Court’s decision in Powell as an example of a state court declining to follow Bowers in construing “provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.”

Of course the Powell decision and the subsequent media reaction was only one event in a barrage of criticism of Bowers that came from many sources over

167. Id.
170. Id. at 2483.
171. Id.
a period of seventeen years, and did not by itself trigger the Supreme Court’s reversal of position. The reaction to Powell, moreover, was certainly one of the more extreme examples of how state constitutional rejectionism may affect public opinion. However, even less significant or less well-covered state constitutional rulings may, in the long term, and when multiplied many times over, have similar impacts on public opinion and ultimately on the content of national constitutional law. Criticism of Supreme Court rulings by state courts cannot alone restrain abuses of national judicial power, of course, yet it is hardly irrelevant to such restraint. Official criticism of federal actions by holders of high state offices may from time to time find an attentive audience. And although it may take a long time, national public opinion is eventually reflected even in the rulings of Supreme Court Justices who, after all, are nominated and confirmed by democratically elected and accountable national officials.\(^{172}\)

2. Establishment of State-Level Legal Consensus

Another way in which state courts sometimes exert an indirect influence on the exercise of national judicial power is by contributing to the establishment of a national legal consensus at the state level. Such a consensus among the states can then influence federal courts in their own constitutional decisionmaking. This process can proceed in one of two ways. First, state constitutional decision-making can simply influence federal courts by the persuasiveness of its reasoning. If the reasons supporting state constitutional rulings apply at all in the national setting, federal courts may adopt or at least be influenced by such reasoning.\(^{173}\) The more state courts agree among themselves, the more influence their collective position may have upon federal reasoning in cases arising under the U.S. Constitution. But there is also a second and far more robust way in

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which state constitutional adjudication affects federal rulings: by contributing to the establishment of a consensus that federal courts can use as a meaningful reference point for federal constitutional adjudication. This phenomenon is seen with increasing frequency in U.S. Supreme Court decisions that elaborate the meaning of the Due Process Clause.

American courts proceeding in the fashion of the common law have a long tradition of examining judicial decisions from other jurisdictions. Sometimes courts turn to decisions from other jurisdictions out of mere prudence. For example, courts may want to make sure they have not overlooked any significant arguments or considerations, or they may wish to examine decisions from other jurisdictions for the persuasive value of their reasoning. Yet there is another reason why courts consult peer institutions, one rooted in the Blackstonian conception of the common law as the embodiment of truth: the decisions of other courts may furnish important evidence of the “true”—or at least the “best”—content of rules of law. The fact that forty-four states follow one rule of tort liability and only six follow an alternative rule is not conclusive evidence, even in the Blackstonian tradition, that the majority rule is the “correct” one, but it is impressive nonetheless, and courts often respond to such considerations.

Constitutional adjudication bears more than a passing resemblance to common law adjudication. Occasionally, federal courts contemplating some decision under the U.S. Constitution will consult the rulings of state courts in the common law fashion, opening themselves to influence and persuasion. Certainly the premier example of this is *Mapp v. Ohio* in which the U.S. Supreme

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175. Blackstone held that common law rules embody “the wisdom of the ages,” 1 WILLIAM BLACKSTONE, *Commentaries on the Laws of England* 64 (William Carey Jones ed., 1915), and should thus be treated as expressions of true principles on the ground that “no individual or even an entire generation can match the experience and wisdom accumulated over countless generations and reposed in the law.” GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 64 (Tony Honore & Joseph Raz eds., 1986).

176. See, e.g., Matter of Ind. State Bar Ass’n, 550 N.E.2d 311, 316 (Ind. 1990) (Shepard, C.J., dissenting) (“Fifty state supreme courts have examined the questions about which [we] write today and forty-nine of them have reached the opposite conclusion. The fact that Indiana stands alone on this issue does not mean that we are wrong, but it certainly does not prove we are right. Instead, I think it suggests that this might be a moment to heed the advice we often give to juries: ‘Re-examine your own views in light of the opinions of others.’”).


Court adopted the exclusionary rule, which requires the suppression of unconstitutionally seized evidence, as a means of enforcing the Fourteenth Amendment's prohibition of unreasonable searches and seizures.\(^{179}\) In reaching this decision, the Court was deeply influenced by an emerging consensus among state courts, which it carefully and extensively documented, that suppression of illegally seized evidence was the most effective way to deter constitutionally unreasonable searches.\(^{180}\)

The issue the Court confronted in *Mapp* had its genesis in the Court's 1914 decision in *Weeks v. United States*.\(^{181}\) In *Weeks*, the Court held that the Fourth Amendment's prohibition of unreasonable searches and seizures required the suppression of evidence seized by federal officials in violation of the Fourth Amendment.\(^{182}\) In 1949, the Court considered for the first time whether to extend the exclusionary rule to evidence seized unconstitutionally by state officials in violation of the Due Process Clause of the Fourteenth Amendment. In *Wolf v. Colorado*, the Court declined to do so.\(^{183}\) Acknowledging that the freedom from unreasonable searches and seizures was """"implicit in the concept of ordered liberty,"""" and thus protected by the Fourteenth Amendment, the Court nevertheless ruled that the Fourteenth Amendment did not require the states to adopt any particular remedy for violations by state officials of the substantive guarantee.\(^{184}\)

In reaching this conclusion, the Court relied heavily on what it characterized as a """"contrariety of views of the States"""" on how best to enforce the constitutional ban on unreasonable searches and seizures.\(^{185}\) Since its decision in *Weeks*, the Court noted, forty-seven states had reviewed their practices concerning the use of unconstitutionally obtained evidence.\(^{186}\) Thirty-one states, the Court observed, rejected use of the exclusionary rule, and only sixteen had adopted that approach.\(^{187}\) From this array of rulings, the Court concluded that exclusion of illegally obtained evidence was not regarded as vital to protection of the underlying right and thus could not be considered incorporated in the Fourteenth Amendment's protection of fundamental liberties.\(^{188}\)

A mere dozen years later, the Court returned to the exclusionary rule in *Mapp*. Utilizing the same standard and the same methodology, however, it reached the opposite conclusion, holding that the exclusion of unconstitutionally seized evidence had since *Wolf* become an aspect of the ordered liberty

\(^{179}\) *Id.* at 654–55.
\(^{180}\) *Id.* at 650–52.
\(^{181}\) 232 U.S. 383 (1914).
\(^{182}\) *Id.* at 398.
\(^{183}\) 338 U.S. 25, 33 (1949).
\(^{184}\) *Id.* at 27 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).
\(^{185}\) *Id.* at 29.
\(^{186}\) *Id.*
\(^{187}\) *Id.*
\(^{188}\) *Id.* at 30–31.
protected by the Due Process Clause of the Fourteenth Amendment. In 1949, the Court explained, “almost two-thirds of the States were opposed to the use of the exclusionary rule.” By 1961, however, “more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to” the rule. The Court placed special emphasis on a ruling by the California Supreme Court adopting the exclusionary rule as a matter of federal and state constitutional and state evidentiary law, in which the California court found that other remedies had “completely failed to secure compliance with the constitutional provisions.” Finding California’s experience consistent with that of other states, the Court overruled Wolf and incorporated the exclusionary rule into the Fourteenth Amendment’s definition of protected liberty.

Since Mapp, and particularly in the last fifteen years or so, the Court has turned increasingly to this more robust form of reliance on state court decision-making. Rather than merely opening itself to persuasion by the reasoning and experiences of state courts, the Court has increasingly used the content of state law to provide a baseline against which to measure whether any particular individual right can be considered part of the fundamental liberty protected by the Fourteenth Amendment. In earlier periods, the Court tended to focus, as it did in Wolf and Mapp, on whether a particular right could be considered “implicit in the concept of ordered liberty.” In its contemporary due process jurisprudence, however, the Court now tends to utilize a slightly different formulation that focuses on whether the liberty in question is “deeply rooted in this Nation’s history and tradition,” an analysis that it cannot perform without some examination of the content and evolution of state law.

Moreover, in reviewing American legal traditions as embodied in state law, the Court has repeatedly examined whether legal patterns in the states have persisted into the present. This new, heavy emphasis on the recent and contemporary content of state law gives state courts even greater opportunities to influence the shape of national constitutional doctrine. In Bowers v. Hardwick, for example, the Court declined to recognize what it characterized as a due process privacy right to engage in consensual homosexual sodomy. In

190. Id. at 651.
191. Id.
192. Id. (quoting People v. Cahan, 282 P.2d 905, 911 (Cal. 1955)).
193. Id. at 658.
195. See, e.g., id. at 723 (“[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today[,]”); Cooper v. Oklahoma, 517 U.S. 348, 356 (1996) (“We are persuaded, by both traditional and modern practice . . . . , that the State’s argument must be rejected.”); Burnham v. Superior Court, 495 U.S. 604, 615 (1990) (“This American jurisdictional practice is, moreover, not merely old; it is continuing.”).
reaching this decision, the Court relied on a detailed review of the history of state regulation of sodomy, noting that before 1961 "all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." 197

In *Cruzan v. Director, Missouri Dep't of Health*, the Court recognized a due process constitutional right to be free from unwanted medical treatment, but held that the right had not been violated by a state law that prohibited termination of life support for a person in a persistent vegetative state without clear and convincing evidence that the person, if competent, would so wish. 198 Both aspects of the Court's rulings were heavily informed by its survey of past and present state law concerning the content and application of state doctrines of informed consent. Some of the state cases the Court consulted that recognized a right to refuse treatment, the Court explicitly noted, were based on a combination of state common law and privacy rights recognized under state constitutions. 199

This trend continued in *Cooper v. Oklahoma*, in which the Court invalidated on due process grounds a state law requiring a criminal defendant to prove his incompetence to stand trial by clear and convincing evidence. 200 The Court held, on the basis of "both traditional and modern practice," 201 that such an elevated standard was inconsistent with due process. "Contemporary practice," the Court observed, "demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest in prompt and orderly disposition of criminal cases." 202 Similarly, in *Washington v. Glucksberg*, 203 the Court refused to recognize a due process right to physician-assisted suicide based upon a review not only of seven hundred years of "Anglo-American common law tradition," 204 but also upon a review of contemporary legislative and judicial attitudes toward the practice. The Court thus found it relevant that "[i]n almost every State . . . it is a crime to assist a suicide," 205 and that "the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed." 206 The Due Process Clause cannot be understood to recognize such a right, the Court concluded, because "we are confronted with a consistent and almost universal tradition that has long rejected the asserted

197. Id. at 193–94.
199. Id. at 271 ("Most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right.").
201. Id. at 356.
202. Id. at 360.
204. Id. at 711.
205. Id. at 710.
206. Id. at 716.
right, and continues explicitly to reject it today.\(^{207}\)

Most recently, the Court in *Lawrence v. Texas* overruled *Bowers*, finding that the Due Process Clause protects a personal right of private sexual autonomy sufficiently broad to encompass homosexual unions.\(^{208}\) The majority opinion devoted extensive consideration to the historical claims made in *Bowers*, finding them unfounded. Instead, the Court recharacterized the historical record, arguing that “American laws targeting same-sex couples did not develop until the last third of the 20th century.”\(^{209}\) The Court then turned to state practice and policy following its 1986 decision in *Bowers*, noting expressly that several states had repealed or ceased to enforce existing sodomy statutes, and that five state appellate courts had construed their state constitutions to require invalidation of state sodomy laws on due process grounds. The Court concluded by proclaiming: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”—a surprising acknowledgement of the ability of the instrument to evolve in response to changes in official and public opinion and practice.

The U.S. Supreme Court’s approach in due process cases arising under the Fourteenth Amendment suggests strongly that state courts have the ability to influence indirectly the content of nationally guaranteed liberties through their rulings under cognate provisions of state constitutions. More to the point, it seems possible for state courts to use this process to work actively, if slowly, to undermine Supreme Court interpretations of the U.S. Constitution with which they disagree.\(^{211}\) The possibility of engaging in this kind of resistance is increased by the widespread tendency among state high courts to consult rulings

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207. *Id.* at 723; *see also* *Vacco v. Quill*, 521 U.S. 793 (1997) (rejecting equal protection challenge to state law that permitted patients to refuse lifesaving treatment but that prohibited physician-assisted suicide on the ground that past and contemporary state law makes a clear distinction between actions that permit death to occur naturally and actions that unnaturally hasten it).

208. *Id.* at 7472 (2003).

209. *Id.* at 2479.

210. *Id.* at 2484.

211. This process need not be used solely to expand individual rights; it can also contract them. A national overexpansion of individual rights could just as easily be understood as “abusive,” especially when it sets up a conflict with other perceived rights such as property or economic rights. A good example is state constitutional protection for speech in shopping malls, which was challenged unsuccessfully as violating either nationally protected rights of property owners to exclude unwanted individuals, or their entitlement to compensation for the loss of the power to exclude. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (rejecting Fifth Amendment takings claim). A state is free to set its own protection for uncompensated takings at a higher level, and in so doing, attempt to influence the content of federal Fifth Amendment doctrine.
from other states when construing their own state constitutions.\textsuperscript{212} Thus, much as the common law evolves and converges by mutual consultation across jurisdictions, constitutional law may evolve in the same way—particularly when the controlling methodology of interpretation under the Fourteenth Amendment places considerable emphasis on the emergence of consensus on the state level. By working to form a consensus at the state level, then, state courts may employ state constitutional law as a tool to resist incorrect and abusive interpretations of the U.S. Constitution by federal courts.\textsuperscript{213}

3. Creation of a Protected Space for Prohibitable Behavior

I have focused thus far only on indirect routes by which state constitutional decisions influence the exercise of national power—methods that operate by influencing over the long term the U.S. Supreme Court’s conception of the scope of federally protected rights. There are, however, at least two ways in which state constitutional rulings granting state citizens heightened individual rights can much more directly and immediately counteract the impact on individual liberties of oppressive federal constitutional rulings: first, by making it more likely that there will be some space for certain kinds of private behavior that the U. S. Supreme Court permits American governments to suppress; and second, by providing space for private behavior that amounts to second-best alternatives to the types of behavior the Supreme Court permits governments to suppress.

To say that someone holds a right or is free to exercise some liberty generally means that he or she may engage in some kind of private behavior without fear of punishment by the government against which the right or liberty is held.

\textsuperscript{212} MARY CORNELIA PORTER & G. ALAN TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM xxi–xxii (1980); TARR, supra note 56, at 199–200.

\textsuperscript{213} Others suggest additional ways in which state law can influence the content of federal rights. Akhil Reed Amar points out that some provisions of the federal Bill of Rights, such as the Seventh Amendment’s right to a jury trial, implicitly incorporate standards established by state law into the content of the right. The same is true regarding the Fifth Amendment’s recognition of constitutionally protected property rights, which are established by state law. See Akhil Reed Amar, Foreword: Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses, 27 RUTGERS L.J. 845 passim (1996). Such limitations do not necessarily rely on state constitutional law, although they may do so if the relevant standards have been constitutionalized rather than created by statute or the common law.

Calvin R. Massey argues that state constitutional rights are incorporated into the national Bill of Rights by the Ninth Amendment in a kind of “reverse preemption.” Calvin R. Massey, The Antifederalist Ninth Amendment and Its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229, 1232–33; see also Vincent Martin Bonventre, Beyond the Reemergence—“Inverse Incorporation” and Other Prospects for State Constitutional Law, 53 ALB. L. REV. 403, 415–18 (1989) (similar idea). Massey’s account is much more robust than the one set out in this Article. According to Massey, under the Ninth Amendment, a state polity can bind national officials to observe rights granted by its own state constitution even when the national constitution does not otherwise require national officials to do so. I take a different view: the Supremacy Clause allows national officials to do as they please so long as they observe the requirements of the U.S. Constitution. The limitations on national power established by the Ninth Amendment pose a different question and, in my view, not one that receives a different answer in different states.
Nevertheless, the fact that some right or liberty may be constitutionally guaranteed does not, in our system, affirmatively grant anyone the right to engage in any particular behavior. On the contrary, under the theory of government laid out in the Declaration of Independence, the Constitution, and numerous decisions of the Supreme Court, the general rule is that anyone may engage privately in any behavior whatsoever until some government with the power to curtail the behavior invokes that power and restricts the activity in question. This is the model of negative liberty that dominates American constitutional law. Consequently, to have a constitutional right to engage in some behavior typically means less that one has the freedom to act than it means that government may not restrict the behavior by prohibiting it. For most practical purposes, these two understandings of constitutional right amount to the same thing, for in organized society, one is generally free to engage in an activity only insofar as one’s government is disabled from restricting it. But once we begin dealing with more than one government at a time, as we inevitably must in a federal system, the difference between these two understandings takes on greater significance.

When a federal court takes a restrictive view of the scope of some individual liberty guaranteed by the U.S. Constitution, it does nothing by itself to restrict in any way the actual ability of any person to engage in any particular behavior. Rather, the main significance of such a ruling is that it authorizes the national legislative and executive branches to enact and enforce laws that prohibit or restrict some kind of behavior in which people would otherwise wish to engage. Moreover, since the 1960s, when the Supreme Court developed the incorporation doctrine under the Due Process Clause of the Fourteenth Amendment, a federal individual rights ruling that authorizes the national government to suppress some kind of behavior usually amounts to a similar authorization to state and local governments to suppress the same behavior. Thus, a stingy ruling on individual rights by the U.S. Supreme Court for the most part amounts to an authorization to every government in the United States to suppress the behavior in question should it choose to do so—it declares a kind of open season against the private activity that is the subject of the ruling.

Here, however, is where the difference between constitutional authorization

214. With the notable exception of the Thirteenth Amendment, which forbids slavery by private individuals, it is generally assumed that the U.S. Constitution applies only to government actors. This is the source of the “state action” requirement. See The Civil Rights Cases, 109 U.S. 3, 11 (1883). The default assumption that individuals are entitled to do as they wish until restrained by lawful authority probably has its roots in Enlightenment theories of government, which generally take the state of nature as their point of reference. Thus, John Locke said that people in the state of nature are in “a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit.” Locke, supra note 7, § 4; cf. Hobbes, supra note 9, at 107. Still, Enlightenment philosophers did not think that even the state of nature was a state of unlimited freedom: the “law of nature,” given directly by God, contained some inherent limitations on human behavior. See Locke, supra note 7, § 4, 6–8.

to suppress behavior and actual legislative use of that authorization begins to make a difference. If the Supreme Court holds that the Constitution does not forbid governmental power to be used to restrict some particular activity, then the national government and all fifty state governments may restrict it. But, of course, they need not do so. A decision by one state to invoke this authority and suppress the activity typically will not in any way affect the ability of people in any other state to engage in that activity. Thus, the impact of a federal constitutional ruling on individual rights is typically felt by any individual only if the authority to suppress behavior is invoked legislatively either by Congress or by the legislature of the state in which the individual resides.

Because of this architecture of the federal system, state constitutional rulings can thus serve as actual antidotes—of a limited scope, to be sure, but antidotes nonetheless—to abusively restrictive federal judicial interpretations of federally guaranteed individual rights. A ruling by a state supreme court recognizing heightened protection of the very same individual right that the U.S. Supreme Court has already held to be narrowly protected by the national Constitution is a ruling that revokes the state government's authority to exercise the power which the federal courts have granted it to suppress the behavior. The practical effect of such a ruling is that only one government—the national government—is then permitted to punish the behavior in question.

But not all governments are equivalent in their ability to suppress all varieties of constitutionally prohibitable behavior. In practice, the power of the national government to suppress behavior within any given state is often only a fraction of the power that the state government has to suppress the same behavior. National law enforcement resources must be spread around the entire country, and the ability of the national government to detect and punish prohibited behavior is often limited; it is certainly far less than the ability of the state government to detect and punish the behavior. Moreover, as shown in Part I.B.2, the national government often requires the cooperation of the states to achieve its programmatic goals, cooperation which will not be forthcoming if state officials are barred under their own state constitutions from providing the requested assistance. As a practical matter, then, to enjoy protection from

216. This reasoning has been invoked, for example, to criticize the Supreme Court's decisions establishing an individual right to obtain an abortion. See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., dissenting) (criticizing Roe v. Wade for settling the abortion issue at the national level, thereby short-circuiting a national debate and preventing states from making their own determinations about whether and to what extent to protect an individual's right to an abortion).


218. A particularly stark example of this phenomenon is the refusal of the Portland, Oregon police department to cooperate with the FBI's effort to interview approximately 5,000 young men of Middle
punishment of some activity by state government is sometimes to enjoy close to complete protection from any governmental punishment at all.

A concrete example may help to illustrate the point. Libel laws permit individuals to sue and recover damages from those who publicly circulate defamatory statements about them. In a 1964 case, the U.S. Supreme Court held that libel laws are subject to evaluation under the First Amendment of the United States Constitution because they restrict freedom of speech.\textsuperscript{219} Since this decision, litigants have clashed over the scope of the First Amendment's protection for speech that has the potential to harm the reputation of others. One question that sometimes arose was whether the First Amendment protected statements of opinion from punishment; many took the position that expressions of opinion, unlike assertions of fact, were sheltered from civil liability rules under the First Amendment. In its 1990 decision in \textit{Milkovich v. Lorain Journal Co.},\textsuperscript{220} the U.S. Supreme Court held that couching a statement in the form of an opinion does not cloak it with constitutional immunity from libel rules.\textsuperscript{221} After \textit{Milkovich}, any legislature in the United States was thus constitutionally free to craft libel laws that punish the expression of defamatory opinions. While most libel rules would be expected to appear at the state level, it is not inconceivable that Congress might also enact a libel law within the scope of its admittedly more limited powers. For example, there might be a plausible argument that Congress could enact libel laws to protect national government officials and candidates for office from unwarranted attacks, especially if it could be shown that highly qualified candidates were being deterred from seeking national office because they feared smear attacks by their opponents.\textsuperscript{222}

A year after the Supreme Court's decision in \textit{Milkovich}, the same issue reached the New York Court of Appeals, New York's highest court.\textsuperscript{223} That court disagreed with the Supreme Court's handling of the opinion question. Of course, it could do nothing about the Supreme Court's interpretation of the First Amendment of the U.S. Constitution. However, the New York Constitution also

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\textsuperscript{220} 497 U.S. 1 (1990).
\textsuperscript{221} \textit{Id.} at 20-21.
\textsuperscript{222} Article I, Section 4 of the U.S. Constitution, which grants Congress the power to regulate the time, place, and manner of congressional elections, may authorize an election code containing such a provision.
has a provision protecting freedom of speech, and in *Immuno AG. v. Moor-Jankowski*, the New York court interpreted that provision to provide broader protection for free speech than the First Amendment—sufficiently broader to create a free speech privilege for expressions of opinion. Consequently, the court held, New York's libel law may not constitutionally punish expressions of opinion. After *Milkovich* and *Immuno AG.*, libel law in New York State looks something like this: Congress has the authority to enact libel laws that punish the expression within New York of defamatory opinions, but New York State may not.

How safe is it, then, to express defamatory opinions in New York? Very safe. New York itself is constitutionally disabled from punishing such speech. No other state's law, no matter how restrictive, is likely to apply, at least so long as the opinion is expressed within New York and not distributed outside the state. Congress could conceivably enact a libel law that would reach within New York, but it has not—nor is it likely to do so. Even if it did, the applicability of the law would likely be so limited that it could conceivably affect only an extremely small proportion of the defamatory opinions expressed in the state. By choosing to accord defamatory opinions a higher degree of protection under the New York Constitution than they receive under the U. S. Constitution, the New York Court of Appeals assured the survival of a considerable public sphere in which the expression of such opinions would remain unpunishable. In so doing, it undid a great deal of the harm to the public good—if harm there was—caused by the Supreme Court's decision in *Milkovich*.

Or consider the Supreme Court's search-and-seizure jurisprudence under the Fourth Amendment. In a series of cases, the Court drastically curtailed the scope of this right, making it easier to obtain search warrants on the testimony of anonymous informants, carving out a "good faith" exception to the exclusionary rule, and holding that neither aerial surveillance nor canine sniffs amount to searches within the meaning of the Fourth Amendment.

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225. *Immuno AG.*, 567 N.E.2d at 1277.
226. Things get a bit more complicated if a libelous statement published in the state is distributed beyond its borders. Although libel would likely be within the reach of another state's long-arm statute, see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (no due process violation in applying a state's long-arm statute to defamatory language contained in a magazine published outside of the state but regularly circulated within it), the important question is which state's law would apply in adjudicating the libel claim. The "single-publication rule," see Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 Brook. L. Rev. 921, 940 & n.80 (1996), suggests, though it does not compel, the conclusion that the law of the state of publication would apply. Id.; *Luther L. McDougal III et al., American Conflicts of Law* 454–55 (5th ed. 2001). Not all states follow the rule, however, and it might not apply where there is only one place of publication.
Numerous states have rejected these rulings when construing parallel provisions of their own state constitutions. To the extent that a state considers these national rulings tyrannical or an abuse of national power, contrary state constitutional rulings check the extent of the abuse by withdrawing from state law enforcement authorities the power to follow police practices that the national Constitution now permits.

It is true, of course, that a more rights-protective state constitutional ruling cannot prevent federal FBI and DEA agents operating in the state from using the looser, federally authorized search practices. Nevertheless, the impact of the state ruling may be considerable. In most states, the likelihood that any person will come in contact with federal law enforcement officials is minuscule in comparison to the likelihood of contact with state or local police who are subject to the restrictions of the state constitution. The state constitutional ruling, then, creates a space—a public sphere of potentially considerable scope—in which citizens of the state may enjoy a freedom from police searches that, in the view of the state polity, creates a more appropriate relationship between private conduct and official power.

4. Protection of Second-Best Liberties

A second way in which heightened state protection for individual rights can serve as a direct, if limited, check on abuses of national judicial power is by assuring the existence of some space for private behavior that is a second-best alternative to the types of behavior that narrow federal interpretations of nationally protected rights permit governments to suppress. As a rule, national power tends to be spread thinly throughout the states, and to touch the lives of most citizens lightly. There are, however, some areas in which national power


232. According to the U.S. Department of Justice's Bureau of Justice Statistics, federal agencies in 2000 employed 88,496 full-time law-enforcement personnel. Sixty percent of this total worked for the Immigration and Naturalization Service, Federal Bureau of Prisons, FBI, and Customs Service. More than a quarter of these officials were deployed in only two states, Texas and California. See U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT STATISTICS, supra note 217. In contrast, state and local law enforcement agencies in 1996 employed nearly one million full-time personnel. See U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT STATISTICS, supra note 217.
penetrates American life deeply, if narrowly. In these areas, national standards prevail and there may be nothing states can do to limit their impact on the activities subject to federal regulatory standards. When national power is deployed in this way and used to achieve a purpose antithetical to the public good, liberty is irrevocably lost.

Liberty means, among other things, the freedom to live one's life in a certain way.\(^{233}\) When national power is carefully targeted and then deployed to maximum effect, it is fully capable of choking off certain ways of life. That is, of course, the very definition of effective power, and the Constitution grants powers to the national government in ways designed to make them effective within their legitimate scope.\(^{234}\) Thus, in such cases, the exercise of national power can close off certain ways of life, resulting in a loss of liberty to those who value that way of life and wish to pursue it.

A state that views such an exercise of national power as an abusive invasion of liberty has at its disposal no fully legal means to undo directly the particular harm committed by the national government. A lawful exercise of national power, backed by the Supremacy Clause and the threat of enforcement, is enough to make that harm stick. Nevertheless, it may be possible for the state government to ameliorate that harm indirectly by using its lawful powers to expand and protect liberty in other directions. One important way in which the state can accomplish that objective is by providing heightened protection under the state constitution to other liberties that are related to the liberty that national power has denied, or which might in some circumstances plausibly substitute for it.

For example, until 1994, national drug laws that criminalized the possession and distribution of peyote\(^{235}\) prohibited some Native Americans from practicing their religion in traditional ways. The enforcement of drug proscriptions tends to be heavily federalized.\(^{236}\) The U.S. Supreme Court, moreover, ruled in 1990 that applying a statutory peyote ban to Native American religious rituals does not violate the Free Exercise Clause of the U.S. Constitution.\(^{237}\)

Several states reacted to this ruling defiantly by enacting initiatives authorizing the medical use of marijuana, another drug the possession of which is barred, subject to heavy penalties, by national law.\(^{238}\) Lawsuits brought by

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\(^{234}\) Though limited, the powers of the national government are said to be plenary within their sphere. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819).

\(^{235}\) 21 U.S.C. §§ 811–12 (1994). However, the Drug Enforcement Administration had by regulation exempted the sacramental use of peyote from prosecution. 21 C.F.R. § 1307.31 (1999). Apparently this regulation was respected by the Justice Department in its enforcement policies.


\(^{237}\) Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990). Although the precise facts involved a state statute, the ruling clearly applied equally to federal criminal statutes.

federal prosecutors in federal court resulted in the swift invalidation of these measures, however, weaving the Supreme Court’s approach to drug laws deeply into the fabric of judicial oversight of law enforcement activities. Although these rulings concern marijuana, not peyote, their relevance to Native Americans is clear: state defiance of national drug laws will not be tolerated. Until Congress voluntarily chose to exempt Native Americans (and only Native Americans) from the reach of the peyote ban, national power was applied systematically and effectively to preclude a group of citizens—certain Native Americans—from living a particular kind of life, one in which they might take part in what they consider to be important sacred rituals. As far as these individuals were concerned, their liberty had been irrevocably impaired. Moreover, should congressional tolerance for the sacramental use of peyote flag and Congress rescind the exemption, Native Americans would again be in the position of being barred by federal law from practicing their religion as they believe they must.

A state whose people thought such an exercise of national power abusive could do nothing short of outright, escalated defiance of federal law—nothing, that is, by legal, nonviolent means—to win for Native Americans the right to use peyote in religious rituals. It is true that state courts could invalidate state anti-peyote laws on free exercise grounds, but federal prosecution of drug crimes is fairly ubiquitous, and Native Americans are a small group who are already subject to extensive federal oversight. Nevertheless, even in these circumstances, it may well be within the power of state governments to use constitutional or statutory means to protect other enclaves of religious liberty in the hope that the uncomfortable effects of a contraction of liberty at one point in the system might be offset in some way by an expansion of liberty elsewhere.

For example, virtually every state constitution contains a provision that, like...
the Establishment Clause of the First Amendment of the U.S. Constitution, requires states to treat all religions neutrally, a requirement that prohibits states from endorsing any particular religion. The U.S. Supreme Court has interpreted the Establishment Clause narrowly in recent years, holding that overtly religious symbols associated with the major religions may be displayed prominently on public property in certain circumstances without violating the Clause. Critics of this decision sometimes claim that it takes insufficient account of the context in which such symbols are displayed, a context in which these displays look to those who do not practice the major religions very much like official endorsements of Christianity, and occasionally of Judaism and Islam. The idea that the state endorses certain religious ideas and not others may then be perceived by dissenters as marginalizing and oppressive.

A state, however, is free to take a more expansive view of state constitutional prohibitions on government support for religion than the Supreme Court has taken of the First Amendment’s Establishment Clause. A state constitutional ruling barring any displays of religious symbols on public property might expand the liberty of Native Americans in a way that could help ameliorate some of the harm they might feel from the federal proscription of peyote. Native Americans are a tiny minority in this country. Like other religious minorities, they probably feel their identity is put under constant pressure by the ways in which a largely Christian majority unreflectively takes the assumptions and practices of Christianity to be those of religion in general. It is of course this very kind of thinking that accounts for the fact that federal drug laws, until recently, made no exception for the ceremonial use of peyote; things undoubtedly would have been different if peyote use were part of Christian ritual. The unreflective invocation of religious symbols by those who practice majority religions is one of many potential sources of pressure on minority religious identity. A state ruling barring the display of any and all religious symbols on state and local government property might go some way toward easing this pressure. It might send a welcome message of inclusion and understanding. In one way or another, it might use state power to confront and counteract a potentially liberty-impairing use of national power.

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244. See id. at 700–01 (Brennan, J., dissenting) (“inclusion of the crèche in its display would serve the wholly religious purpose of ‘keeping [Christ] in Christmas’”); see also id. at 701 (“The effect on minority religious groups, as well as those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.”).
245. Lynch, 465 U.S. at 696 (Brennan, J., dissenting) (“[T]his case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems familiar and agreeable.”); William van Alstyne, Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 786 (referring to the Court’s interpretation of the Establishment Clause as “secularized Christian ethnocentrism”).
246. Research disclosed no state decision rejecting Lynch as a matter of state constitutional law. At least one state court has followed Lynch under its state constitution. See King v. Vill. of Waunakee, 517 N.W.2d 671, 675 (Wis. 1994).
A more difficult example is presented by recent uses of national power to severely restrict the use of affirmative action in employment and education. Affirmative action programs give preferences in employment or educational opportunities to members of minority groups that historically have suffered disadvantages as a result of official discrimination. Such programs originally were justified as a kind of compensation for opportunities denied in the past. More recently, supporters have also justified affirmative action programs as a way to achieve a desirable racial and ethnic diversity in workplace and university settings. For a time, national law permitted moderate affirmative action programs. In the last decade, however, the U.S. Supreme Court has interpreted the Equal Protection Clause in a way that sharply restricts the constitutionality of national or state laws that extend employment and, to a somewhat lesser extent, educational preferences to minorities. The Court’s theory is that such preferences often amount to a kind of reverse discrimination against majority groups such as whites and males. Moreover, national law in this area is privately enforceable in antidiscrimination suits, so any lack of vigilance by government enforcement officials is of little consequence.

Suppose the people of a state see the Court’s rulings in this area as a tyrannical use of national power—one that entrenches an unjust status quo in

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which members of racial minorities suffer from continuing bias and social or economic structural disadvantages. Suppose the state’s people think this infringes the liberty of racial minorities by impairing their ability to live the kinds of life they wish to live—lives characterized by meaningful educational opportunities and dignified, remunerative work. What, if anything, can be done to counter this use of federal power? Affirmative action presents a more difficult problem than the peyote example because of the extraordinary reach of the equal protection principles at issue. If national law prohibits a state from offering distinct advantages to blacks in employment or education, a state probably cannot invoke its constitution to provide blacks with some other kind of advantage because the Supreme Court’s rulings seem to prohibit states from offering any kind of advantage to blacks that is not available equally to whites. The entire field of racial relations is so hemmed in on all sides by national law that it may prove exceedingly difficult for a state to counteract a national contraction of liberty by expanding liberty in any directly related area.

In this situation, states may be relegated to protecting liberties that are only tangentially related to the liberty that has been denied at the national level, and which thus constitutes a distinctly “second-best” kind of substitute. For example, it is possible that a state constitution might be used to expand the liberty of racial minorities in other directions by recognizing a constitutional right to public reparations for past discrimination, though, even here, it seems possible that the Supreme Court’s construction of the Equal Protection Clause might in some circumstances invalidate such a provision. If the liberty of racial minorities to enjoy educational and employment opportunities cannot be expanded in any direction without violating federal law, perhaps the state constitution could be interpreted to confer upon minorities some kind of right to noneconomic opportunities, such as cultural integrity or cultural expression. There is, to be sure, an important difference between a constitutional right to pursue economic opportunities and a right to pursue cultural ones. The way of life associated with the second path may be quite different from the one associated with the first, and perhaps less widely or intensely desired by those in a position to benefit from the offered liberty. But even when state power is limited to offering liberties that are only substitutes for the liberties national power has denied, state power might nevertheless plausibly be understood as asserting itself against national power in the only way it can.

In making these arguments, I certainly do not wish to be understood to say that liberty is a single or fungible entity. If the national government invades liberty in one sphere in ways that states are powerless directly to affect, it is not necessarily the case that a state expansion of personal liberty in a different

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253. It is possible that the Court would view a generalized reparations payment, not limited to victims of specifically identified prior instances of discrimination, as just another kind of affirmative action program that discriminates on the basis of race.

sphere automatically counterbalances the harm. To be sure, each liberty is different, and giving people one kind of liberty instead of another will not and should not satisfy everyone, especially those to whom the denied liberty is extremely important. When the denied liberty has structural functions that affect politics, such as free speech or association, the harm may be irremediable. But it may well be that for a great many people, expanding opportunities to pursue one kind of liberty may help even the score for the denial of others. Liberty, as I have indicated, does not compel behavior; it opens up opportunities for people to live certain kinds of lives if they so choose. Denying a liberty in any respect limits in some way the kinds of lives people are able to lead. But expanding liberty in another direction expands life choice options. Undoubtedly, some people who value highly the opportunity to live a certain kind of life will not be mollified by the opportunity to live a different kind of life to which they do not aspire. But there may be many other people who do value that kind of life more than the kind that has been denied, or who are indifferent between the two. These people will be made better off by state expansion of a wholly different kind of liberty. For such individuals, a state's use of its constitution to provide heightened protection for individual rights may indeed be a relatively potent tool with which to combat national tyranny.

III. CONSEQUENCES FOR STATE CONSTITUTIONAL INTERPRETATION

In the preceding Part, I tried to show how state courts' rejection of federal precedents or reasoning regarding individual rights, and the judicial expansion of individual liberty under state constitutions beyond that granted by corresponding federal judicial interpretations of the national Constitution, can be forms of legitimate resistance to abuses of national judicial power. Not surprisingly, this functional or tactical use of state constitutional law has potentially significant consequences for the interpretation of state constitutions by state courts.

Contemporary jurisprudential thought about the interpretation of state constitutions tends to be mired in well-worn ruts that lead to two competing and unhelpfully rigid models of interpretation. The first and most widely held


257. Not everyone has been content with the existing interpretational categories. Recently, G. Alan Tarr and Robert A. Schapiro have made important contributions that challenge the received wisdom. See Tarr, supra note 56; Robert A. Schapiro, Identity and Interpretation in State Constitutional Law, 84 Va. L. Rev. 389 passim (1998). A recent article by Robert F. Williams suggests the possibility of a new kind of synthesis. Robert F. Williams, Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples, 43 B.C. L. Rev. 73 passim (2001). Daniel B. Rodriguez also has expressed displeasure with existing approaches. Daniel B. Rodriguez, State Constitutional Theory and Its Prospects, 28 N.M. L. Rev. 271 passim (1998). And Helen Hershkoff has of late been slowly and methodically dismantling the normative foundations of
model, often labeled the "primacy" approach, holds that state courts analyzing questions of state constitutional law should treat state constitutions as freestanding, wholly independent sources of positive constitutional law.258 This means that state courts should interpret state constitutions by bringing to bear all the traditional tools of constitutional analysis: text, structure, history, controlling state precedent, and the values of the state polity.259 This analysis should be performed, moreover, without any consideration whatsoever for analogous rulings by federal or other state courts except for the limited purpose of providing guidance; and courts must understand that the nature of this guidance is merely persuasive and never controlling, regardless of any similarities between the constitutional provisions under review and those construed in cases from other jurisdictions.260

The other main position, often called the "interstitial" or "supplemental" approach, holds that state courts should turn to the state constitution only after it becomes apparent that the U.S. Constitution provides inadequate protection for the civil liberties at issue. Upon making such a determination, the state court should then examine the state constitution to determine whether it provides any additional increment of protection for the right at issue.261 This approach is usually associated with a methodology of state constitutional interpretation, often labeled the "criteria" approach, which directs state courts to compare the state constitutional provision at issue to its cognate provision in the federal Constitution, and to construe it to have a different meaning from its federal counterpart only if some objective indicium supports the divergent interpretation.262 The indicia sufficient to support a divergent interpretation typically are said to include differences in the constitutional text, structure, or history; differences in controlling state precedent; and differences in the concerns or values of the local populace.263

Neither of these models is satisfactory either as a normative guide to or an


258. Tarr, supra note 56, at 183–85.


262. See Tarr, supra note 56, at 182–83; Friedman, supra note 173, at 104–05.


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258. Tarr, supra note 56, at 183–85.


262. See Tarr, supra note 56, at 182–83; Friedman, supra note 173, at 104–05.

accurate description of the judicial practice of interpreting state constitutions.\textsuperscript{264} The functional approach I have sketched here, however, holds the promise of breaking this impasse and arriving at an account of contemporary state constitutional jurisprudence that is far more normatively attractive than the dominant approaches, as well as more descriptively accurate of actual judicial practice.

Although they differ in significant respects, both the primacy and interstitial approaches share a critical underlying assumption. Both jurisprudential philosophies begin from the premise that state courts may not construe state constitutional rights differently from the way federal courts construe national constitutional rights \textit{merely because they disagree} with the federal decisions on the merits.\textsuperscript{265} Indeed, the entire course of development of contemporary theories of state constitutional interpretation may usefully be understood as an attempt to shield state courts from charges that they have issued rights-expansive state constitutional rulings solely because they disagree with specific rulings of the Burger or Rehnquist Courts.\textsuperscript{266}

This premise, I believe, is fundamentally false. The functional approach to state power I have sketched here suggests that state courts should be doing exactly what their critics accuse them of doing. That is to say, when state courts disagree with a Supreme Court decision construing the U.S. Constitution, they may interpret similar provisions in state constitutions differently \textit{precisely because} they believe that the U.S. Supreme Court has misinterpreted the national document, thereby according insufficient protection to the legitimate rights and liberties of the American people—liberties that it is in part the function of state courts to protect.\textsuperscript{267}

\textsuperscript{264} For criticism, see generally James A. Gardner, \textit{The Failed Discourse of State Constitutionalism}, 90 Mich. L. Rev. 761 (1992); Paul W. Kahn, \textit{Interpretation and Authority in State Constitutionalism}, 106 Harv. L. Rev. 1147 (1993); Schapiro, supra note 257.


\textsuperscript{266} See Tarr, supra note 56, at 178-80; George Deukmejian & Clifford K. Thompson, Jr., \textit{All Sail and No Anchor—Judicial Review under the California Constitution}, 6 Hastings Const. L.Q. 975, 975, 1009-10 (1979); Friedman, supra note 173, at 94.

To be sure, state courts interpreting provisions of the state constitution cannot be guided *solely* by their reaction to decisions of the U.S. Supreme Court interpreting the U.S. Constitution. State constitutions are still enactments of positive law that may be adopted for particular purposes and subject to particular restrictions that state courts are bound to obey.\(^1\) A state court’s agreement or disagreement with related national precedent thus will seldom be the only, or even the controlling, determinant in its constitutional decisionmaking. But the court’s reaction to federal precedent most certainly can and should be a factor to be weighed in the analysis.\(^2\) Indeed, it is difficult to see how state courts could discharge their responsibilities in the federal system by doing otherwise.

The methodological errors of the primary and interstitial approaches to interpretation can be explained, moreover, largely by their incorrect premises about the nature of state power within the structure of American federalism. The primary approach conceives of state constitutional interpretation as a self-contained enterprise whose only point of reference is the state constitution itself. To interpret a state constitution, say the proponents of the primary approach, one must treat it no differently than one would treat the national constitution: as an expression of the will of the people of the state.\(^3\) This might be a valid approach if an American state were an independent nation, and the United States were nothing more than a league of independent sovereigns connected for a few common purposes by a treaty or compact. But the United States is not a compact of independent sovereigns; it is a nation—if the Civil War settled anything, it was that.

The interstitial approach veers too far in the opposite direction. By accepting interpretations of the U.S. Constitution as presumptively binding on state courts interpreting state constitutions, the interstitial approach treats state constitutions as having virtually no independent legal agency. State constitutional law, in this model, is treated not as an independent body of positive law authored by a distinct self-governing polity, but as a local and subordinate iteration of positive law established at the national level. This would perhaps be a valid approach if states were merely administrative subdivisions of the nation and thus had no legitimate authority to pursue and enact into law their own independent judgments concerning the structure and conditions of local self-governance. But, of course, states are more than administrative subdivisions of the nation. Although the principle of national supremacy circumscribes their independence, they nevertheless have considerable leeway to make independent decisions about

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\(^2\) The precise way in which this particular factor should be considered in the complex mix of factors in constitutional analysis is a topic I expect to address in a future work.

\(^3\) See Schapiro, *supra* note 257, at 396–404.
how best to promote and protect the welfare and liberty of their citizens—decisions which they are able to back up because they possess a considerable amount of independent political power.

The truth, of course, lies somewhere in between the two models. States are neither independent sovereigns nor subordinate subdivisions. State polities govern themselves to some extent, but are also governed to some extent by decisions made at the national level. States are not free to maneuver wholly according to their independent judgment, yet they are expected to serve as independent checks on abuses of national power by the national government. State power is to be exercised in the service of goals established by the state polity, but it is also to be exercised in the service of goals established nationally. Neither the primacy nor the interstitial approach captures these complexities, and consequently each prescribes a methodology of constitutional interpretation that fails to accord with the reality that state judges routinely face when adjudicating questions of state constitutional law.

The functional approach sketched here, I hope, charts a course out of this impasse. By treating state power as having an essential function derived in part from the national structure of federalism, the functional approach recognizes that state power always exists in relation to national power and never in isolation from it. A state constitution is a document fundamentally ordering the exercise of state power. Consequently, a state constitution must generally be interpreted with one eye on the U.S. Constitution and on the actions of the national government taken in reliance on it. Only by monitoring the operation of the national government can any organ of state government fulfill its responsibility to discover and resist abuses of national power. Certainly, the national government will be watching the state. Federalism requires that this practice be reciprocal. Where individual rights are concerned, this means that state courts should always be prepared to exercise independent judgment about the propriety of U.S. Supreme Court rulings and, when appropriate, to resist and work to undermine those rulings of which they disapprove.271

A related common complaint about state constitutional adjudication, heard especially from advocates of the primacy approach to interpretation, is that state courts too often proceed in “lockstep” with federal courts, which is to say that they too often merely copy federal constitutional law by reflexively adopting the terminology, analyses, and results of U.S. Supreme Court decisions rendered under the national Constitution.272 For example, according to former Oregon Supreme Court Justice Hans Linde:

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271. Cf. Michael C. Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 Sup. Ct. Rev. 61, 67 (“Constitutional interpretation should be a shared endeavor among . . . all the branches of the national, state, and local governments.”).

Most state courts do not free themselves from Supreme Court formulas but treat them as generic constitutional law. . . . Adopting timeworn verbiage in applying similar constitutional clauses is a venial sin. . . . The federal formulas take on a life of their own, copied by state courts regardless of whether the state’s law has the same clause or perhaps offers a more direct and defensible route to the same result. 273

This criticism, however, is equally misguided for it proceeds from the same incorrect notion that state constitutions are completely independent of national law.

Let us be realistic. Why, exactly, do state courts so frequently copy federal constitutional doctrine and adopt it as part of state constitutional analysis? Is it because state judges are too lazy or ignorant to conduct an independent analysis of constitutional meaning under cognate provisions of the state constitution? This does not seem particularly likely. The likeliest explanation is undoubtedly the most obvious one: state judges adopt the Supreme Court’s approach because they like it and think that it does a perfectly adequate job of protecting the liberty in question. No innovative, pathbreaking, independent analysis of the state constitution is needed because there is no threat to liberty that the state constitution need be invoked to counteract. 274

Critics of lockstep analysis, doubtless influenced by the primacy approach, clearly believe that mere approval of federal doctrines or analyses can never be an adequate basis for incorporating them into state constitutional jurisprudence. 275 Under the functional approach to state power I have described here, however, there is nothing at all wrong with state judges adopting U.S. Supreme Court terminology and analyses merely because they think the Court’s approach does an effective job of protecting the relevant liberties. Quite the contrary. If a state court believes that some individual liberty is being adequately protected under some formulation developed by the U.S. Supreme Court, it has no particular reason to undertake the effort of independently deriving a different, equivalent formulation to protect that same liberty under the state constitution merely for the sake of demonstrating its independence.

To be sure, there may well be circumstances when the outright adoption of federal doctrine is not an option available to a state court. Particularities of text,
history, or the framers’ intent, among other things, may compel the conclusion that the people of the state have decided for themselves what level of liberty they deem appropriate, and state courts may then have no choice but to obey those commands. But if state constitutional provisions reveal no such particularized popular intent, as is so often the case, a state court may justly feel that it has considerable latitude to exercise its own independent judgment about the adequacy of federal judicial interpretations of parallel provisions of the U.S. Constitution, and to express those judgments in its handling of similar questions under the state constitution. Federalism may require mutual checking, but where there is no abuse of power there is nothing to check. State acquiescence in the proper use of national power is no cause for concern. Indeed, if one is inclined to think that the national government will in the vast majority of cases use its powers in appropriate ways for appropriate ends, then one ought to expect to find state courts adopting the corresponding federal analysis far more often than they reject it—an intuition borne out by observation.276

Much of the criticism of lockstep analysis seems to derive from a misunderstanding of what it reveals. Critics seem to think that courts engaging in lockstep analysis have revealed a willingness to abandon altogether to the U.S. Supreme Court the field of protecting constitutional liberties.277 If this is indeed what state courts are doing when they engage in lockstep analysis, then the criticism is well taken, although for a different reason than lockstep critics usually advance. The problem in such a case would not be that such state courts are failing to conduct a mandatory independent analysis of the state constitution, as the primacy approach would have it, but that they are failing to discharge the responsibility for monitoring and checking abusive exercises of national power that a well-functioning system of federalism presupposes.278 These two functions overlap, of course, but are by no means identical.


277. See, e.g., Tarr, supra note 56, at 182 (“The lockstep approach renders state rights guarantees superfluous.”).

278. This distinction, I believe, differentiates what I am advocating here from what appear to be recent endorsements by Robert F. Williams and Lawrence Friedman of state court disagreement with national rulings. In a recent article, Williams argued that state court divergence from national precedent can be seen not as mere result-oriented disagreement, but as “the product of honestly held alternative ways of looking at a problem of constitutional interpretation and the consequences of resolving it in a certain way.” Robert F. Williams, In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 NOTRE DAME L. REV. 1015, 1049 (1997). Friedman also argues for the value of interjurisdictional dialogue in the development of constitutional law. Friedman, supra note 173, at 137. However, both authors take this position in the service of arguments against the criteria approach and in favor of the primacy approach. Friedman, supra note 173, at 133; Williams, supra, at 1049. This is where we part company. The primacy approach decrees that the proper state constitutional interpretation issues from an independent analysis of the state constitution; that is, proper state constitutional interpretation requires an exclusive focus on internal state interpretational guideposts, without reference to national law and national actions. I argue here that proper state constitutional interpretation can also issue from the state judicial
In any event, there is a more benign way to understand lockstep analysis. Lockstep analysis, one might say, does not necessarily reveal an abandonment by state courts of their responsibilities to protect liberty and to reflect meaningfully upon the best ways to do so. On the contrary, it might well represent a discharge of those responsibilities, but in circumstances where the state court feels that the national government is already doing a reasonably good job. In those circumstances, a state court might reasonably conclude that there is no need, at least for the moment, to explore in any greater depth the possibilities presented by the state constitution to protect liberty any more or less vigorously than it is already protected by the national judicial analysis. Lockstep analysis thus need not represent an absence of independent constitutional judgment; it can just as easily represent the outcome of a fully-informed exercise of independent state judicial judgment.

To be clear, the interpretational process I have just described is not the same as the standard interstitial approach to state constitutional interpretation. The interstitial approach rests on two important premises. First, it treats federal constitutional law as providing a presumptively correct standard for its state constitutional counterpart. Second, it authorizes state courts to reach a different result from federal law only if they can identify some objective factor of text, history, precedent or state values to justify the divergence. Courts proceeding under the functional approach are bound by neither of these conditions. First, far from treating Supreme Court precedent as presumptively correct, state courts utilizing this approach would exercise their own independent judgment about the correctness of Supreme Court rulings. Second, state courts would be authorized to depart from the Supreme Court's approach for purposes of state constitutional interpretation not merely when some concrete indication of text or history so requires, although that might suffice; but also when they think the Supreme Court has erred, on the merits, in interpreting the U.S. Constitution. Conversely, if they think the Supreme Court's rulings adequate, they may incorporate them into state constitutional jurisprudence; but they do so not because they think such rulings presumptively correct, but because, in the exercise of their independent judgment, they deem such rulings to provide adequate protection for the liberties at issue, a responsibility they share with federal courts. Thus, state courts proceed in this fashion under the functional approach because state courts, when they approach the state constitution, are not limited functionally to interpreting an independent piece of positive law in the form of a state constitution. State courts also exist to help monitor and check national tyranny by using their powers to resist and limit the effects of abusive interpretations of the national constitution by federal courts.
The dynamics of this process are well illustrated by a series of cases decided by the New Mexico Supreme Court. In language identical to the Fourth Amendment of the U.S. Constitution, Article II, Section 10 of the New Mexico Constitution prohibits "unreasonable searches and seizures." For many years, the New Mexico Supreme Court interpreted this provision in lockstep with federal judicial interpretations of the Fourth Amendment. More recently, dissatisfied with the earlier approach, the New Mexico Supreme Court in *State v. Gomez* adopted a new approach to state constitutional interpretation which it identified as "interstitial." Normally, the interstitial approach would require the state court to follow federal Fourth Amendment precedent unless some peculiarity of New Mexico's constitutional environment required a different result. Clearly, no difference of text would qualify. Yet in listing the reasons why it might diverge from otherwise presumptively correct federal precedent, the court included among them its independent judgment that the controlling "federal analysis" was "flawed." In so doing, the court thus gave itself permission to interpret the New Mexico search and seizure provision differently from the way the U.S. Supreme Court interprets the Fourth Amendment simply if it finds the federal analysis unpersuasive.

In *Gomez*, that is exactly the conclusion the New Mexico Supreme Court reached. A sheriff's deputy had conducted a warrantless search, first of the defendant's stopped automobile and then of his fanny pack. The search uncovered marijuana, which the defendant was charged with and convicted of possessing. In analyzing the constitutionality of the search, the New Mexico Supreme Court held that the warrantless searches of the automobile and closed container were permissible under a bright-line test used by the U.S. Supreme Court in cases involving automobiles. The court chose not to follow this interpretation.

279. The two provisions are virtually identical in every other respect as well. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV. Its New Mexico counterpart provides:

> The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or things to be seized, nor without probable cause, supported by oath or affirmation.

N.M. CONST. art. II, § 10.


282. Id. at 7.

283. Id.

for purposes of construing the New Mexico Constitution. Its reasoning relied not on differences of text, state constitutional history, or the values of New Mexicans, but on its belief that the U.S. Supreme Court’s decisions governing warrantless searches of automobiles were poor ones:

[W]e do not accept the federal bright-line automobile exception. There is some tension between the blanket automobile exception and the U.S. Supreme Court’s recent [cases, in which] the Court states: “We have eschewed bright-line rules in applying the totality-of-circumstances test, instead emphasizing the fact-specific nature of the reasonableness inquiry...” We regard the automobile exception as a failure to recognize such variations.

That is the sum total of the court’s explanation for departing from federal reasoning. Even on its merits, the state court’s reasoning is flimsy: there is no inherent contradiction between adopting a bright-line approach for some circumstances and a case-by-case approach for others. But this seems like quibbling. It is clear that the state court here is departing from the federal approach simply because the court disagrees with it and prefers a different approach used by the U.S. Supreme Court in other kinds of cases.

In later cases, the New Mexico Supreme Court recharacterized its disagreement with federal precedent in Gomez as a distinctive feature of New Mexico constitutional law which it then used to justify its departure from other, unrelated federal precedents decided under the Fourth Amendment. For example, in State v. Cardenas-Alvarez, the defendant was detained at an internal border checkpoint and found to possess a large amount of marijuana. Under federal precedent interpreting the Fourth Amendment, the search was valid. The New Mexico Supreme Court reviewed its prior ruling in Gomez, holding that “[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law.” This “distinct characteristic,” the court held, justified reaching a different result in the case at hand under the New Mexico Constitution.

This bootstrap reasoning is not persuasive. It seems that what the state court is doing is once again disagreeing with the U.S. Supreme Court’s interpretation of the Fourth Amendment, and that it is doing what it can with the only tool it has to fight the outcome dictated by federal law. What seems a shame is that the state court feels it has to hide this purpose behind the window-dressing of an improperly applied interstitial approach to state constitutional analysis.

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285. Id. at 6-7.
286. Id. at 13.
288. Id. at 227.
289. Id. at 229.
290. Id. at 231.
291. Id. at 233.
functional approach I have outlined here gives state courts permission to do what they are doing anyway, but without the flimsy excuses and bad disguises. State courts are just as responsible for protecting American liberties as are national courts. They can and should simply go about the business of protecting those liberties without apology.

CONCLUSION

A state constitution is positive law enacted by the people of a state to order the exercise of state power. But state power exists in our system of government not only to pursue objectives established by the people of the individual states for the achievement of their own separate good. State power also plays an integral role in the American system of federalism by helping all Americans achieve their collective good, a function it performs when it is deployed to resist abuses of national power. State judicial power is not exempt from this dynamic. It has obvious uses internal to the state, but it may also play a role in the external deployment of state power for the purpose of resisting national tyranny, especially tyranny perpetrated by national courts.

Most accounts of the function and methodology of interpreting individual rights protected by state constitutions do not recognize this checking function of state courts. This oversight has caused courts and commentators to conceive of state constitutional rights solely in terms of the way in which such rights constrain abuses of power by state governments, and to ignore their potential role in checking abuses of power originating at the national level. But the vigilant protection by state courts of state constitutional rights can serve as a form of resistance to abusively narrow Supreme Court interpretations of federally protected individual rights through mechanisms of public dissent, consensus formation, and independent, state-level protection of identical or second-best liberties.

To discharge fully their responsibilities to monitor and check national power, state courts must incorporate into their state constitutional jurisprudence some recognition and independent evaluation of the content of corresponding federal constitutional law. While it is beyond the scope of this Article to lay out all the details of how this might be accomplished, such a reform requires, at a minimum, abandonment of the artificially constrained primacy and interstitial approaches to state constitutional interpretation. Both approaches begin from the incorrect assumption that state courts have no business evaluating and reacting to rulings made under the national constitution by national courts. In fact, that is just the function federalism requires state courts to undertake.