WHEN WORLDS COLLIDE: FEDERAL CONSTRUCTION OF STATE INSTITUTIONAL COMPETENCE[†]

by Marcia L. McCormick[*]

I. INTRODUCTION

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

It turns out that the Supreme Court has staged a federalism revolution, but nobody has noticed. Well, actually, many have noticed that some kind of revolution is happening, but few can make much sense of it and nearly everyone has missed a piece that is revolutionary in its own right.[2] Focusing on recent cases restricting Congress' power under the Commerce Clause and the Tenth

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

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

[2]Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to*

amendment, and the Supreme Court's power under the Eleventh Amendment, many commentators have argued that the Court is building up state power at the expense of the national government.[3] But at the same time that it has expanded state power in these areas, the Supreme Court has expanded national power at the expense of the states in others.[4] One of these expansions has been in the amount of deference the Court seems willing to grant state court interpretations of state law. And the method of this expansion lies in the Court's imposition of federal separation of powers principles on state governments. In two cases in recent years, the Supreme Court differentiated between the branches of government at the state level to justify a refusal to defer to the state courts. It had never done so before. By relying on a seemingly neutral federal principle, the Court hid the aggrandizement of power to itself.

The first case we are all familiar with, and in fact are probably weary of: *Bush v. Gore*, in which the Supreme Court ordered an end to a recount of ballots cast in the 2000 presidential election.[5] Justice Rehnquist's concurring opinion argued that the Florida Supreme Court's interpretation of state law should be rejected; because the United States Supreme Court delegated the power to design elections to the legislatures of the states, the Court had a duty to ensure that the

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Professor Merrill, 47 ST. LOUIS UNIV. L. J. 659 (2003).

[3]*E.g.* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 234-41 (2001) [hereinafter Jackson, *Narratives*]; Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 699 (2000) [hereinafter, Jackson, *Seductions*]; *see* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570-71 (2003) (summarizing the main critiques).

[4]*See* Chemerinsky, *supra* note 2, at 659; Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 84 (2001); Merrill, *supra* note 3, at 569.

[5]531 U.S. 98, 105-11 (2000).

state judicial branch was faithful to the will of the state legislative branch.[6] He explained that given this federal constitutional duty, the review and rejection of the state court interpretation of state law "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[7] A flurry of scholarly contributions debated the propriety of not deferring to the state court's interpretation of state law, but none addressed the court's construction of state separation of powers in a systematic way.[8]

That flurry over the concurrence may have been much ado about nothing except that three years later, to no fanfare, a unanimous court, deciding a mundane equal protection challenge to a state tax, rejected an interpretation of state law by a state supreme court, stating that "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their . . . laws and how much help those laws ought to provide."[9] In other words, rather than defer to the state court, the Supreme Court

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[6]*Id.* at 111-13 (Rehnquist, C.J., concurring).

[7]*Id.* at 115 (Rehnquist, C.J., concurring) (emphasis in original).

[8]Louise Weinberg did discuss the issue in these terms, but devoted only a small portion of her article to the issue, and instead, focused primarily on the fact that the Court decided the outcome of the election, arguing that action was an unconstitutional aggrandizement of power. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 625-27 (2002). Additionally, Professor Mark Tushnet wrote that Vicki Jackson suggested this separation of powers issue in an e-mail to him in 2001. *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L. J. 113, 124 n.64 (2001).

[9]Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 108 (2003). At issue was a tax on the proceeds of slot machines at the state's racetracks and riverboats; these proceeds were the primary source of revenue for both types of gaming establishment. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 559 (Iowa 2002). At the state's horse and dog racetracks, slot machine proceeds were taxed at a maximum of thirty-six percent, while at the state's riverboats, they were taxed at a maximum of twenty percent. Iowa Code §99F.4A(6), 99F.11 (2003). Finding that the proceeds were similarly situated, the Iowa Supreme Court then found the scheme

deferred to the state legislature. To date, this case, *Fitzgerald v. Racing Association of Central Iowa* has not even been a blip on the radar screen of federalism scholars.

Fitzgerald is representative of cases the federal courts routinely encounter where they are asked to consider an issue of state law. That a state court had already analyzed the law at issue does not make this case much more unusual. In every one of those cases, the federal courts must decide whether to defer to the state court analysis and, if so, how much. The federal courts will often defer, but many times have not done so, and they rarely explain the reasons for the departures they make. This article explores the reasoning behind the courts' decisions about deference and endeavors to provide some guidance for when the federal courts should defer to state court pronouncements of state law.

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

I submit that when the federal courts defer to a particular branch of state

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irrational because the tax frustrated the purpose of the act creating it. *Racing Ass'n of Central Iowa*, 648 N.W.2d at 561. The purpose found by Iowa Supreme Court was to promote the state's racing industry, in an effort to make an unprofitable venture profitable again. *Id*. at 560. Taxing the proceeds at the race tracks at a rate so much higher than that of the riverboats damaged that profitability, defeating the purpose of the act. *Id.* at 560-61, 562. Before the Iowa Supreme Court, the state argued that the purpose of the act was to encourage economic growth and promote agriculture. *Id.* at 560. The court found that even if this were the purpose of the act, this purpose too was frustrated by the higher tax rate on racetracks. *Id*. at 561.

The race tracks argued that when the Iowa Supreme Court determined what the purpose of the act was, the court was interpreting Iowa law, and that interpretation deserved the deference that is almost always accorded state supreme court declarations of state law. Transcript of Oral Argument at 26, Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (Apr. 29, 2003) (No. 02-695). In other words, that interpretation was binding on the United States Supreme Court. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

government at the expense of another branch, they risk infringing very seriously on state sovereignty. The power of the federal courts to review acts of Congress is a constitutional power. Similarly, the power of state courts to review acts of state legislatures is a matter of state constitutional power. Where the federal constitution explicitly grants state legislatures particular powers or where the state court's actions seem designed to evade judicial review or frustrate a federal right, the federal courts are on relatively solid ground not deferring to the state courts. Conversely, where the federal constitution treats the states as unitary entities and where there is no indications the state courts are working to undermine an important federal interest, the federal courts have little justification to exercise independent review of state law. Not deferring runs the risk of dictating what state constitutional law should be. And that result could nullify the power of the people within the states to define their government and to define their individual rights in a way more generous than that of the federal constitution.

II. FEDERAL COURT APPROACHES TO STATE LAW

The framers of our constitution are thought to have created our federal system of government to diffuse power in order to guarantee the maximum amount of individual freedom.[10] The courts tend to treat our system of federalism as dual, creating two judicial tracks, whose judges have competence over distinct subjects.[11] Federal courts are considered to have greater competence over federal

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[10]MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 4, 25 (1995); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post*-Erie *World*, 46 WM & MARY L. REV. 1399, 1401 (2005).

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

law, and state courts, greater competence over state law.[12] This notion of dual sovereignty suggests a particular division of labor with regard to legal issues. Federal claims and federal issues should be heard by federal courts, and state claims and state issues should be heard by state courts.

But the world does not divide up quite so nicely, and there is significant overlap of state and federal issues. So, for example, state courts are often called upon to decide issues of federal law.[13] State court competence over federal law is not entirely surprising, because state courts are courts of general jurisdiction, and, bound by the Supremacy Clause, not only are able to decide federal questions, but have a duty to do so.[14] Of course, that competence notwithstanding, scholars

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[12]MARTIN H. REDISH, FEDERAL JURISDICTION : TENSION IN THE ALLOCATION OF JUDICIAL POWER 2-3 (2d ed. 1990); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236 (2004); Schapiro, *supra* note 10, at 1409; *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607 (1982); Philip P. Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 487 (1960).

[13]In fact, given how few cases the United States Supreme Court hears, the states have become important guardians of federal interests. *See* Friedman, *supra* note 12, at 1218-20; Robert R. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1289, 1304 (2005); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 350-53 (2002).

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

disagree on whether state courts can adequately protect federal interests.[15]

As accepted as the notion of state court competence over federal issues is, federal courts seem less competent to decide state law issues. The mantra of modern federalism is that the federal courts are courts of limited jurisdiction and may only exercise the jurisdiction that the constitution or a federal statute grants. Thus, our first instinct might to be to say that the federal courts should never decide issues of state law.[16]

That approach, however, is not required by the text or structure of the constitution.[17] The constitution extends the judicial power of the United States to "all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties [and] . . . to Controversies" between certain parties.[18] Moreover, the appellate power of the Supreme Court extends "both as to Law and

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[15]Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *see also e.g.* Bator, *supra* note 12; Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 599 (1991); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983).

[16]*See* Schapiro, *supra* note 10, at 1426-28.

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

[18]U.S. CONST. art. III § 2.

to Fact."[19] By empowering the judicial branch to decide all cases and particular controversies and by defining the appellate power as allowing de novo review, the constitution gives the judicial branch the power to decide every issue, whether of fact or law, whether state or federal, as long as that issue is contained in a case or controversy that would fall within Article III's limits.[20] Thus, under the constitution's terms, the federal courts likely have the power to not only to consider issues of state law, but to decide them without deferring to state court constructions of that law.[21]

Not only does the text of the constitution allow the federal courts a broad reach to decide state law issues, the structure of the constitution also demonstrates that state and federal governance overlap significantly. The federal government and the states share competence to legislate in many areas. While some categories

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[19] *Id*.

[20] That is not to say that there are no constitutional limits on the review of facts found at the trial-court level. The Seventh Amendment explicitly limits those facts a federal appellate court can review, and the Due Process clause may also provide some limit. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985). Additionally, the adequate and independent state ground doctrine, which provides that the Supreme Court lacks jurisdiction over a case that presents a federal question if the judgment could be wholly supported on the outcome of a state law issue, may have constitutional foundations. If the Supreme Court's reversal of the judgment would have no effect on the result, since the state court could issue the same judgment on the state law grounds. Herb v. Pitcairn, 324 U.S. 117, 126 (1945). The Supreme Court's decision would be an advisory opinion. *Id*.; *see also* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 Am. U.L. Rev. 1053 (1999) (arguing that the adequate and independent state law doctrine is a part of Article III's standing requirement that the injury be redressable). It is difficult to see, though, how what happened in *Fitzgerald v. Racing Association of Central Iowa*, where the state did just that on remand, would not be an advisory opinion in the same way. *But see* Michigan v. Long, 463 U.S. 1032, 1039-40 & n.4 (1983) (detailing the circumstances in which the Court will take jurisdiction even though the judgment could be sustained on state grounds where those grounds are not clearly the actual grounds relied on, not truly adequate, or not truly independent).

[21] Monaghan, *supra* note 20; Henry Paul Monaghan, *Supreme Court Review of State-*

are truly reserved to the states, like a general police power, and some are granted exclusively to the federal government, like the power to grant patents, these categories grow ever fewer as our society changes, and more conduct transcends state boundaries.

Because of an overlap of federal and state law, the federal courts encounter state law questions in a number of ways.[22] The most obvious way is when the federal court is sitting in diversity.[23] Federal courts also encounter state

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Court Determinations of State Law in Constitutional Cases, 103 COLUM. L. REV. 1919 (2003).

[22]*See* Martin v. Hunter's Lessee, 14 U.S. 304, 337-47, 358-59 ( ) (Story, J.) (considering the federal courts' power under Article III to review the judgments of state courts and to examine issues of state law).

I use "federal courts" here to encompass the Supreme Court and the lower federal courts. At this point, distinguishing between the two would only confuse the general introduction provided in this section. However, the distinction has implications for analysis, but the end result may be the same.

On review of state court decisions, the Supreme Court will encounter state law issues that the state's highest court has just interpreted in this particular factual context. Conversely, in the lower federal courts and in the Supreme Court on review of those courts' decisions, the state law issues may or may not have been interpreted in a state forum, and will most likely not have been applied to the precise context the court is considering.

It would seem that if the federal court at issue is reviewing a state court interpretation formed in the case before it, then the federal court should exercise more deference to the state court's judgment. On the other hand, if the federal court is considering an interpretation of state law issued in a separate factual context, there may be even less reason to suspect the state court of interpreting the law so as to evade federal review, *see* infra note 162 and accompanying text, which would also suggest that there is less reason not to defer.

[23]The constitution grants the federal courts jurisdiction over "[c]ontroversies . . . between [c]itizens of different [s]tates." U.S. CONST. art. III, § 2. Congress gave that jurisdiction to the lower federal courts, as well. 28 U.S.C. § 1332.

Congress has provided that state law will provide the rules of decision in civil actions in "cases where they apply" unless a treaty, federal law, or the constitution requires otherwise. 28 U.S.C. § 1652. The federal courts once fashioned general federal common law in diversity cases. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). The Court interpreted the rules of decision act as requiring the application only of state positive law, and not state common law. *Id*. at 12-13, 18-19. One reason for the Court's holding was its view that uniform federal common law would facilitate commercial transactions, and the development of the law would serve as a model for states to adopt. *Id*. at 19. Additionally, the Court viewed the creation of common law as the divination of

law claims when exercising supplemental jurisdiction over state law claims that arise from the same nucleus of operative facts as a claim the federal courts would have jurisdiction over.[24]

In addition to these situations in which the state law issues make up discrete causes of action, questions of federal law are often intertwined with questions of state law, for example when the federal court is considering a federal question to which federal common law applies and the content of that common law is state law.[25] Other examples of intertwined issues include situations when the state law question is an essential step in the analysis of federal law, such as when the court must decide whether the federal constitution protects a right created by state law,[26] or when a federal statute confers a benefit or puts a burden on a class of people defined by state law.[27] A third category of these state-law-

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objectively correct legal principles, and so a part of the inherent power of judges. *Id*. at 2. Federal judges would have the same power and expertise as state judges to discover these principles. *Id*.

The Court overruled *Swift* in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

[24]28 U.S.C. § 1367. When federal court jurisdiction is based on diversity, there is no supplemental jurisdiction over parties that would destroy that diversity. 28 U.S.C. § 1367(b).

[25]*E.g.* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001); United States v. Kimbell Foods, 440 U.S. 715, 739-40 (1979).

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

[27]A well known example is the Internal Revenue Code which determines taxable income on the basis of whether an individual is married, but does not define how a person becomes married. *See* 26 U.S.C. § 1 (2000); *cf. Id.* § 7703 (providing rules that govern when in time a person is considered married if that person has had a change in marital status and that certain married people living apart will not be considered to be married). The federal Defense of Marriage Act provides another limit on the definition of marriage, providing that for federal purposes,

antecedent situations occurs when the federal courts evaluate the constitutionality of state laws.

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

This article also discusses state law as if it were a single entity, and that too is an oversimplification. For purposes of this discussion, the state law determinations could range from pure questions of law, like what law applies, to "mixed" questions of law and fact, or the application of the law to the facts.[28]

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marriage is any legal marriage between one man and one woman, but it does not define for that group what a legal marriage is. 1 U.S.C. § 7 (2000).

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

[28]This article does not touch on the amount of deference to be given to lower court findings of fact. For a discussion of that issue, see Monaghan, *supra* note 20 (Const'l fact review), at 236-38. Although some courts and scholars assert that the different types of question are

Both categories may be reviewed de novo, but the more fact-intensive the question, the more the courts may choose to grant some deference to the lower courts.[29]

A. Rules Providing Deference to State Court Determinations

The propriety of whether federal courts should consider state law has been addressed in several different situations, with fairly consistent results. In the context of review of state court decisions, in 1875, the Supreme Court examined whether to review issues of state law in cases from state high courts when those state law issues were distinct from the federal law issues.[30] The Court determined that under the jurisdictional statutes, it could review all of the federal issues, but that the holdings of the state court on issues of state law could not be reviewed.[31]

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discrete, they are more properly viewed on a continuum. *Id*. at 233; Professors Allen and Pardo argue that there is no defensible distinction between types of questions, and that questions of law are simply different types of fact questions. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

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

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

[31]*Id.* at 632-33. This principle is so firmly established that in *Ring v. Arizona*, the Supreme Court deferred to an Arizona Supreme Court's refusal to follow the United States Supreme Court's prior interpretation of an Arizona death penalty statute. 536 U.S. 584, 603 (2002). Some scholars have argued that Congress did intend to give the Supreme Court the power

This principle lies beneath the rule that the Supreme Court will not exercise jurisdiction over a case in which a federal issue is present, even if that issue was wrongly decided by the state court, if the judgment in the case rests on "adequate and independent state grounds."[32]

Similar to the rules developed for Supreme Court review of state court decisions, federal courts encountering state issues must often defer to state court declarations of law. For example, sitting in diversity, the federal courts, by statute, must follow state constitutional, statutory, and common law.[33] Thus, when the state's highest court has declared what the law is, the federal courts must follow that when deciding diversity cases.

And similar to the adequate and independent state grounds threshold for Supreme Court review of state court decisions, lower federal courts will abstain entirely from considering cases in certain circumstances when state law is unclear.[34] For the court to abstain in constitutional cases, the state law must be

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to review state court holdings on state court decisions because after the Civil War, Congress fundamentally distrusted the state courts. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1319 (1986).

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

[33]Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (interpreting the Rules of Decision Act which is now codified with a few minor differences at, 28 U.S.C. § 1625). The holding in *Erie* rested, in part, on perceived constitutional limitations. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 703 (1974); Paul J. Mishkin, *Some Further Last Words on* Erie, 87 HARV. L. REV. 1682 (1974). Some scholars have cast doubt on these principles as constitutionally required. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 315 (4th ed. 2003) (stating that "[t]he constitutional basis for . . . *Erie* . . . has confounded scholars," citing Ely and Stewart Jay, *Origins of Federal Common Law: Part Two*, 133, U. PA. L. REV. 1231 (1985); Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977)).

[34]Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (concerning federal question cases); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (concerning complex state

substantially uncertain and there must be a reasonable possibility that the state court's clarification will resolve the issue so that the court need not get to the constitutional issue.[35] In diversity cases, the state law issue must be unclear and the case must involve some important state interest that is part of the state's unique power as sovereign, like eminent domain.[36] Similarly, in federal question cases in which the issue is regulated by a complex state administrative process designed to treat uniformly an essentially local problem, the federal courts may defer to the state process rather than issue injunctive relief.[37]

Special rules of construction have been developed that embody deference to the states for cases in which the federal courts must interpret state laws that have been challenged as violating the federal constitution.[38] Statutes, even those enacted by states, are presumed to be constitutional, and a challenger bears the

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administrative procedures); Alabama Pub. Serv. Comm'n, 341 U.S. 341 (1951) (expanding *Burford*); Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (concerning diversity cases).

[35]Kusper v. Pontikes, 414 U.S. 51, 54 (1973) (citations omitted); Baggett v. Bullitt, 377 U.S. 360, 375 (1959) (citations omitted).

[36]*Thibodaux*, 360 U.S. at 28; *see* Alleghany County v. Frank Mashuda Co., 360 U.S. 185 (1959) (holding that abstention is not always appropriate in eminent domain cases).

[37]Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (limiting this type of abstention to equitable relief); New Orleans Public Serv., Inc. v. Council of City of New Orleans (NOPSI), 491 U.S. 350, 364 (1989) (limiting abstention to situations that would substantially interfere with administration of an essentially local program).

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

burden of demonstrating that a statute violates the constitution.[39] Where the challenge is that the law is unconstitutionally vague, it must be vague in all of its applications, not merely unclear in some instances.[40] Where a statute might seem on its face to violate the constitution, if the state court has given the statute a narrower construction that would be constitutional, that construction will be upheld.[41]

B. Rules Providing Less Deference to State Courts

The federal courts will not always defer to state court determinations, however. Even in the diversity context, the federal courts have some flexibility to interpret state law. If the state's highest court has not spoken on the issue, the federal courts are not required to certify a question to those courts. And they do not have to defer to the state's appellate courts unless the federal courts are convinced that the state supreme court would agree. In other words, the federal courts are allowed to predict how the state supreme court would decide the issue.[42]

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

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

[41]Bell v. Cone, 543 U.S. 447, ___, 125 S. Ct. 847, 851-52 (2005) (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002)). In a way that is less deferential to the states than abstention, in cases that involve constitutional issues and pendent state law claims, a federal court can decide the issue on the state law claim if doing so avoids the constitutional issue, and need not refer it to the state for decision. Siler v. Louisiana & N. R.R., 213 U.S. 175 (1909). That approach affords the state significant deference by not calling a state law into constitutional question, and avoids some of the problems posed by abstention, such as delay and increased cost.

[42]CHARLES WRIGHT & MARY KAY KANE, FEDERAL COURTS 396 (6th ed. 2002). Additionally, the Supreme Court has traditionally deferred to the findings of lower federal courts

Additionally, there are many situations in the state-law-antecedent cases where the federal courts will interpret what state law means even if the federal court also gives some amount deference to a state court interpretation. State law is antecedent to a federal issue when the "existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law."[43] When the federal right depends in this way on an issue of state law, the federal courts have the ability and the duty to decide what impact the state law will have on the federal law.[44] That impact, is actually a federal question, and not really interpretation of the state law at all, even though the federal court analysis may look as if the federal court is interpreting the state law.[45] Moreover, even in a state-law-antecedent case in which the state court construction of the issue would resolve the matter and preclude consideration of the federal question, the federal court may need to review the state law to some extent to ensure at the least that the law is not being construed to impair federal interests.[46] As a practical matter as well, the Supreme Court will often interpret state law, rather than

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on the law of a state within their jurisdictions. Phillipps v. Washington Legal Foundation, 524 U.S. 156, 167 (1998). Deference is not warranted if state expertise would not be warranted in interpreting the state law. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2804 (2005).

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

[44]Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1925-26, 1935-47 (2003).

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

[46]RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 498 (5th ed. 2003) [hereinafter HART AND WECHSLER]; Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002) (arguing that the Supreme Court should defer to state court judgments unless it explains why it has reason to suspect the states of

remand the matter to the state's highest court for its interpretation when it must determine whether a right under a state statute was unconstitutionally denied,[47] or when the state statute itself is unconstitutional.[48]

When a state court has spoken on the issue, the Supreme Court usually looks to see whether the decision of the state court "rests upon a fair or substantial basis . . . [I]f there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, [the Supreme] Court will not . . . substitute its own view of what should be deemed the better rule."[49] This fair support rule applies generally to state-law-antecedent issues.

But the Supreme Court does not always follow the fair support rule. In *Indiana* ex rel. *Anderson v. Brand*,[50] for example, the issue before the Court was whether a teacher had a vested contract right that could not be impaired under the constitution's Contract Clause.[51] The Indiana Supreme Court had ruled that she had no contract under Indiana law, but the Supreme Court stated:

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

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frustrating the operation of federal law).

[47]Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

[48]Standard Oil Co. v. Johnson, 316 U.S. 481 (1942).

[49]Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930).

[50]303 U.S. 95 (1938).

[51]*Id.* at 96-99. The constitution's Contracts Clause is in art. I, §10.

decisions of its courts.[52]

The Supreme Court found, contrary to the Indiana Supreme Court, that the Indiana statutes and the state's actions under those statutes created a contract between the teacher and the state, which was protected under the constitution's Contracts Clause.[53]

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

C. Unifying the Two Approaches

This review of deference rules reveals that the amount of deference that the federal courts afford the states ranges from total abstention, to de novo review of state law. The rules that have emerged are pragmatic and balance state autonomy against federal interests.[54] Essentially, the traditional rule has embodied

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[52]*Brand*, 303 U.S. at 100.

[53]*Id.* at 105, 108-09. It is possible that rather than deciding the issue as a matter of state law, the Court was deciding the federal effect of the state laws. *See* General Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) ("The question whether a contract was made is a federal question for purposes of Contract Clause analysis . . . and 'whether it turns on issues of general or purely local law we cannot surrender the duty to exercise our own judgment.'"). Professors Monaghan and Fallon argue that the Due Process clause has some core conception of liberty and property, defined as matters of federal law, that state law must satisfy, but state law rarely fails to satisfy those thresholds. Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327-29 (1993); Henry Paul Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405, 440 (1977); *see also* Sandin v. Conner, 515 U.S. 472, 484-86 (1995) (holding that state law mandating certain procedures be followed before a prison inmate could be disciplined did not by itself create a liberty interest but that only a sentence that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" would impair the limited liberty interest an inmate could have).

[54]The rules could actually promote an ideological purpose of the Court, rather than a

a dualist federal approach: the federal courts primarily review issues of federal law, and state high court determinations are mostly final on issues of state law.[55] While that is a general rule, the federal courts are less likely to defer or affirmatively ask the state to interpret a state law when faced with a state-law-antecedent situation.

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

Most recently, the Rehnquist Court seemed to breathe new life into state power by limiting Congress' power under the commerce clause and Section Five of the Fourteenth Amendment, while strengthening the Tenth and Eleventh Amendments. In *United States v. Lopez*[56] in 1995 and *United States v. Morrison*[57] in 2000, the Court struck down legislation as beyond Congress' commerce clause power, for the first time since 1937.[58] In *City of Boerne v. Flores*,[59] the Court

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neutral federalism purpose. Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000) (documenting how the Justices use federalism strategically to promote ideological goals).

[55]Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

[56]514 U.S. 549 (1995).

[57]529 U.S. 598 (2000).

[58]Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2-3 (2004). Since *Morrison*, the Court seems to have stepped back from this states rights jurisprudence. In *Gonzales v. Raich*, 545 U.S. ___, 125 S. Ct. 2195 (2005), the Court upheld the federal Controlled Substances Act as valid commerce clause legislation that preempted California's Compassionate

limited Congress' power to create legislative rights broader than the constitutional rights the Fourteenth Amendment created.[60] That decision was applied to broaden the reach of the Eleventh Amendment, limiting Congress' ability to subject the states to suits for money damages.[61] Using the Tenth Amendment, as well, the Court during this time period limited federal power in *New York v. United States*[62]

Use Act. The Compassionate Use Act had allowed individuals to grow small amounts of marijuana for their own use when a doctor recommends the drug for serious medical conditions. Cal. Health & Safety Code Ann. §11362.5 (West Supp. 2005). In its most recent decision, the Court avoided the federalism issue in a case involving the executive branch's attempts to preempt Oregon's Death with Dignity Act, which allowed doctors to prescribe drugs to help terminally ill patients commit suicide, by finding that Congress failed to give the executive branch the power to prohibit doctors from prescribing these drugs. Gonzales v. Oregon, 04-623 (Jan. 17, 2006).

[59]521 U.S. 507 (1997).

[60]*Id.* at 519-20, 536.

[61]Bd. of Trustees v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). The Eleventh Amendment was strengthened in this way by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could only abrogate state sovereign immunity under its Fourteenth Amendment powers. Not only are states immune from suit in federal court, but Congress cannot subject them to suit in their own courts either. Alden v. Maine, 527 U.S. 706 (1999). For a thorough analysis if this Eleventh Amendment jurisprudence, see Marcia L. McCormick, *Federalism Re-Constructed*, 37. IND. L. REV. 345 (2004).

Like in the commerce clause context, the Court seems to be stepping back here as well. Four cases in the last three years have upheld Congress' power. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court held that Congress had the power under the Fourteenth Amendment to enact the Family Medical Leave Act. In *Tennessee v. Lane*, 540 U.S. ___, 124 S. Ct. 1978 (2004), the Court upheld Title II of the Americans with Disabilities Act as a valid abrogation of state sovereign immunity at least as far as it mandated access to courthouses and other functions of government. Then in two bankruptcy cases, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Virginia Community College v. Katz*, ___ U.S. ___, 2006 WL 151985 (Jan. 23, 2006), the Court held that Congress could subject the state to suit in in rem bankruptcy proceedings under its bankruptcy powers in article I.

[62]505 U.S. 144 (1992) (finding that Congress could not "commandeer" state governments to accept ownership of radioactive waste or implement federal legislation on the subject).

and *Printz v. United States*.[63] The Court has also taken a restrictive view of federal power in habeas corpus jurisdiction[64] and civil rights cases.[65]

Currently, in all but the Tenth Amendment context, the Court has issued subsequent decisions that elevate federal interests above states rights.[66] And at the same time that it issued the strong states rights decisions described above, the Court has issued decisions that extend the national power in other areas.[67]

Taken as a whole, then, the Court's federalism decisions seem inconsistent and ideologically based.[68] The following section of this article seeks to divine some non-ideological guiding principles that federal courts can draw on to explain the level of deference they are giving to the states in state law issues.

III. FEDERAL CONSIDERATION OF STATE-LEVEL INSTITUTIONAL COMPETENCE

As the federal courts encounter state court determinations or state common law, there is a spectrum of options available to the federal courts. At one end of

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[63]521 U.S. 898 (1997) (prohibiting Congress' mandate that local law enforcement conduct background checks on applicants for gun permits as commandeering).

[64]*E.g.* Schlup v. Delo, 513 U.S. 298, 318 (1995) (expressing concern that habeas filings threatened the finality of state court judgments, implicating comity and federalism).

[65]*E.g.* Reno v. Bossier Parish Sch. Bd., 520 U.S. 421 (1996); Growe v. Emison, 507 U.S. 25, 32 (1993). *But see* Bush v. Vera, 517 U.S. 952, 1069 (1996) (Souter, J., dissenting) (criticizing majority opinion as ignoring federalism interests).

[66]*Supra* notes 58, 61.

[67]*E.g.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564 (1997) (striking down a state tax incentive on dormant commerce clause grounds; Morales v. Trans World Airlines, 504 U.S. 374 (1992) (finding state law preempted).

[68]Cross & Tiller, *supra* note 54, at 757-62, 768; David Niven & Kenneth W. Miller, *Federalism by Convenience: The Supreme Court's Judicial Federalists on the Death Penalty and States Rights Controversies*, 33 CAP. U. L. REV. 567 (2005); *see also* Jackson, *Narratives*, *supra* note 3, at 280.

the spectrum, the federal courts would abstain from deciding issues of state law at all, and would simply defer entirely to any state determination of what the law means or how it should be applied to these facts. At the other end of the spectrum, the federal courts would review every issue of law or fact de novo, with no deference to any prior holdings by the state courts either in the case before the federal court or in one that would be precedential in state court.

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

Federal court discourse has long incorporated the concept of institutional competence, usually under the principle of separation of powers. That notion, has nearly always been articulated when it has been employed in a fashion, horizontal to the federal judicial branch, with the federal courts determining whether the federal judicial branch, Congress, or the President is more properly suited for a particular task. Occasionally, though, state-level institutional competence has been the explicit focus of the federal courts. Chief Justice Rehnquist's concurrence in *Bush v. Gore*[69] is the most famous, or infamous, example.

This part analyzes the cases in which the Supreme Court has not deferred to state court interpretations of state law with a particular focus on those cases in which the Court has explicitly deferred to the state legislative branch. I submit that because the federal constitution rarely differentiates between the branches of

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[69]531 U.S. 98, 111-22 (2000) (Rehnquist, C.J., concurring).

state government, the federal courts have little justification for doing so. Ultimately, deciding which branch of state government should have primacy over any particular issue is a matter of state constitutional law. In other words, just as federal judicial review is part of the federal courts' constitutional power, the interpretation of state law is simply an exercise of the state courts state constitutional power. As such, the balance of that power should be left to the states to work out.

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

The Supreme Court has admitted that it is engaging in independent review of the meaning of state law and rejected the state court's interpretation of that law in few cases, and each of those instances was in service to the supremacy of an important and substantive federal right or enumerated power. In *Fairfax's Devisee v. Hunter's Lessee*,[70] for example, the Supreme Court had reviewed the state law of Virginia independently to determine the proper title to land because the state law issues were antecedent to deciding what rights the putative owner had under federal treaty.[71] State hostility to the role of the Supreme Court and the supremacy of federal law at the time of the *Fairfax* case may have made such rejection necessary.[72] Born out of similar resistance to federal authority, the Supreme

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[70] 11 U.S. (7 Cranch.) 603 (1813).

[71] *Id.* at 618-28. The Court explained its reasoning to do this in *Fairfax* in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 357-58 (1816).

[72] *Bush v. Gore*, 531 U.S. 98, 140 (Ginsburg, J., dissenting) (citing GERALD GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 61-62 (13th ed. 1997)). This hostility was based at least in part on state hostility to British creditors after the Revolutionary War. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1438-49.

Court's decisions in *NAACP v. Alabama* ex rel. *Patterson*[73] and *Bouie v. City of Columbia*[74] rejected state supreme court deviations from prior state law when those deviations themselves violated due process.[75] And at a more stable time in history, in *Indiana* ex rel. *Anderson v. Brand*,[76] the Supreme Court similarly rejected the Indiana Supreme Court's construction of state law where that construction could be argued to have deprived a teacher of property without due process of law.[77]

Conversely, in most instances in which a state court is interpreting what a state statute means, the federal courts will defer to that state court interpretation.[78] But this is not always the case. The most controversial example is *Bush v. Gore*, in which a majority of the Supreme Court ordered an end to a recount of ballots cast in the 2000 presidential election.[79] The majority held that no constitutionally permissible recount could be accomplished by a deadline that gave the states a "safe harbor," even though the Florida Supreme Court was given no opportunity

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[73]357 U.S. 449 (1958).

[74]378 U.S. 347 (1964).

[75]*Bouie*, 378 U.S. at 350; *Patterson*, 357 U.S. at 455.

[76]303 U.S. 95 (1938). This case is discussed in greater detail in part II, B, *supra*.

[77]*Id.* at 108-10.

[78]*See, e.g.,* Johnson v. Fankell, 520 U.S. 911 (1997) (holding that the federal courts lack the authority to construe a state statute differently than the state's highest court has);R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992) (holding that state supreme court's interpretation was binding); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971) (putting the issue in jurisdictional terms); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993) (contrasting interpretation of a state statute from conclusions about what effect the statute has).

[79]531 U.S. 98, 105-11 (2000).

to determine whether the legislature intended to take advantage of this deadline in a situation like this.[80] Rather than remand to the Florida Supreme Court to order that the recount proceed in a method consistent with Florida's election law, the Supreme Court held that any constitutional method could not complete the recount in time to comply with what it interpreted the election law to require.[81]

Chief Justice Rehnquist's concurrence went further. In it he argued that the Florida Supreme Court misinterpreted Florida election law when it ordered the recount and, thus, impermissibly thwarted the will of the Florida Legislature.[82] As a precursor to this conclusion, the Chief Justice argued that the United States Supreme Court had a duty under Article II of the United States Constitution, which assigned the power to direct the appointment of electors to the legislatures of the states, to ensure that the state judicial branch was faithful to the will of the state legislative branch.[83] He explained that given this federal constitutional duty, the review and rejection of the state court interpretation of state law "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[84]

Thus, where the state courts are suspected of undermining the supremacy of the federal government as an institution, depriving an individual of a federal constitutional right, or otherwise violating an express provision of the

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[80]*Id*. at 110-11.

[81]*Id.* at 111.

[82]*Id.* at 116-22 (Rehnquist, C.J., concurring).

[83]*Id.* at 111-13 (Rehnquist, C.J., concurring).

[84]*Id.* at 115 (Rehnquist, C.J., concurring) (emphasis in original).

constitution, the federal courts will not defer to those courts.[85]

B. Independent Review in the Statutory Purpose Context

Another less analyzed area is state court declarations of the purpose of legislation. The purpose of legislation is an important consideration in First and Fourteenth Amendment constitutional analysis, as well as dormant commerce clause analysis. In these contexts, the courts apply varying levels of scrutiny based on the type of legislation at issue and the interest at stake, and these levels of scrutiny embody varying levels of deference to the states. Some types of restrictions and classifications are simply not allowed. For example, in the Establishment Clause context, the government may not impose a requirement or restriction on individuals for a religious purpose.[86] Other restrictions and classifications are given strict scrutiny: the law must be the least restrictive means to achieve a compelling state interest.[87] Still others receive intermediate scrutiny: the law must be substantially related to an important state interest.[88] The vast majority of legislation receives rational basis review: the law must be rationally related to a legitimate governmental purpose.[89]

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[85]Laura S. Fitzgerald has argued that these should be the only times that the federal courts should fail to defer to state court interpretations of state law. Fitzgerald, *supra* note 46.

[86]Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[87]Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986).

[88]United States v. Virginia, 518 U.S. 515, 524 (1996).

[89]Heller v. Doe by Doe, 509 U.S. 312, 319-20 (1993). Justice O'Connor suggested that there should be an even lower threshold for invalidating state legislation under the commerce clause than the standard used under the due process clause because a federal court decision on commerce clause grounds may be overcome more easily by the legislature. ASARCO, Inc. v. Idaho St. Tax Comm'n, 458 U.S. 307, 350 n.14 (1982) (O'Connor, J., dissenting); *see also* Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice*

For strict and intermediate scrutiny, the state bears the burden to demonstrate that the purpose of the legislation is to promote the right kind of governmental interest.[90] For rational basis review, on the other hand, the burden is on the challenger to demonstrate either no legitimate governmental interest, or no rational relationship between the interest and the means chosen by the legislature.[91] The legislature need not articulate that purpose, and if they do not, the courts will evaluate whether any plausible legitimate purpose could be behind the legislation.[92] This test is not completely boundless, however. The legislature must have been able to consider the legislative facts before it to be true.[93] Still, those facts need not actually be true; that legislative facts turn out to be mistaken is not a reason to reject a purpose based on those facts.[94]

The Supreme Court has stated that it affords deference to state court declarations of purpose similar to that, if not quite at the same level, of interpretations of meaning.[95] For example, in *United States Term Limits, Inc. v.*

O'Connor, 52 U. CHI. L. REV. 389, 419 (1985).

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

[91]Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 109 (2003) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

[92]Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

[93]*Id.* at 11.

[94]Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (holding that the belief is enough).

[95]This qualification was noted by Justice Breyer in his dissent in *Kansas v. Hendricks*, 521 U.S. 346, 383-84 (1997) (Breyer, J., dissenting), although it is not made explicit in the cases

Thornton,[96] the Court stated, "[w]e must, of course, accept the state court's view of the purpose of its own law."[97] Similarly, in *Allen v. Illinois*,[98] both the majority and the dissent agreed that the state court was the authority on both the meaning and purpose of state law.[99] In fact, the rules that the Supreme Court has developed will sometimes lead to greater deference to findings of purpose. For example, the Supreme Court has held that the purpose of a state law is a question of fact,[100] and that the parties may present evidence on the subject.[101]

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that he cites.

[96]514 U.S. 779 (1995).

[97]*Id.* at 829.

[98]478 U.S. 364 (1986).

[99]*Id.* at 367 (accepting the state court's interpretation of purpose, but also analyzing the statute); *Id.* at 380 (Stevens, J., dissenting) (stating that the state is the final authority on both meaning and purpose, but disagreeing with the effect of the statute).

[100]Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 544 (1982) (treating the issue as one of fact). Although the law at issue in *Crawford* was a proposition amending California's constitution, the Supreme Court did not indicate that the type of state law made a difference in the analysis, and it does not seem that a statute's purpose should be treated more like a question of law. Certainly state court interpretations of the meaning of state constitutional provisions should be given enormous deference because those constitutions embody a particularly sovereign interest, the state courts are uniquely situated to interpret that meaning, and the federal courts are not competent to second-guess the state courts except in extremely rare circumstances. However, the issue is not one of meaning, but rather one of purpose, which is more like a historical fact than is the slippery notion of group intent.

[101]United States v. Carolene Prods. Co., 304 U.S. 144, 153-54 (1938). It is not enough to provide evidence that the legislature was mistaken, however.

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

Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting *Carolene Prods.*, 304 U.S.

Despite these assertions, the Supreme Court has rejected state court findings of purpose in several cases. In the Establishment Clause context, the Court has stated, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[102] Because Establishment Clause cases warrant a very searching review, this result seems analogous to those cases involving meaning where the Court suspected the state courts of evading Supreme Court review.

In the context of rational basis review as well, though, the Supreme Court has rejected state court findings of purpose. In *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*,[103] the statute and constitution of the state provided that property tax valuation be based on a particular criterion.[104] The Supreme Court rejected a state court finding that the legislature could have intended to base valuation on a different and incompatible criterion.[105]

While in these examples the Supreme Court is rejecting an expansive

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at 154.). That is not the type of proof at issue in *Fitzgerald* or *Kansas v. Hendricks*, 521 U.S. 346 (1997), discussed *infra*. Those cases concerned evidence of what the legislature considered and intended, not of the validity of the facts before the legislature.

[102]Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (citing Wallace v. Jaffree, 472 U.S.38, 64 (1985) (Powell, J., concurring); *id.* at 75, (O'Connor, J., concurring in judgment); Stone v. Graham, 449 U.S. 39, 41 (1980); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223-24 (1963)).

[103]488 U.S. 336 (1989).

[104]*Id.* at 345.

[105]*Id.*; *see also* Nordlinger v. Hahn, 505 U.S. 1, 14-15, 16-17 and n.7 (1992) (distinguishing the situation before it from *Allegheny Pittsburgh*). In another situation in which the Supreme Court defended its decision to construe purpose broadly, the Court distinguished a prior case that had not. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959) (distinguishing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949) and stating, "[h]aving themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence").

interpretation of purpose, found in an attempt to make state legislation legitimate, in at least two recent cases, the Court has rejected limiting interpretations of purpose state courts used to strike down legislation, as well. In *Kansas v. Hendricks*,[106] a Kansas man challenged the state's Sexually Violent Predator Act,[107] arguing among other things that it was a punitive statute which violated the federal constitutional prohibitions against double jeopardy and *ex post facto* laws.[108] The Supreme Court treated as a matter of law, and thus a question of statutory construction, the law's classification as civil or criminal.[109] The court then looked at the placement of the statute in the Kansas codes and analyzed the statute's language and structure.[110] The Court found that two things manifested the intent of the legislature that the statute not be punitive: 1) the placement of the statute in the probate code; and 2) the statement within the statute that its purpose was to create a civil commitment procedure.[111]

The Kansas Supreme Court had held, despite these two things, that the "overriding" purpose of the statute was punitive – to segregate people subject to it from the public – and that any treatment was "incidental at best."[112] The court held this, in part because the legislature had stated in its declaration of purpose

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[106]521 U.S. 346 (1997).

[107]Kan. Stat. Ann. §§59-29a01 through 29a21 (2005).

[108]*Hendricks*, 521 U.S. at 360-61.

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

[110]*Id.* at 361-67.

[111]*Id.* at 362.

[112]*In re* Care & Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996).

that sexually violent predators could not be treated under the existing civil commitment statute, which provided for commitment of people with mental illnesses, and no effort had been made to treat any offenders.[113] Accordingly, the Kansas Supreme Court held that the primary purpose of the statute was to incarcerate, not to provide treatment.[114]

The United States Supreme Court rejected this formulation, finding that the statute could have more than one purpose, and the mere possibility that the Kansas legislature could have intended that sexually violent predators be treated in an ideal world was enough to make this a civil statute.[115]

Justice Breyer dissented, arguing that the statute contained enough punitive aspects that its purpose was ambiguous.[116] Given that ambiguity, Justice Breyer argued that the finding by the Kansas Supreme Court that the purpose of the statute was to incapacitate and not to treat offenders should be entitled to deference.[117]

Six years later, Justice Breyer delivered the opinion in *Fitzgerald v. Racing Association of Central Iowa* for a unanimous court, refusing to defer to the

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[113] *Id.* The state supreme court found it particularly troubling that the statute did not even allow for treatment until after a sexually violent predator had served the original criminal sentence. *Id.*

[114] *Id.*

[115] *Hendricks*, 521 U.S. at 367-69.

[116] *Id.* at 379-81 (Breyer, J., dissenting).

[117] *Id.* at 384-85 (Breyer, J., dissenting). Justice Breyer supported the finding of the Kansas Supreme Court by analyzing the statute and the record, which detailed the lack of effort made to treat Hendricks. *Id.* at 385-95 (Breyer, J., dissenting).

Iowa Supreme Court's finding of purpose.[118] At issue in *Fitzgerald* was a tax on the proceeds of slot machines at the state's racetracks and riverboats; these proceeds were the primary source of revenue for both types of gaming establishment.[119] At the state's horse and dog racetracks, slot machine proceeds were taxed at a maximum of thirty-six percent, while at the state's riverboats, they were taxed at a maximum of twenty percent.[120] Finding that the proceeds were similarly situated, the Iowa Supreme Court then found the scheme irrational because the tax frustrated the purpose of the act creating it.[121] The purpose found by Iowa Supreme Court was to promote the state's racing industry, in an effort to make an unprofitable venture profitable again.[122] Taxing the proceeds at the race tracks at a rate so much higher than that of the riverboats damaged that profitability, defeating the purpose of the act.[123]

The race tracks argued that when the state court determined what the purpose of the act was, the court was interpreting Iowa law, and that interpretation deserved the usual deference.[124] In other words, that interpretation was binding on

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[118]539 U.S. 103 (2003).

[119] Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 559 (Iowa 2002).

[120]Iowa Code §99F.4A(6), 99F.11 (2003).

[121]*Racing Ass'n of Central Iowa*, 648 N.W.2d at 561.

[122]*Id*. at 560.

[123]*Id.* at 560-61, 562. Before the Iowa Supreme Court, the state argued that the purpose of the act was to encourage economic growth and promote agriculture. *Id.* at 560. The court found that even if this were the purpose of the act, this purpose too was frustrated by the higher tax rate on racetracks. *Id*. at 561.

[124]Transcript of Oral Argument at 26, Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (Apr. 29, 2003) (No. 02-695).

the United States Supreme Court.[125] The state court had found that the purpose of the statute at issue was to promote the racing industry in Iowa, and that the differential tax rate was not rationally related to that purpose.[126]

But the Supreme Court did not agree that it owed any deference to the state court. Rather than accept the purpose the state court found, the *actual*[127] purpose, the Supreme Court theorized multiple *potential* legitimate state interests that the differential tax could rationally relate to, found that rational relationship, and upheld the tax under the federal constitution.[128] To justify its decision not to defer to the state court, the Supreme Court stated,"the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."[129] In other words, rather than defer to the state court, the Supreme

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[125]Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

[126]This was the stated purpose of the legislation. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 560-61(2002). At trial, the state contended that another purpose of the legislation was economic development. *Id.* at 560. The court found that the differential level of taxation could only serve to drive the racetracks out of business. *Id.* at 561.

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

[128]Not to be outdone, the Iowa Supreme Court later struck down the tax under the Iowa Constitution's Equal Protection provision, although it did so not by creating a separate test under its constitution, but through an "independent application" of the federal test. Racing Ass'n of Central Iowa v. Fitzgerald, 675 N.W.2d 1, 6-7 (Iowa 2004) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977)), There is no (federal) question that the Iowa court could do that and reach the same result the United States Supreme Court had rejected as long as the Iowa court's result rested on the Iowa Constitution. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping*, 46 WM. & MARY L. REV. 1499, 1501, 1514 (2005).

[129]*Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. at 108.

Court deferred to the state legislature.

While this may seem analogous to Justice Rehnquist's concurrence in *Bush v. Gore*, which relied on the constitutional delegation of authority to the state legislative branch, one important ingredient is missing. The constitution does not expressly delegate the authority to set state policy to the state legislative branch. That power would be reserved to the state as a whole, as evidenced by the Tenth Amendment, which makes no distinction between the branches of state government.[130]

Certainly, there may be other arguments that support the decision to defer to a particular branch of state government in the purpose context that are different from those in the meaning context. For example, less deference may be warranted in the purpose context than that given in the meaning context because saying what a statute means is different from saying why a statute exists, and that difference suggests different institutional competencies. The language and meaning of the statute determine how that statute will operate on the world. Conversely, the purpose of legislation has very little effect on the world. It can be used to help interpret the meaning, or, given an improper purpose, it can make the statute invalid. However, the purpose by itself usually changes nothing in the world.

Additionally, the legislature is in a position better than the courts to say why a statute is needed. Thus, when the legislative act is presumptively valid, in other words when rational basis would apply under a constitutional analysis, the federal courts must defer to legislative possibilities rather than the holdings of courts. Conversely, where the judicial branch has greater competence, which it

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[130]U.S. CONST. amend. X.

does when it interprets what the law means as written because by doing that it gives effect to legislative intent and culls a single meaning from multiple actors, the state judicial branch warrants deference.

Yet, an equally persuasive argument could be made to treat purpose interpretations with more rather than less deference. The federal courts have expertise equal to that of state courts to interpret statutory language. Statutory interpretation is something that all courts do. Conversely, the state courts are in a much better position, as part of the state government, to understand why particular legislation was passed. The state judges are more likely to know what public debate over the issues was when the legislation was created than are their federal counterparts. State judges are also more likely to have some insight into the state legislative process. Thus, the state courts are in a substantially better position to interpret the purpose of state legislation than are the federal courts.[131]

C. Separation of Powers at the State Level

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

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[131]On yet another side, the fact of the Fourteenth Amendment may suggest that states cannot be trusted to tell the truth about what the purpose of some legislation is if that legislation impacts individual rights. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 66-74 (1993).

protection.[132]

But, there is nothing in the federal constitution that warrants giving deference to the state legislative branch at the expense of the state judicial branch in the majority of situations. The federal constitution does not distinguish between state legislative and judicial branches in describing the powers of each.[133] And, the only constitutional provision that limits the form the state government may take and the distribution of powers within state government is the Guarantee Clause, which provides

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.[134]

Not only is the constitution silent about how states organize themselves within the

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[132]This was Justice Rehnquist's stated reason for deferring to the legislative branch in his concurrence in *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1842, 1900-01 (2001).

[133]It is true as Chief Justice Rehnquist noted in his concurrence in *Bush v. Gore* that Article II, Section 1 delegates the power to determine how to elect presidential electors to the legislature of each state. U.S. CONST. art. II, § 1. Article I, Section 4, which details how members of Congress shall be elected also refers to state legislatures and contrasts that power with Congress' power, rather that the power of the state judicial branch. U.S. CONST. art. I, § 4. In other places as well the constitution refers to different branches of state government, assuming a structure somewhat similar to that of the federal government. Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54-58 (1998). No section suggests anything about the primacy of one branch over another. Moreover, there is no historical support for the significance of the language in Article II. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. UNIV. L. REV. 731 (2001).

[134]U.S. CONST. art. IV, § 4.

bounds of a republican form of government,[135] the Supreme Court has held that interpretation of this clause is a political question and not justiciable.[136]

State constitutions, then, define how state governments are to be formed and how various governmental powers exercised, and because the institutions of government are not identical to their federal counterparts, the competence of those institutions is not identical to that of their federal counterparts, and their powers need not be separated in exactly the same way.[137] In fact, state constitutions often

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[135]This silence has not uniformly been interpreted to mean that the constitution fails to limit the exercise of power within state government. Dorf, *supra* note 133, at 58 (arguing that the structure of the federal constitution implies that states should be organized in federal-style separation of powers terms); Louis H. Pollak, *Judicial Power and "The Politics of the People"*, 72 YALE L. J. 81, 88 (1962) (stating that the federal constitution suggests that a republican form of government meant a tripartite arrangement like that of the federal government).

[136]Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). That the issue is a political question does not leave the states entirely unregulated. The federal government must guarantee that a state's form of government is republican, and with the federal courts out of the picture, it is up to Congress to interpret what that means. Congress has not spoken on the subject.

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

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

> Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.

Dreyer v. Illinois, 187 U.S. 71, 84 (1902); *see also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (holding that the states need not have the same separation of powers limitations as the federal government); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 3 (1998); Hershkoff, *supra* note 132, at 1884-86; James A. Gardner, *State Courts as Agents of Federalism:*

give the judicial branch a much broader role in government than that possessed by the federal judicial branch.[138] For example, state courts are not bound by Article III's justiciability doctrines and, in fact, often share a policymaking role with the legislative branch.[139] Conversely, in some instances, state courts have a narrower role in government than does the federal judicial branch.[140] Thus, separation of powers operates quite differently at the state level, and among the states, from how it operates at the federal level,[141] but it remains an issue of state constitutional law.

Federal separation of powers doctrine limits the power of the federal courts to strike down federal legislation on the ground that unelected judges should not be given the chance to frustrate the will of the majority except in a few instances.[142] In every case involving legislation, there is a chance that the court

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Power and Interpretation in State Constitutional Law, 44 WM. & MARY L. REV. 1725, 1744-46 (2003). The federal courts lack jurisdiction to determine whether state actions violate the state's constitution. Calder v. Bull, 3 U.S. (3 Dall.) 386, 392 (1798).

[138]Hershkoff, *supra* note 132, at 1844-76; Hans A. Linde, *The State and the Federal Courts in Governance, Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1273-79 (2005).

[139]Hershkoff, *supra* note 132, at 1861-68.

[140]*See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1359-62, 1375-70 (2005) (discussing the strong nondelegation principle in state constitutional law and other differences in organization of state powers).

[141]Hershkoff, *supra* note 132, at 1882-98; *see* Stanley H. Friedelbaum, *State Courts and Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1458-59 (1998) (suggesting that separation of powers is becoming more meaningful in the states); *see also* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 88-94, 99-107 (1998) (describing ways that states routinely adopt federal separation of powers concepts even though they do not have to and such adoption may not be appropriate).

[142]REDISH, *supra* note 10, at 5, 17-19; Martin H. Redish, *Federal Judicial Independence:*

could frustrate the will of the majority. It is easy to see that when a court strikes down legislation as unconstitutional, the court is countering the will of the majority, but that is only the tip of the countermajoritarian iceberg. Every time a court is asked to interpret legislation it risks frustrating the will of the majority because the court might come to a meaning different from what the majority of legislators thought they had intended.[143] Similarly, even where the court has interpreted the statute "correctly," the court might apply the statute to reach a conclusion different from that a majority of legislators would have reached. Thus, every interaction between the federal courts and a legislative enactment brings with it an inherent risk of contermajoritarian action.[144] Because of this risk, many

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Constitutional and Political Perspectives, 46 MERCER L. REV. 697, 707-08 (1995). As the Supreme Court has said,

> federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process."

Allen v. Wright, 468 U.S. 737, 750 (1984) (alteration in original) (putting the separation of powers principle in the context of justiciability and quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892) and Flast v. Cohen, 392 U.S. 83, 97 (1968)).

[143]Evidence of this phenomenon can be seen where Congress has amended statutes in response to interpretations it did not agree with. *E.g.* Civil Rights Act of 1991, Pub. L. 102-166 §2(2), 105 Stat. 1071 (1991) (finding that the Supreme Court's decision in *Wards Cove v. Atonio*, 490 U.S. 642 (1989) was not an accurate interpretation of Title VII of the Civil Rights Act of 1964).

[144]Part of this difficulty lies in the nature of statutory interpretation. How is it possible to assign a single meaning to a complex collection of words put together by a number of different actors, subject to differing influences, through an interactive process designed to frustrate the exercise of power? The elusive nature of statutory interpretation and how courts should engage in it has been debated by many. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252-54 (1992) (describing the views of Judges Posner and Easterbrook in the Seventh Circuit, and Justice Scalia, the three most prominent voices in the current statutory interpretation debate). For more on the debate between Judge Posner, on the one hand, and Judge Easterbrook and Justice Scalia on the other, *compare* United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.) *with id.* at 1331-38 (Posner, J., dissenting); *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 275

scholars contend that the federal courts should intervene only where intervention is necessary to protect the political minority from a tyranny of the majority.[145]

The countermajoritarian concern is not as warranted for many states, and thus the state court powers need not be quite so limited. Many states elect their judges, who may then, because they are more accountable to the electorate than appointed judges, pose less of a danger of frustrating the majority to the extent that they create a tyranny of the minority.[146] Even unelected state judges may pose less of a countermajoritarian difficulty for state law issues, arguably, than do

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(1990) (discussing whether an objective method of statutory interpretation is possible); ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-29 (1997); Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533 (1983) (rejecting the notion that legislative bodies can have "intents"). For an alternate view of statutory interpretation, see *e.g.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38-47 (1994) (describing and criticizing overreliance on the text to the exclusion of other interpretive tools).

[145] *E.g.* STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM (2002) (criticizing recent Supreme Court jurisprudence both in constitutional and statutory interpretation); JOHN HART ELY, DEMOCRACY AND DISTRUST 4-9 (1980) (describing the underlying theory of the constitution as grounded in the notion of government by the majority); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (arguing that the judicial power could be dangerous in this way, but that the institutional limits the Court puts on itself guard against the worst dangers); Redish, *supra* note 142, at 707-08 (describing the countermajoritarian difficulty). *But see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 425, 500 (1989) (suggesting that courts might have a role in defining public policy).

[146] Hershkoff, *supra* note 132, at 1887 (citing HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 21 (7th ed. 1998); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 414 (1999)); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1158-60 (1999). Of course, those judges may be ill-equipped to prevent tyrannies by the majority, but that is an entirely separate issue being debated in states across the country. Hershkoff, *supra* note 132, at 1887 (citing DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 288 (1996); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726-28 (1995)); Hershkoff, *supra*, at 1160-61.

federal judges for state or federal law issues. State judges may feel closer to their communities than do federal judges simply by virtue of the fact that state districts are smaller.[147] Additionally, as a part of state government, state judges may feel more bound to that smaller community of people and be more active in other ways in it.[148] As a result, they may be more likely to know what the will of the representative branches is and what remedies are expected within the state.

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

State courts also have more flexibility to respond to local concerns than do federal courts because the state court decisions are not as far-reaching, and as a result, may be viewed as more democratically legitimate.[149] Thus, the state

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[147]*See Id.* at 1887 (citing Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L. J. 537, 542).

[148]Lawrence G. Sager, *Foreward: State Courts and the Strategic Space between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

[149]Hershkoff, *supra* note 132, at 1887, 1902 (quoting Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 732 (1981)); Burt Neuborne, *Foreward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899 (1989). This flexibility, however, might limit state judges' use of politically unpopular remedies

judicial branch need not be restrained in the same way that the federal judicial branch has restrained itself.

Apart from the concerns about the accountability of institutions, federal separation of powers theory seeks to take advantage of a different kind of institutional competence: a faith in a functional division of labor.[150] The federal elected branches are better equipped than are the federal courts to create national policy, and were designed that way to develop expertise in that type of policy making..[151] Conversely, the federal courts are more competent to adjudicate disputes among parties and to say what legislation means or how it applies to the world.[152] Coupled with this separation of functions is the notion that the federal government is one of limited jurisdiction, so that the judicial power of the federal

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when those remedies are called for. *Id.* at 1887-88 n.287 (citing CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 148-50 (1996); Dan T. Carter, *"Let Justice Be Done": Public Passion and Judicial Courage in Modern Alabama*, 28 CUMB. L. REV. 553 (1998)).

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

[151]HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 122 (1991); Hershkoff, *supra* note 132, at 1891 (describing the ways that Congress is set up to better make policy); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1828 (1998) (arguing that both the fact of election and the procedures that Congress follows make it institutionally better able to craft policy for the nation); David L. Schapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 551-58 (1988) (comparing institutional advantages of courts and legislatures).

[152]Hershkoff, *supra* note 132, at 1877-79; *see* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803) (describing the judicial function as interpretation); Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

courts is thought to be rather narrow.[153]

The function of state courts, on the other hand, are not limited in this way. First, they are courts of general jurisdiction, and therefore are viewed as having broader inherent powers than those of the federal courts.[154] For example, the state courts have always engaged in common law lawmaking, while the federal courts are though to be able to create common law only in limited circumstances.[155] Additionally, many state constitutions give the state judicial branch a broad responsibility to help make state policy or exercise administrative power, either explicitly or through provisions that grant positive rights to individuals.[156] Additionally, state legislative and executive branches are not necessarily organized the same way with the same power as their federal counterparts, which lessens their special expertise or democratic responsiveness.[157] And finally, many

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[153]*See* Aldinger v. Howard, 427 U.S. 1, 15 (1976) (comparing federal courts to state courts); Robert R. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739, 823-34 (describing the narrowness of the federal government's powers as a structural constitutional principle).

[154]Hershkoff, *supra* note 132, at 1888-89; Mark H. Zitzewitz, State v. Krotzer: *Inherent Judicial Authority – Going where No Court Has Gone Before*, 81 MINN. L. REV. 1049, 1060 (1997) (describing the inherent authority claimed by state courts).

[155]Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) (concerning the scope of federal court power to create federal common law); Michael Herz, *Choosing between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725, 733 (1992) (noting the policy making function of creating common law); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 486 (1982).

[156]Hershkoff, *supra* note 132, at 1863-75, 1880-82, 1889-94 (describing the various ways in which state courts exercise power that Article III courts lack and the ways in which state constitutional provisions might differ from federal provisions).

[157]Hershkoff, *supra* note 132, at 1895-98; Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired*

states have mechanisms for direct, rather than representative democracy,[158] which some commentators suggest necessitates greater state court vigilance to protect against tyrannies of the majority made possible by a less deliberative form of law making.[159] Based on the different institutional competency of the state courts and the state representative branches, there is little reason to assume that state separation of powers must play out the same way as in the federal system.[160]

Because the issue of state separation of powers is fundamentally a matter of state constitutional law, then, the federal courts should leave that balance to the states as a unitary entity. Where the state court has interpreted a state statute, its very exercise of interpretation struck a particular balance. Even if the state court exceeded its powers under the state constitution, the issue is one that should be left to the states to sort out. The federal courts, even if they have to power to do so, should not intervene. Therefore, the federal courts should defer to the balance

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Regulatory Programs and Standards, 46 WM. & MARY L. REV. 1343, 1359-62, 1375-70 (2005) (discussing the strong nondelegation principle in state constitutional law and other differences in organization of state powers).

[158]33 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 233 tbl.5.14 (2000).

[159]John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 258-59 (1998); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 529 (1994); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 435 (1998); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 974-84 (1988); David B. Magleby, *Let the Voters Decide?: An Assessment of Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 33-34 (1995).

[160]*See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1307 (1999). Despite this fact, some commentators suggest that the states ought to mimic the federal system. Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 23 (1998); Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 736 (1988).

struck by the state courts and accept the interpretation offered by the state court in an exercise of that balance unless there is an important federal interest that would conflict with that deference.[161]

IV. TO DEFER OR NOT

Given the starting point that the primacy of a branch of government is a matter of state constitutional law to be struck by the states, the inquiry necessarily must turn to an exploration of what interest might be sufficient to warrant not deferring to the state judicial branch once it has struck a balance and interpreted state law. That reason would seem to have to be a relatively strong one that promotes sovereignty of some substantive federal interest.

The most compelling reason to not defer would be in a circumstance in which the federal court has a reason to suspect that the state court is working to frustrate a federal right or a federal interest.[162] For example, where the state court deviated from prior state law in a way that violated due process, as the Supreme Court found had happened in *NAACP v. Alabama* ex rel. *Patterson*[163] and *Bouie v. City of Columbia,*[164] the federal court would have a constitutional duty to intervene. In this way, state courts might interpret state law in a way to frustrate

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[161]*Cf.* Romer v. Evans, 517 U.S. 620, 626 (1996) (deferring to Colorado Supreme Court's interpretation of the purpose of a constitutional amendment); Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 544 (1982) (treating the purpose of a proposition to amend California's constitution as an issue of fact, although that court agreed that the purpose stated in proposition was the actual purpose); Reitman v. Mulkey, 387 U.S. 369, 373-74 (1967) (deferring to state court's interpretation of state constitutional provision).

[162]HART AND WECHSLER, *supra* note 46, at 520; PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 83 (5th ed. 2004); Fitzgerald, *supra* note 46, at 158-71.

[163]357 U.S. 449, 455 (1958).

review by federal courts and frustrate enforcement of important federal rights.[165] Conversely, the most compelling reason to defer would be where the state law issue was truly discrete from any federal issue, such that no federal interest could be said to be at stake.

Short of these situations, deciding whether to defer is much more difficult. The vast majority of state action is reviewed under a standard that is designed to be quite deferential: rational basis review.[166] In fact, rational basis review is so deferential that some commentators have suggested that it is not review, but is instead the absence of review, the refusal to commit judicial resources to subjects outside of core constitutional concerns.[167] Rational basis review does not enforce any substantive right or enumerated power.[168] Rather it is a way to limit the countermajoritarian power of Article III judges.[169] Thus, rational basis review embodies a policy of deference to the federal legislative branch, and it embodies a

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[164]378 U.S. 347, 350 (1964).

[165]*See* Fitzgerald, *supra* note 46 (arguing that the Supreme Court should defer to state court judgments unless it explains why it has reason to suspect the states of frustrating the operation of federal law).

[166]Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1282-84 (1993); Lawrence G. Sager, *Justice in Plain Clothes: Reflecting on the Thinness of Constitutional Law*, 88 NW. U.L. REV. 410, 410-11 (1993).

[167]Hershkoff, *supra* note 146, at 1153; *see also* Loffredo, *supra* note 166, at 1282-84; Sager, *supra* note 166, at 410.

[168]Erwin Chemerinsky, *The Supreme Court, 1988 Term – Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 49 (1989).

[169]*See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 84-95 (1994) (describing judicial minimalism); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144

policy of deference to the states. But the rational basis test does not enforce any positive Constitutional delegation of power to the state legislative branch that would justify not treating the states as unitary entities.

And so, on the one hand, it is easy to see why, in exercising rational basis review, the federal courts reflexively defer to the legislative branch, any legislative branch, at the expense of any gloss a court has put on the law, as a function of accepted notions of federal institutional competence. But as explained above, assessing institutional competence at the state level is not for the federal courts to address in most instances.[170] The question of institutional competence is a matter of state constitutional law in the first instance, a question more properly dealt with by state courts under the Supreme Court's notions of dual federalism.[171] Thus, without some substantive federal interest to enforce, the federal courts have no good reason not to defer to state court interpretations of state law.

One could argue that the federal interest at stake is in uniformity, that the rational basis test must mean the same things everywhere that it is applied.[172] Uniformity is an important federal interest, but only when it serves to protect federal sovereignty. If the federal government has no sovereignty interest, then it has no interest in uniformity. To say otherwise would take us to the world

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(1893).

[170]Hershkoff, *supra* note 146, at 1158-60.

[171]Schapiro, *supra* note 10, at 1409.

[172]*But see* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1483-86 (2005) (noting an inevitable lack of uniformity of applying even uniform federal tests).

envisioned by the Supreme Court in *Swift v. Tyson*,[173] where the development of common law by the federal courts spread uniform common law throughout the country for the sake of uniformity alone. Going there is certainly a choice we could make as a society, but we have not made it, and in fact the Supreme Court specifically rejected it in *Erie*.[174] Without a substantive federal interest enforced by the rational basis test, it is difficult to see why the federal courts should exercise independent judgment on an issue of state law any time a state court has spoken.

At the opposite end of the review spectrum, where a fundamental right is at stake, or a suspect class affected, the federal constitutional test to apply would be strict scrutiny. Strict scrutiny, unlike rational basis review, is employed to enforce substantive federal constitutional values, those of equality and liberty. The Fourteenth Amendment represents a fundamental shift of power to protect individual rights away from the states and to the federal government.[175] Individual rights to liberty and equality are at stake even where strict scrutiny is not employed, as well, and the Fourteenth Amendment places vindication of those rights is primarily in the federal government.[176] So perhaps the proper touchstone here is simply whether a liberty or equality issue is at stake. If so, the federal courts have an interest that warrants exercising independent review, not deferring to at least some state court interpretations.

Certainly, there are reasons to defer even here, however. For example,

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[173]Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

[174]Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[175]Aynes, *supra* note 131, at 66-74; *see also* McCormick, *supra* note 61, at 370-71.

allowing states to interpret their laws narrowly so as to avoid federal constitutional questions strengthens the quality of state government by allowing the state judicial branch to participate in enforcing the federal constitution. It also limits extending constitutional principles without a solid foundation. And so, the federal courts, it would seem, have stronger reasons both to defer and not to defer, depending on the state law issue, in the strict scrutiny context.

In either context, where the state court is overprotecting a federal interest or underprotecting a state interest, it is difficult to see what federalism value is promoted by failing to defer to the state court interpretation of state law.[177] One argument for not deferring could be that if states wish to deviate from the federal model, they should do so by grounding decisions in their own constitutions, rather than by relying on federal constitutional principles. In other words, let the states be politically accountable for their decisions rather than suggesting that the federal government is responsible.

By not allowing state courts to shift responsibility, the federal courts may enhance political responsibility in a more positive way, as well. States and localities are given the chance to use the state political process to remedy constitutional violations, which may give those remedies greater credibility with the people of the state, which in turn should make those remedies more effective.[178] Not only does the chance for democratic resolution enhance the

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[176]*See* McCormick, *supra* note 61, at 371.

[177]*See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced* , 91 HARV. L. REV. 1212, 1249 (1978) ("Unless competing constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous of federal constitutional values.").

[178]Hershkoff, *supra* note 132, at 1900-01.

effectiveness of the remedy, but so does the fact that the remedy is chosen by insiders rather than seen as imposed from outside.[179] Experimentation by state legislatures may lead to a greater ability for the states to innovate on ways to remedy constitutional problems.[180] That innovation benefits us all.[181] This state innovation, however, might be achieved by ensuring a strong role for the state judiciary, regardless of whether the constitutional limit the state courts rely on is federal or state.

This inquiry has implications far beyond the meaning or purpose the state courts find, as well. The state courts' processes necessarily impact the deference equation. For example, for a brief period of time the Connecticut Supreme Court adopted a method of statutory interpretation that is different from the method used in the federal courts.[182] That court held that it could use any contextual information to interpret the text of a statute even if that text was not ambiguous, contrary to what is called the "plain meaning rule," which is used by the federal courts, and which allows a court to consult extratextual materials only when

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[179] *Id*.

[180] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (writing the now-famous line that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

[181] *Id*.; Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1387-88 (2005).

[182] State v. Courchesne, 816 A.2d 562 (Conn. 2003). The Connecticut legislature enacted a statute to overrule that part of *Courchesne*, and the Connecticut Supreme Court acquiesced, not analyzing whether the legislative overruling was constitutional under Connecticut's constitution. Goodyear v. Discala, 849 A.2d 791, 796 n.4 (Conn. 2004). Despite the fact that Connecticut no longer deviates from the federal method, the possibility that a state could makes this a useful illustration.

statutory language is ambiguous.[183] The method of statutory interpretation should be a matter negotiated between the states legislative and judicial branches, and not necessarily imposed from outside unless that method is somehow used to frustrate a substantive federal interest. Similarly, state choices about the amount of deference reviewing state courts give to lower state tribunals may differ from their federal counterparts. It is difficult to see how that decision implicates any substantive federal interest to warrant imposing the federal model on the states. Ultimately, a lack of deference could impact the states' abilities to interpret the substantive provisions of their own constitutions where those constitutions mirror the language of the federal constitution, or perhaps even where similar rights are only mentioned. Even for those who argue against a dual federalism model, this result would encroach too far into state autonomy and sovereignty.

V. CONCLUSION

The federal courts encounter state law issues in a great variety of ways with varying levels of state court interpretation attached. To date, the federal courts have treated the state courts sometimes as if they were lower federal courts and sometimes as if they were the courts of completely separate sovereigns without explaining why. While this lack of transparency gives the federal courts the greatest amount of discretion and power, it does little to support the legitimacy of the federal courts. This article has attempted to describe when the Supreme Court will defer and when not, and found that difference somewhat counter-intuitive and in conflict with the Supreme Court's notions of dual sovereignty. While dual sovereignty might be neither truly possible nor desirable in the age of the administrative state, it can provide some practical boundaries to divide the

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[183] *Id*. at 560-65.

labor of the courts in our federal system when they necessarily interact. Thus, this article has suggested that the federal courts defer to state courts unless an issue presents a substantive federal interest that warrants independent federal review. I hope that this provides some normative guidance that the courts could consider in negotiating those interactions.