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# Demosprudence, Interactive Federalism, and Twenty Years of *Sheff v. O'Neill*

Justin R. Long

*University of Connecticut*, [justin.long@wayne.edu](mailto:justin.long@wayne.edu)

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## Essay

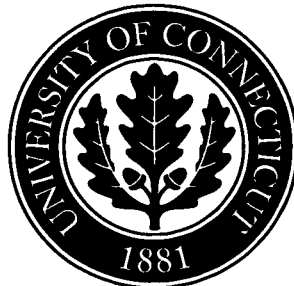
### Demosprudence, Interactive Federalism, and Twenty Years of *Sheff v. O'Neill*

JUSTIN R. LONG

*Professor Lani Guinier and others have recently developed a theory called "demosprudence" that explains the democracy-enhancing potential of certain types of U.S. Supreme Court dissents. Separately, state constitutionalists have described state constitutions' capacity to offer a base of resistance against the U.S. Supreme Court's narrow conception of individual rights. Applying these two seemingly unrelated theories to school desegregation litigation in Connecticut and to same-sex marriage litigation in Iowa, this Essay suggests that certain state constitutional decisions might function like U.S. Supreme Court dissents to enhance democratic activism. In this way, interactive federalism might usefully serve as a category of demosprudence.*

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# Demosprudence, Interactive Federalism, and Twenty Years of *Sheff v. O'Neill*

JUSTIN R. LONG\*

## I. INTRODUCTION

Twenty years ago, civil rights lawyers sued state officials on behalf of school children in Hartford, Connecticut, complaining that the nearly all-white suburban schools and nearly all-minority city schools violated the state constitution. The lawyers sued in court because state politicians seemed not to be responding to the *de facto* segregation. Rather than fight what looked like a futile political campaign, a lawsuit could compel the desegregation Hartford children needed. The lawyers sued under the state constitution because they knew that the U.S. Supreme Court was steadily withdrawing the courts from their historic role in school desegregation. The Connecticut Constitution and courts could avoid this federal retrenchment. In this way, both law and politics were causes of the landmark *Sheff v. O'Neill*<sup>1</sup> case, and both legal and political change were its goals. But constitutional theorists, however, have struggled with how to reconcile law and politics in a principled fashion.<sup>2</sup> If our nation is a democracy, what legitimacy can there be for counter-majoritarian law? If we are subject to the rule of law, what room is left for popular will?

Lani Guinier's recently developed idea of "demosprudence" offers a new way of thinking about the law/politics divide. Guinier argues that certain kinds of judicial decisions, and dissents in particular, can inspire popular responses in the form of social and political activism. These political activities can, in turn, affect judges' understanding of fundamental constitutional norms. In this way, there is an ongoing national debate about the meaning of the most important values embedded in the federal Constitution. U.S. Supreme Court opinions are not merely politics by another means, nor are politics merely parallel to legal interpretation. Instead, both judicial and social activity together comprise a broader conversation about the interpretation of the core constitutional values

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\* Visiting Assistant Professor, University of Connecticut School of Law. A.B., Harvard College; J.D., University of Pennsylvania School of Law. I thank Michael Fischl, Rick Kay, Bob Williams, the participants in the University of Connecticut School of Law faculty workshop series, and Ariana Silverman for helpful comments.

<sup>1</sup> 678 A.2d 1267, 1289 (Conn. 1996) (declaring unconstitutional state statutes responsible for *de facto* school segregation).

<sup>2</sup> See, e.g., Larry D. Kramer, Professor & Dean of Stanford Law School, "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, in 41 VAL. U. L. REV. 697, 699–700 (2006) (describing the difficulty and importance of distinguishing between law and politics).

underlying our democracy.<sup>3</sup>

Meanwhile, Paul Kahn,<sup>4</sup> James Gardner,<sup>5</sup> Robert Schapiro,<sup>6</sup> and other state constitutional scholars<sup>7</sup> have persuasively argued that state constitutional jurisprudence can usefully function as a site of resistance to federal constitutional interpretations, a theory known as “interactive federalism.”<sup>8</sup> If the U.S. Supreme Court fails to protect such rights as privacy, marriage equality, or public education under the federal Constitution, state high courts may, and often do, provide a competing constitutional vision that does protect those liberties. Although the states’ more expansive protection of civil rights formally derives from the state constitutions, interactive federalism suggests that the true debate underlying these decisions is a dispute about the basic values we share as Americans. State constitutionalism, in this view, can and should function as a legal space for contesting the dominant federal interpretation of national norms. Furthermore, state constitutional jurisprudence can galvanize a popular political response that leads either to changes in federal jurisprudence or to new legislative action.<sup>9</sup>

This Essay suggests a previously overlooked link between the theories of demosprudence and interactive federalism. Using the example of *Sheff v. O’Neill*, this Essay asks, “Can state constitutional decisions function as demosprudential dissents?” Preliminary analysis of the *Sheff* litigation and same-sex marriage litigation suggests that scholars of demosprudence and state constitutionalism have much to learn from each other. Imagining state constitutional decisions as demosprudential dissents offers a new perspective on federal and state constitutional theory, and potentially offers a democracy-enhancing justification for American federalism.

## II. DEMOSPRUDENCE

Professor Guinier’s far-reaching insight is that U.S. Supreme Court dissents can be effective beyond merely persuading some as-yet unseated

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<sup>3</sup> See Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15–18, 58–59 (2008) (discussing how dissenting opinions are illustrative of this theory).

<sup>4</sup> See Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) (rejecting a separate-spheres approach to federalism).

<sup>5</sup> See generally JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (Univ. of Chi. Press 2005).

<sup>6</sup> See generally ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (Univ. of Chi. Press 2009); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (providing a useful background and historical evaluation of this philosophy).

<sup>7</sup> See, e.g., Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 95 (2000) (describing state constitutional interpretation as legitimately reactive to federal constitutional law).

<sup>8</sup> *Id.*

<sup>9</sup> E.g., *id.* at 298.

Court majority to overturn the disfavored decision in the misty future.<sup>10</sup> Rather, as Robert Williams pointed out in 1984, the Justices' dissents can, and sometimes do, address contemporary political forces.<sup>11</sup> By inspiring, comforting, and teaching common people affected by the Court's opinion, dissents can reach past legal elites to provoke democratic engagement and change.<sup>12</sup>

Guinier identifies three defining characteristics of the demosprudential dissent: substantively, the dissent is about a basic issue of democracy; stylistically, the dissent is written with a tone and structure that address a broader audience than the legal in-crowd; and procedurally, the dissent challenges that broader audience to exercise popular sovereignty by counteracting the majority opinion.<sup>13</sup> Guinier points out that part of the populism-provoking capacity of the demosprudential dissent comes from its partial-outsider status. The dissent is conducive to popular inspiration in part because it lacks the compelling power of the state behind it; dissents establish no precedent and justify no legal violence. Instead, dissents inherently offer a challenge to the prevailing legal norm and an alternative to the state's use of force to carry out that norm. Dissents, like the socio-political action they hope to provoke, are an act of resistance.<sup>14</sup>

By describing an imagined alternative to the legal world defined by the majority opinion, and by drawing ordinary people into sharing the dissenter's vision, dissents protect what Robert Cover called the "jurisgenerative" features of communal life.<sup>15</sup> Justices accomplish this, Guinier suggests, by writing directly to the public (or affected segments of it) in language that avoids dry, cold legalisms in favor of emotional appeals to common national values. The best demosprudential dissents attend to "the premises behind the logic, the stories and not just the explanations" underlying the Court's constitutional hermeneutics.<sup>16</sup> In doing so, they welcome—perhaps "authorize"—everyday folk to oppose the Court's

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<sup>10</sup> See Guinier, *Foreword*, *supra* note 3, at 50–51 ("Simply by contesting the view of the Court majority, the dissenter may reveal a more transparent deliberative process of lawmaking").

<sup>11</sup> See Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 375 (1984) (noting the influence of U.S. Supreme Court dissents on Congress—and state courts); see also Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009) (describing the significance of Guinier's theory as its placement of judges within, rather than apart from, democratic deliberation).

<sup>12</sup> See Guinier, *Foreword*, *supra* note 3, at 15–16 (explaining that dissents sometimes focus on "enhancing . . . democratic potential" rather than reasoning through traditional legal forms).

<sup>13</sup> See *id.* at 49 (describing the elements of a demosprudential dissent).

<sup>14</sup> See *id.* at 48–49 (noting that dissents challenge, rather than exercise, the law's coercive power).

<sup>15</sup> See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 544–45 (2009) (citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)) (describing demosprudential dissents as a method of cooperation between legal elites and ordinary people).

<sup>16</sup> See Guinier, *Foreword*, *supra* note 3, at 11, 13 (describing a Justice Breyer dissent).

conclusion.<sup>17</sup>

In contrast, conventional constitutional thought suggests that U.S. Supreme Court opinions end the debate about the fundamental norms at stake in the decided case; it is for this reason that advocates of judicial minimalism urge the Court to avoid reaching these profound questions.<sup>18</sup> For reasons of popular sovereignty, Larry Kramer seems appalled<sup>19</sup> by the way that Supreme Court decisions exhibit the “jurispathic” tendencies—the killing of ongoing popular debate about the meaning(s) of fundamental social values as embodied in law—that Professor Cover described.<sup>20</sup> Demosprudence offers a path toward revival of alternative, non-statist *nomoi* and narratives because it reminds us that court law and folk law are articulated, just as the leg bone is connected to the hip bone. We the People occasionally find sufficient inspiration in judicial dissents, like Justice Ginsburg’s in *Ledbetter*<sup>21</sup> or Justice Breyer’s in *Parents Involved*,<sup>22</sup> to take up the colors and recapture the legal battlements. As new scholarship from Jason Mazzone confirms,<sup>23</sup> the Court speaks, but it lacks the last word.

Unfortunately, the *orality* of dissents from the bench attracts Guinier’s attention as particularly promising for democratic engagement.<sup>24</sup> “The idea,” she argues, “is that speech is primary, present, natural, interior, real, authentic, and whole, and writing is secondary, artificial, exterior, a representation of speech, a substitute for speech, removed from reality, a subversion or corruption of the original speech.”<sup>25</sup> Even if true, the near-total unavailability of U.S. Supreme Court dissents from the bench makes

<sup>17</sup> See Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MICH. L. REV. 1560, 1581 (2009) (explaining that oral dissents “signal litigants and other actors . . . that the [Court’s] decision is a bad one and someone must act to change it”).

<sup>18</sup> See, e.g., Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 128 (2005) (arguing that “the argument for minimalism is strongest in an identifiable class of cases: those in which American society is morally divided, those in which the Court is not confident that it knows the right answer, and those in which the citizenry is likely to profit from more sustained debate and reflection”).

<sup>19</sup> See Kramer, *supra* note 2, at 697 (complaining that lawyers and lay people alike assume without real question that the U.S. Supreme Court has sole interpretative authority over the federal Constitution).

<sup>20</sup> See Cover, *supra* note 15, at 53 (describing state-backed law as tending to destroy all competing legal norms).

<sup>21</sup> See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting), *superseded by statute*, 42 U.S.C. § 2000e-5(e) (2009).

<sup>22</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2800 (2007) (Breyer, J., dissenting). At the time of publication, this case had not been published in the U.S. Reporter.

<sup>23</sup> See Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. (forthcoming 2010) (describing how the U.S. Supreme Court’s interpretive authority has elided into that of the state courts).

<sup>24</sup> See Guinier, *Foreword*, *supra* note 3, at 26–27 (emphasizing the special significance of spoken dissents).

<sup>25</sup> *Id.* at 27.

them poor candidates, at present, for democratic engagement.<sup>26</sup> However, Guinier's distinction between oral and written dissents may be somewhat hyperbolic. A Justice who authored a stirring written dissent but declined to read it aloud might be forgiven for concluding, like the poet, that "Between my finger and my thumb/ The squat pen rests./ I'll dig with it."<sup>27</sup> Applying Guinier's concept of demosprudence to written dissents seems to sacrifice little of the theory's descriptive and normative power.

Critics of demosprudence theory notably include the political scientist Gerald Rosenberg. He argues that the theory, although an effort to link the Court with democratic deliberation and with the popular legitimacy such deliberation would provide, hinges on wildly misplaced optimism about how much the public knows or cares about the Supreme Court's work.<sup>28</sup> For Professor Rosenberg, legal elites' concentrated gaze on the U.S. Supreme Court, even when purporting to study grassroots activism, reveals a blind romanticism. Rosenberg argues that demosprudence imprudently ignores the institutions of popular politics, the majoritarian venues through which democratic deliberation really happens.<sup>29</sup>

In rebuttal, Robert Post points out that precious few members of the public could identify congressional leaders or the faceless activists who toil on party platforms, either, yet those politicians' importance to how American popular government works appears beyond cavil. This is because, Post suggests, deliberative democracy operates more through public debate and communal relationships than through the measurable results of superficial shifts in public-opinion polls.<sup>30</sup> Indeed, Guinier's understanding of demosprudence explicitly depends on this subtler (yet more profound) concept of politics.<sup>31</sup>

Beyond defending Guinier's development of demosprudential theory, Professor Post, with Reva Siegel, has also recently contributed to the literature on the relationship between the U.S. Supreme Court and democratic action. They explain that political backlash to U.S. Supreme Court opinions, often viewed with dismay by juriscentric legal elites, actually exhibits the mutually influential relationship between grassroots

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<sup>26</sup> See Frederick C. Harris, *Specifying the Mechanism Linking Dissent to Action*, 89 B.U. L. REV. 605, 607 (2009) (noting that the possibility of oral dissents provoking grassroots action is hampered by the public's lack of access to these spoken texts).

<sup>27</sup> SEAMUS HEANEY, *Digging*, reprinted in NEW SELECTED POEMS: 1966–1987, at 2 (1990).

<sup>28</sup> See Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009) (arguing that ordinary people simply do not know about the Court's opinions and that even elites care only about the holdings, not the Justices' reasoning or rhetoric). *But see* Dion Farganis, *Does Reasoning Matter? The Impact of Opinion Content on Supreme Court Legitimacy* (July 15, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1434726> (arguing that the reasoning in a Supreme Court opinion does affect how a lay reader perceives the opinion's legitimacy).

<sup>29</sup> Rosenberg, *supra* note 28, at 564.

<sup>30</sup> See Post, *supra* note 11, at 583–85 (2009) (rejecting Rosenberg's reliance on observable and quantifiable factors as the sole determinants of political significance).

<sup>31</sup> See Guinier, *Foreword*, *supra* note 3, at 48 (explaining that the goal of demosprudential dissenters is not necessarily a shift in voting percentages, but a shift in public normative discourse).



politics and Court decisions.<sup>32</sup> This connection offers the Supreme Court a measure of democratic legitimacy that helps it escape the charge that its countermajoritarian power undermines popular sovereignty.<sup>33</sup> Backlash, though obviously undesirable to the Justices whose interpretations face public rejection, potentially strengthens rather than weakens the Court as a crafter of *nomos*.<sup>34</sup> And how do the Court's opinions engage the ordinary people who then respond politically? Post argues that the Justices use the "familiar techniques" we recognize in demosprudence theory: a combination of both standard legal reasoning and emotional rhetoric to inspire and persuade.<sup>35</sup>

### III. INTERACTIVE FEDERALISM

The new scholarship on demosprudence has focused exclusively on the role of the U.S. Supreme Court in engaging grassroots democracy, to the exclusion of state courts (or, indeed, of states at all). Similarly, the best recent scholarship on state constitutionalism has largely overlooked the relationship between courts and ordinary people in constitutional interpretation, in favor of scrupulous attention to the dialogue between state high courts and the U.S. Supreme Court. The most prominent exception, Douglas Reed's 1999 article,<sup>36</sup> links state constitutions to popular democracy, but treats the interaction between state constitutional interpretation and political forces as internal to each state. Nevertheless, the state constitutionalists' theory of federalism amply rewards careful study.

James Gardner's path-breaking book, *Interpreting State Constitutions*,<sup>37</sup> proposes an elegant solution to a problem that has vexed state high courts and their academic observers since Justice Brennan's famous call for state constitutional interpretation independent of federal precedent.<sup>38</sup> The difficulty is that many state constitutions include rights provisions worded identically (or close enough) to corresponding provisions in the federal Constitution; what might legitimate a state court

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<sup>32</sup> See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 390–91 (2007) (noting that U.S. Supreme Court decisions can provoke a backlash that consists of ordinary people debating constitutional meaning and acting on their legal understanding).

<sup>33</sup> See *id.* at 383 (arguing that one reason for popular loyalty to the Supreme Court is its potential responsiveness to democratic demands).

<sup>34</sup> See *id.* at 395 (suggesting that backlash might be essential to retaining the democratic legitimacy of judicial opinions).

<sup>35</sup> Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 441 (1998).

<sup>36</sup> Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 874–75 (1999).

<sup>37</sup> See generally GARDNER, *supra* note 5.

<sup>38</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (calling for state courts to interpret their state constitutions as more rights-protective than federal constitutional jurisprudence).

in giving such a provision any meaning other than the U.S. Supreme Court's authoritative interpretation?<sup>39</sup> Professor Gardner's functional approach positions states as competitors to the national government for the People's trust and affection.<sup>40</sup> Like Lawrence Friedman's earlier work,<sup>41</sup> Gardner's theory suggests that state courts should unabashedly consider such matching clauses as an invitation to check and balance the U.S. Supreme Court's rights jurisprudence.<sup>42</sup> The beneficiaries of this interpretive redundancy are the People themselves, Gardner maintains.<sup>43</sup> If either the state or federal high court protects individual liberty insufficiently, the other stands ready to fill the breach.<sup>44</sup>

Gardner concedes, as he must, that states have frequently been on the wrong side of the state-federal competition to protect individual liberty.<sup>45</sup> But state constitutions offer state high courts at least the capacity to consider both intrastate domestic arrangements and the relationship between the state and federal governments. Gardner's larger challenge lies in explaining what *nomos* authorizes independent state interpretation. In no uncertain terms, Gardner has steadily rejected the search for an independent state "character" that might provide a normative community sufficient to justify constitutional interpretation.<sup>46</sup> Instead, Gardner reminds us that state citizens are national citizens, too, and that state constitutions exist in a legal universe premised on a federalism prescribed

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<sup>39</sup> See Friedman, *supra* note 7, at 96–97 (noting that independent interpretation of state constitutional clauses parallel to federal constitutional clauses has attracted criticism as result-oriented judicial activism).

<sup>40</sup> See GARDNER, *supra* note 5, at 125–26 (emphasizing the role of states as a protection for individuals against overreaching national power, and vice versa).

<sup>41</sup> See Friedman, *supra* note 7, at 97 (arguing that autonomous state constitutional interpretation can provide a useful protection against inadequate U.S. Supreme Court rights protection).

<sup>42</sup> See GARDNER, *supra* note 5, at 254–55 (explaining that matching constitutional provisions invite the state high court to react to U.S. Supreme Court doctrine and resist the federal interpretation where appropriate).

<sup>43</sup> See *id.* at 256 (discussing the importance of different levels of government being able to act independently in the best interests of the people).

<sup>44</sup> See *id.* at 254–55 (noting that the same provision in state and federal constitutions can best serve the people as interpreted by the respective state and federal authorities).

<sup>45</sup> See *id.* at 135 (noting that states have historically posed an even greater threat to individual liberty than the federal government); see also Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 666–67 (2005–06) (describing the states' rabid red-baiting and oppressive speech restrictions, above and beyond the national effort, during World War I and the McCarthy era).

<sup>46</sup> See GARDNER, *supra* note 5, at 231–32 (emphasizing that state citizens derive their political identity from their concurrent status as national citizens); James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1291 (1998) (empirically attacking the argument that state constitutions reflect unique state values or character). For the view that federalism is *only* justified where the subnational units do express a deep set of norms distinct from national values, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 60–61 (2008).

by the national Constitution.<sup>47</sup> Therefore, Gardner implies that the national character and national values provide the normative foundation for state constitutional interpretation.

Robert Schapiro, like Gardner, accepts the implausibility of founding autonomous state constitutionalism on unique state “character.”<sup>48</sup> Rather than looking toward a national *nomos*, however, Professor Schapiro decouples state constitutions from actual communities of value. Instead, he argues that state constitutions contain, in the texts themselves, all of the normative foundation an interpreter might need. For Schapiro, it is the imagined, aspirational *nomos* described (or implied) in the constitutional text that ought to drive constitutional interpretation, not any actual or perceived normative community in the real world.<sup>49</sup> Schapiro’s concept is especially useful as a justification for counter-majoritarian state constitutional interpretation; the judicial result may not comport with the values of the state’s actual population, but it reflects the fundamental values fixed in the text.<sup>50</sup> Implicit in this aspect of Schapiro’s theory lies the central idea that law can influence the ordinary person’s understanding of constitutional values: if the state court’s mediation of the constitutional words into actual law could not move the state polity toward the constitutional aspirations, then the law’s violence would be futile and cruel.

Even though autonomous state constitutional interpretation derives justification from each state’s particular constitutional text, Schapiro’s later work emphasizes that states are not stand-alone entities. Rather, state and federal power overlap, like the sounds of woodwinds and strings in a single orchestra: what Schapiro calls “polyphonic” or “interactive” federalism.<sup>51</sup> In this view, the state and federal governments each operate simultaneously on the same subject matter as the other, not within separate spheres of substantive jurisdiction. Geography, Schapiro maintains, not regulatory field, distinguishes state from federal power.<sup>52</sup> Given states’ overlapping authority with national institutions, Schapiro brilliantly observes that when state law differs from national law (as when state high courts offer independent interpretations of state constitutional provisions textually identical to federal provisions), the result serves as resistance to

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<sup>47</sup> See GARDNER, *supra* note 5, at 231–32 (“[S]tate government power is allocated and deployed not only to ensure good internal self-governance on the state level, but also to ensure the success of the larger federal system of which state government is a part.”).

<sup>48</sup> See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 398 (1998) (rejecting existing state norms as a valid basis for independent state constitutional interpretation).

<sup>49</sup> See *id.* at 394 (“Rather than relying on vague generalities about state character, judges can turn their attention to the State Constitution itself . . .”).

<sup>50</sup> See *id.*

<sup>51</sup> See SCHAPIRO, POLYPHONIC FEDERALISM, *supra* note 6, at 92–95; Schapiro, *Interactive Federalism*, *supra* note 6, at 285–86 (2005).

<sup>52</sup> See Schapiro, *Interactive Federalism*, *supra* note 6, at 285 (“The scope of this political authority is defined by territory, not by subject matter.”).

the U.S. Supreme Court.<sup>53</sup> A state's divergent view of a constitutional right can illustrate an alternative legal world, thereby demonstrating for officials and citizens alike that the U.S. Supreme Court lacks the final, definitive, jurispactic word.<sup>54</sup>

Like Gardner and Schapiro, Paul Kahn rejects states as autonomous *nomoi*.<sup>55</sup> Kahn explains state constitutionalism by emphasizing that state constitutions are situated in a federal structure and therefore always exist in a national context.<sup>56</sup> The role of state high courts in interpreting their constitutions independently from U.S. Supreme Court jurisprudence "accords with a longstanding justification of federalism," Professor Kahn says, "under which state governments provide a forum for discussion, disagreement, and opposition to actions of the national government."<sup>57</sup> Reflecting his view that state constitutional interpretation is really about discovering the meaning of a naturalistic "American" constitution, Kahn admires Thomas Cooley's 1878 treatise on state constitutionalism because it treated the whole field as a single interpretive project across states, rather than as a series of unique state texts.<sup>58</sup> For Kahn, the reduction of American constitutional discourse to the holdings of the federal Supreme Court represents a massive social failure; he therefore calls for a renewed interpretive debate over fundamental values in Congress, in law schools, and particularly in the state high courts.<sup>59</sup>

The consensus of these state constitutional theorists, then, is that state high courts can and do serve as sites of contestation over deep national values. Given their capacity to insulate state constitutional holdings from U.S. Supreme Court review, state high courts enjoy a special power to resist the Supreme Court's tendency to shrink the national constitutional imagination.

#### IV. CAN STATE CONSTITUTIONAL DECISIONS WORK AS FEDERAL DEMOSPRUDENTIAL DISSENTS?

As noted above, adherents to the contemporary demosprudence school of thought focus exclusively on the U.S. Supreme Court as the judicial institution capable of inspiring democratic action (and thereby earning democratic legitimacy). Interestingly, anthropologist Sally Engle Merry

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<sup>53</sup> See *id.* at 288–90 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003), as one such example).

<sup>54</sup> See *id.* at 289 (noting that state law can serve as an inspiring rebuke to federal jurisprudence).

<sup>55</sup> See Kahn, *supra* note 4, at 1148 ("The diversity of state courts is best understood as a diversity of interpretive bodies, not as a multiplicity of representatives of distinct sovereigns.").

<sup>56</sup> See *id.* at 1166 (arguing that state courts should view their constitutions in light of "American constitutionalism").

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 1162–63; see generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (4th ed. 1878).

<sup>59</sup> See Kahn, *supra* note 4, at 1155 (arguing that democracy depends on a rich constitutional discourse expressive of more than a single institution's constitutional view).

found trial-level courts and officials to be profoundly influential in inspiring new popular understandings of legally contested values. She noted that trial courtrooms are the scenes of performances, which “allow authoritative judicial and prosecutorial figures to interpret everyday life in new ways.”<sup>60</sup> Professor Merry’s research suggests the potential power of courts—other than the U.S. Supreme Court—to foster democratic deliberation. This section asks whether state high court constitutional decisions might share some part of the demosprudential potential of U.S. Supreme Court dissents.

By posing this question, I do not intend to consider state constitutional *dissents*, though those judicial writings might well be concerned with the contestation and negotiation of national values. In part, this Essay adopts this approach because a state high court that gives its state constitution a meaning different from federal jurisprudence already acts as a minority voice; the state court already rejects the federal holding (although possibly not for the same reasons as dissenting federal Justices). State court dissents then fill the role of defending the conception of national values explained by the U.S. Supreme Court’s majority opinion, and so become apologia for the federally-declared law rather than writings of jurisgenerative potential. Nor does this Essay intend to review state high court decisions of federal constitutional law. For one thing, an essay asking whether state court determinations of federal law might plausibly be viewed as *about* federal law would not likely be interesting, even to legal academics. For another, such decisions fall unambiguously under the authoritative control of the U.S. Supreme Court,<sup>61</sup> and although state courts might use the opportunity to critique federal jurisprudence, the U.S. Supreme Court can sap the potency of any judicial back-talk with a binding reversal. Finally, my interest here lies in the capacity of state constitutional decisions to inspire a *national* political response from ordinary people. State constitutional decisions can, and certainly do, provoke the sort of democratic backlash described by Post and Siegel within the affected state.<sup>62</sup> This Essay’s query, which links for the first time the exciting recent developments in demosprudence theory and interactive federalism, asks whether the opinions of state high court majorities interpreting state constitutions might function as federal constitutional demosprudential dissents.

This inquiry invites three questions. First, are state high courts really

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<sup>60</sup> SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 261 (2000).

<sup>61</sup> See *Michigan v. Long*, 463 U.S. 1032, 1038–41 (1983) (holding that the U.S. Supreme Court may review state court decisions of mixed state and federal law in the absence of a clear statement that the state disposition is independently supported by state law).

<sup>62</sup> See, e.g., *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (acknowledging that a popular initiative, Proposition 8, had amended the state constitution to supersede the holding of a state court constitutional decision); see also *Reed*, *supra* note 36, at 887–89 (describing the “democratic penetration” into state constitutional interpretation).

talking about the same thing as the U.S. Supreme Court when they interpret state constitutional provisions differently from the matching federal constitutional provisions? In other words, can state constitutional decisions really function as a species of national constitutional law? Second, if state constitutionalism is indeed at least potentially a commentary on federal constitutionalism, can a state constitutional majority opinion function as a dissent, which by definition lacks the force of law? And finally, can state constitutional decisions meet the democracy-enhancing criteria described in demosprudence theory? The remainder of this Essay suggests that the answer to each of these questions might be “yes.”

#### A. *Can State Constitutional Decisions Work as Federal Constitutionalism?*

To start, one must remember that the more common technique of state constitutional interpretation is not divergence from federal precedent, but near-obsequious adherence to it.<sup>63</sup> From the practical perspective of state courts, then, and for better or for worse, state constitutionalism is already driven largely by federal doctrine and federal values.<sup>64</sup>

The work on interactive federalism by Gardner, Schapiro, and Kahn described above further demonstrates that even “independent” state constitutional interpretation is best understood as intimately bound to federal constitutionalism. Because state citizens’ political identity is tied to the national, rather than state, community,<sup>65</sup> even state judges who attempt to read the character of their state for purposes of autonomous constitutional interpretation will end up finding a national *nomos*. As Post and Siegel remind us, open-ended constitutional provisions like those protecting liberty and equality invite courts to express national values.<sup>66</sup> These open-ended provisions in state constitutions extend the same invitation. In the political practices of ordinary people, we see “a social consensus that fundamental values in this country will be debated and resolved on a national level.”<sup>67</sup>

If state constitutional interpreters are really engaged in construing a set

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<sup>63</sup> See Schapiro, *Interactive Federalism*, *supra* note 6, at 290–91 (noting that state high courts usually interpret state constitutional provisions by simply adopting U.S. Supreme Court reasoning and results).

<sup>64</sup> See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (noting that state courts interpreting state constitutions follow federal jurisprudence in the “clear majority” of cases).

<sup>65</sup> See Cover, *supra* note 15, at 48–49 (observing that “by the mid-twentieth century the states had long since lost their character as political communities”).

<sup>66</sup> See Post & Siegel, *supra* note 32, at 378–79 (relating national *nomos* to the judicial interpretation of deep constitutional debates).

<sup>67</sup> James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 828 (1992).

of national constitutional values, as described here, then an important challenge is why the U.S. Supreme Court should lack the authority to impose its final interpretation on these values.<sup>68</sup> Regardless of any “plain statement”<sup>69</sup> they might make, why should state courts be permitted to diverge from the U.S. Supreme Court’s interpretation of national constitutional requirements if their state constitutional clauses are merely alternative articulations of those same national values? Robert Williams has argued that the U.S. Supreme Court’s concern for federalism, a concern that seeps into even ordinary individual-rights cases, renders the federal precedents inadequate to teach state high courts what the underlying values ought to be when the filter of federalism is removed.<sup>70</sup>

Gardner’s functional theory and Schapiro’s interactive federalism, which both argue for a self-consciously federalist approach to state constitutional interpretation, derive their legitimacy from the federal Constitution itself, which carves out from federal oversight the legal space in which state constitutions operate.<sup>71</sup> This constitutional space leads to an important consequence. Both the public and legal elites typically believe that the U.S. Supreme Court has the last word on the meaning of constitutional liberty and equality.<sup>72</sup> Even the Court itself thinks so.<sup>73</sup> But this is false.<sup>74</sup>

From the perspective of the ordinary person, state constitutional interpretation of liberty and equality often offers the last word. To the cop on the beat concerned with executing a lawful search and seizure, the union organizer wishing to distribute petitions in the shopping mall, or the speeding motorist seeking to contest her ticket before a jury, the U.S. Supreme Court’s determination of these rights under the federal Constitution’s text is the starting point, not the ending point, for analysis.<sup>75</sup> The law that actually applies, the word that bears the threat of violence, is the state court’s state constitutional interpretation. If the police officer searches a car without a warrant because federal constitutional doctrine so permits, she will still have done wrong if the state constitutional court has

<sup>68</sup> I am grateful to Rick Kay for raising this point.

<sup>69</sup> See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (declaring that the U.S. Supreme Court will treat state high courts’ constitutional decisions as presumptively federal unless the state court opinion includes a “plain statement” that the decision rests on state constitutional law).

<sup>70</sup> See Williams, *supra* note 11, at 389–90 (noting how the U.S. Supreme Court seems constrained by federalism concerns inapplicable to the states).

<sup>71</sup> See Friedman, *supra* note 7, at 97.

<sup>72</sup> See Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 954–55 (2009).

<sup>73</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

<sup>74</sup> Cf. Mazzone, *supra* note 23 (noting how the U.S. Supreme Court has, for practical purposes, surrendered much of its interpretive authority over the federal Constitution to state courts).

<sup>75</sup> See JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 7–8* (Oxford Univ. Press 2008) (cataloging state constitutional protection of equality and liberty above the federal floor).

protected the privacy of citizens' cars. If the mall manager expels the pamphleteer because the Supreme Court has declined to find free speech protection against private parties, the expulsion will still be unlawful if the state constitution offers a stronger protection of free expression.

Of course, perhaps a particular state high court has not protected the liberty or equality claim at question beyond the protection offered by the U.S. Supreme Court. But that conclusion reflects the state high court's agreement with the Supreme Court majority's view of the disputed rights, not a lack of power in the state court to disagree. Thus, the final, authoritative judicial declaration of how much rights protection individual citizens actually receive commonly depends on state constitutional interpretation.<sup>76</sup>

This means that any popular discontent with judicial rights protection—"Why, there oughta be a law!"—might be targeted at federal institutions and articulated in federal terms,<sup>77</sup> but reflects a (perhaps unwitting) response to *state* constitutionalism. The speeder wishing to contest her ticket before a jury but told she lacks the right to do so might complain about an inadequate Sixth Amendment right to a jury trial, but it is also the state constitution that did not protect her right (although it could have). If the speeder is truly exercised, she might initiate democratic debate leading to a change in the federal understanding of jury-trial rights. But that national result was caused, in part, by the state high court's interpretation of the state constitution. As Gardner eloquently observes, "My welfare, in other words, depends not only on our shared national Constitution and on my state constitution, but also to some extent on your state constitution as well."<sup>78</sup> State constitutions form a front-line part of the overall American constitutional net protecting liberty and equality. It would seem both fair and accurate, then, to suggest that state constitutional decisions form part of the ongoing federal constitutional interpretive project.

### B. *Can State Constitutional Decisions Work as Federal Dissents?*

State constitutional majority decisions are law. They mediate, legitimize, and mobilize real violence against human beings.<sup>79</sup> Dissents, on the other hand, do not. A dissent is a "story," an emotional outburst or

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<sup>76</sup> The state constitution might be interpreted to be *less* protective than the federal Constitution, but it would then have the same practical effect as if it had the same level of protection, because federal law is supreme.

<sup>77</sup> See, e.g., *Area Man Passionate Defender of What He Imagines Constitution To Be*, ONION, Nov. 14, 2009, [http://www.theonion.com/content/news/area\\_man\\_passionate\\_defender\\_of](http://www.theonion.com/content/news/area_man_passionate_defender_of) (satirically illustrating the cultural prominence of the federal Constitution).

<sup>78</sup> GARDNER, *supra* note 5, at 122.

<sup>79</sup> See Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1606 (1986) (identifying the use or threat of violence as essential to the distinction between law and literature).



an attempt to persuade, but powerless to “announce[] . . . new law.”<sup>80</sup> How, then, could a decision be a dissent? To begin to resolve that paradox, this Essay first considers why any judge might take the trouble to pen a dissent.

Standard explanations for dissenting might envision the dissent as motivated by an attempt to persuade a future Supreme Court to reverse course or an effort to gain political capital for the dissenter against the other Justices for use in future disputes.<sup>81</sup> Demosprudence, as seen already, explains some dissents as an attempt to inspire democratic action.<sup>82</sup> Additionally, Justice Brennan once suggested that one reason for a federal Justice to dissent lies in the dissent’s potential to persuade a state high court to adopt the dissenter’s rationale as a matter of state constitutional law.<sup>83</sup> Could state constitutional decisions, in turn, influence the interpretative strategies of national institutions, including the U.S. Supreme Court? Recent empirical work suggests that “[f]rom due process to equal protection, from the First Amendment to the Fourth and Sixth, the [U.S.] Supreme Court routinely—and explicitly—bases constitutional protection on whether a majority of states agree with it.”<sup>84</sup>

State constitutional decisions, although binding in the state where issued, are merely persuasive everywhere else. They do not impose the state judges’ views on the national polity. In this way, state constitutional decisions are simultaneously law and not-law, depending on one’s territorial vantage point. The generic reasons for dissenting might also help motivate a state high court to adopt an independent state constitutional analysis. For example, just as a Justice might use a dissent to convince her colleagues that future disagreements might provoke future dissents, so a prior independent state constitutional interpretation might serve as a signal to the U.S. Supreme Court that the state high court is willing to reject federal doctrine again in the future.<sup>85</sup>

To the extent they find federal constitutional jurisprudence unpersuasive—which is frequently the case when a state court construes its state constitution beyond the federal floor—state high courts implicitly or explicitly criticize the U.S. Supreme Court. Doing so might come at some cost to norms of collegiality and respect, just as dissenting from within the

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<sup>80</sup> Guinier, *Foreword*, *supra* note 3, at 48–49.

<sup>81</sup> See Johnson et al., *supra* note 17, at 1568–69 (describing reasons to dissent).

<sup>82</sup> See Guinier, *Courting the People*, *supra* note 15, at 544–45.

<sup>83</sup> See William J. Brennan, Jr., Associate Justice of the U.S. Supreme Court, In Defense of Dissents, Third Annual Matthew O. Tobriner Memorial Lecture at the University of California, Hastings College of Law (Nov. 18, 1985), in 37 HASTINGS L.J. 427, 430 (1986).

<sup>84</sup> Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. (forthcoming 2009).

<sup>85</sup> See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (justifying a state constitutional interpretation at odds with federal doctrine by reference to an earlier independent state constitutional interpretation).

Court does,<sup>86</sup> so one might not be surprised to find autonomous state constitutionalism practiced only intermittently.<sup>87</sup> Nevertheless, the state judges might be motivated to pay that cost by a desire to change future federal doctrine, to gain credibility vis-à-vis the U.S. Supreme Court, and to inspire public political action. The following review of the Connecticut Supreme Court's decision in *Sheff* and the Iowa Supreme Court's decision in *Varnum* suggests that the functions of a dissent do indeed underlie these state courts' independent constitutional interpretation.

### C. Can State Constitutional Decisions Meet the Demosprudence Criteria?

Guinier proposes a three-part definition of the demosprudential dissent. First, the dissent must be centrally concerned with an "issue of democracy"; second, the writing must be easily comprehensible to ordinary people outside of the legal elite; and, finally, the dissent must "appear[] to inspire nonjudicial actors to participate in some form of collective problem solving."<sup>88</sup> Notably, on their face, none of these criteria are exclusively limited to U.S. Supreme Court dissents. If an independent state constitutional decision deals with issues of liberty, equality, or basic governmental structure, is written in plain terms, and seems to target ordinary people to deliberate democratically, then the decision would seem to satisfy the core characteristics of a demosprudential dissent. To test whether state constitutional decisions can sometimes meet these criteria, this Essay now turns to actual examples of independent state constitutionalism.

### V. SHEFF V. O'NEILL AND SCHOOL DESEGREGATION

Through the 1970s and 1980s, the U.S. Supreme Court adopted an increasingly hostile view toward desegregation and education rights. In cases like *San Antonio Independent School District v. Rodriguez*, holding that a Texas school financing system that disadvantaged poor schools did not violate the federal Equal Protection Clause,<sup>89</sup> and *Milliken v. Bradley*, holding that remedial orders for *de jure* segregation must be confined to the district found to have segregated rather than directed toward a regional solution,<sup>90</sup> the U.S. Supreme Court clearly signaled its impatience to end federal court efforts to reverse racial isolation in public schools. The Court's distaste for ongoing supervision of school desegregation continued

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<sup>86</sup> See Johnson et al., *supra* note 17, at 1570 (establishing empirically the significance of collegiality as a motivation to dissent or not).

<sup>87</sup> See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 42 (2006) (noting the phenomenon of inconsistently independent state constitutional interpretation).

<sup>88</sup> See Guinier, *Foreword*, *supra* note 3, at 16.

<sup>89</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41, 54–55 (1973).

<sup>90</sup> *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

with cases like *Allen v. Wright*.<sup>91</sup> There, parents of black schoolchildren sued to compel the Internal Revenue Service to enforce anti-discrimination rules against all-white (yet purportedly tax-exempt) private schools, but the U.S. Supreme Court held that the plaintiffs lacked standing.<sup>92</sup>

These cases certainly gave civil rights lawyers (and the children they represented) good reason to feel discouraged. Early lawsuits in federal court designed to repair the racial isolation in inner-city schools were dropped when *Milliken* made plain that the federal Constitution could not support inter-district desegregation.<sup>93</sup> Yet, rather than accept the Supreme Court's normative vision of a color-blind Constitution upholding a radically racist education system, civil rights lawyers looked for alternative spaces in which they could contest the federal Court's proffered *nomos*. Specifically, they turned to state constitutionalism.<sup>94</sup>

In April 1989, lawyers from a host of state and national civil rights organizations, including the American Civil Liberties Union ("ACLU") and the NAACP Legal Defense and Educational Fund ("LDF"), filed a complaint in Connecticut Superior Court seeking a declaration that the isolation of racial minorities in the Hartford Public Schools breached the state's constitutional obligation to provide equal educational opportunity.<sup>95</sup> Unlike conventional school desegregation cases at the time, the plaintiffs did not raise federal constitutional claims because they alleged only *de facto* segregation, not the *de jure* segregation the U.S. Supreme Court had come to require before finding a constitutional violation.<sup>96</sup> The plaintiffs' efforts would be vindicated, in 1996, by the Connecticut Supreme Court decision in *Sheff v. O'Neill*.<sup>97</sup>

In shifting from federal to state constitutional litigation, lawyers like John Brittain of the *Sheff* plaintiffs' team were not expressing an epiphany that Connecticut values, rather than American values, would provide the moral girding necessary for constitutionalized desegregation. To the contrary, these legal elites—the cream of the national civil rights

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<sup>91</sup> 468 U.S. 737, 757–58 (1984) (holding that the claimed injury of diminished education to children was not fairly traceable to the government conduct alleged to be unlawful).

<sup>92</sup> See *id.* at 739–40.

<sup>93</sup> See SUSAN B. EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* 80–81 (2006) (describing Hartford-area school desegregation cases filed in federal court but rejected upon application of *Milliken*); George Judson, *Civil Rights Lawyers Hope to Use Hartford Schools Case as a Model*, N.Y. TIMES, Aug. 15, 1996, at B1 (noting that the U.S. Supreme Court's anti-integrationist decision in *Milliken* led to the failure of Hartford school desegregation cases filed in federal court).

<sup>94</sup> See Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 IND. L. REV. 523, 524–25 (2003) (noting that education reform advocates turned toward state constitutional litigation to advance public school integration after U.S. Supreme Court retrenchment in the 1970s).

<sup>95</sup> See EATON, *supra* note 93, at 93, 111–12 (describing the story behind the filing of *Sheff*).

<sup>96</sup> See Charlotte Libov, *State Readies Court Reply to Desegregation Suit*, N.Y. TIMES, Aug. 13, 1989, at 12CN1 (describing the gravamen of the *Sheff* complaint).

<sup>97</sup> 678 A.2d 1267, 1270–71 (Conn. 1996). For a previous study of this case, see Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277 (2002).

bar—persisted in their belief that the federal Constitution should have been construed to protect equal educational opportunity; state constitutional litigation was the lawyers' solution to *evade* the restrictive federal precedents while still offering school children across the country a constitutional remedy.<sup>98</sup> After all, the racial isolation in Hartford—where over ninety percent of the students were black or Latino, contrasted with the suburbs, where over ninety percent of the students were white<sup>99</sup>—was a small part of a nationwide pattern that persists today. In American public schools, most black children have been assigned to mostly minority schools; there has never been a single year where our schools were more integrated than that.<sup>100</sup> Funding for the *Sheff* plaintiffs from the ACLU and the LDF would hardly have been forthcoming if those national organizations did not see the case as a role model of national significance. The *Sheff* complaint thus illustrates the practical role of state constitutionalism as an alternative site to contest American constitutional values and reiterates the potential of state constitutionalism to stand as a counterweight to the U.S. Supreme Court's perceived role as final arbiter of constitutional values.

One might appropriately see the origins of the *Sheff* complaint as support for the interactive federalism theory: state constitutionalism as commentary on national constitutional values. But does the state high court's opinion in *Sheff* satisfy Guinier's criteria for demosprudence?

First, demosprudence requires the case to be about an "issue of democracy."<sup>101</sup> School desegregation, the issue in *Sheff*, unequivocally fits. As a recent student commentator records, training for the responsibilities of democratic citizenship has always been a prominent purpose of public education in this country.<sup>102</sup> Education philosopher Amy Gutmann has written comprehensively on the mutually affirming importance of public education and democratic citizenship.<sup>103</sup> And the *Sheff* court itself acknowledged the close relationship between educational equity and the success of American democracy.<sup>104</sup> Issues of race and children are also culturally powerful and controversial, and so likely to strike ordinary Americans as foundational in a way that other issues might not.

Second, a demosprudential opinion is written in a rhetorical style that

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<sup>98</sup> See EATON, *supra* note 93, at 112.

<sup>99</sup> See Libov, *supra* note 96 (providing racial balance statistics).

<sup>100</sup> See PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 338 (Viking 2002) (describing the national failure to integrate public schools).

<sup>101</sup> See Guinier, *Foreword*, *supra* note 3, at 16.

<sup>102</sup> See Donnelly, *supra* note 72, at 964–65.

<sup>103</sup> See AMY GUTMANN, *DEMOCRATIC EDUCATION* 139–48 (1999) (describing the undemocratic nature of unequal educational opportunity).

<sup>104</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1289 (Conn. 1996) ("It is crucial for a democratic society to provide all of its schoolchildren with fair access to an unsegregated education.").

avoids legal jargon and is within the reading comprehension of ordinary people. Parts, but not all, of the *Sheff* decision satisfy this criterion. “The public elementary and high school students in Hartford suffer daily from the devastating effects that racial and ethnic isolation, as well as poverty, have had on their education,” wrote Chief Justice Ellen Peters for the *Sheff* court.<sup>105</sup> In words surely everyone could understand, the court announced its disposition: “We hold today that the needy schoolchildren of Hartford have waited long enough.”<sup>106</sup> Although the court declined to issue an injunction or other remedy beyond its declaratory judgment, it explained the urgency behind its holding, reminding readers that “[f]inding a way to cross the racial and ethnic divide has never been more important than it is today.”<sup>107</sup> These phrases are both simple and powerful. They appear in the *Connecticut Reports*, but they would not be tonally out of place in a newspaper editorial or on a television talk show. The rhetoric appeals to emotions and values as much as to cold legal logic. In this sense, *Sheff* exhibits the second feature of a demosprudential opinion.

Finally, demosprudence requires the judicial writing to target people outside of the legal elite for inspiration toward democratic change. Some features of the decision do seem self-consciously outward-looking in this fashion. In introducing the case, for example, the court noted that the complaint “raises questions that are difficult; the answers that we give are controversial. We are, however, persuaded that a fair reading of the text and history of [the state constitution] . . . [demands a public school system that] provides Connecticut schoolchildren with a substantially equal educational opportunity.”<sup>108</sup> These lines seem like an attempt to forestall a backlash; it is as if the court is saying that it knows many people will not like its decision, but that the public should trust the court’s sincerity and wisdom. As Post and Siegel have taught us, backlashes are themselves instances of democratic engagement with constitutionalism,<sup>109</sup> and so for the *Sheff* court to attempt to calm citizens who might otherwise be tempted to engage in popular sovereignty logically implies that the court is speaking to ordinary people outside the legal elite. The remedial portion of *Sheff*, though, is the most clearly outward-looking component of the opinion. Chief Justice Peters wrote:

In staying our hand, we do not wish to be misunderstood. . . . Every passing day shortchanges these children in their ability to learn to contribute to their own well-being and to that of this state and nation. We direct the legislature and the executive branch to put the search for

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<sup>105</sup> *Id.* at 1270.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1290.

<sup>108</sup> *Id.* at 1280.

<sup>109</sup> See Post & Siegel, *supra* note 32, at 390.

appropriate remedial measures at the top of their respective agendas. We are confident that with energy and good will, appropriate remedies can be found and implemented in time to make a difference before another generation of children suffers the consequences of a segregated public school education.<sup>110</sup>

In this passage, the court is speaking to the public and to public officials quite explicitly, in both tone and substance. In that sense, the opinion seeks to engage ordinary people and inspire them toward political action, and so satisfies the third element of a demosprudential opinion. Indeed, *Sheff* has inspired much political debate in Connecticut (though disappointingly little action).<sup>111</sup>

The true test of whether a state constitutional opinion can be a *federal* constitutional demosprudential dissent, however, presumably cannot rest on inspiring local political action.<sup>112</sup> Evidence that *Sheff* inspired ordinary people or political leaders to reconsider or debate national values would go further toward establishing the demosprudential potential of state constitutional opinions. As it happens, some evidence of that type does exist. For example, one of Connecticut's U.S. Senators referred to *Sheff* by name in an address in favor of education reform on the Senate floor.<sup>113</sup> An editorial in the *Christian Science Monitor*, a national newspaper, praised *Sheff* and situated the case unambiguously in the national struggle for educational equity, arguing that "[c]ourt decisions like that in Connecticut, though they offer no pat solutions, can at least keep us focused on the need to work together toward a more meaningful education for all America's children."<sup>114</sup> And predictably, civil rights lawyers from other states were eager to learn from the Connecticut experience so as to seek similar progress from their own state courts.<sup>115</sup>

On balance, the *Sheff* opinion seems to satisfy Guinier's concept of a federal constitutional demosprudential dissent. The case was brought to avoid giving the U.S. Supreme Court the final word in an area of law where it had declined to protect liberty and equality, and the state high court did indeed use its power to interpret the state constitution to reject the

<sup>110</sup> *Sheff*, 678 A.2d at 1290.

<sup>111</sup> See Vanessa de la Torre, *Sheff Backers Worry About State Budget*, HARTFORD COURANT, June 16, 2009, at A3 (quoting the co-chairman of the state legislature's education committee urging support for increased education funding by asking the legislature to meet "'its [still un-satisfied] legal and moral responsibilities'" under *Sheff*).

<sup>112</sup> *But cf.* Guinier, *Foreword*, *supra* note 3, at 12 (describing a Louisville school official's use of Justice Breyer's dissent in *Parents Involved* to promote local political change).

<sup>113</sup> See 147 CONG. REC. S1271-02 (daily ed. Feb. 13, 2001) (statement of Sen. Lieberman) (supporting an amendment to the Elementary & Secondary Education Act of 1965 by praising a Connecticut school's response to *Sheff*).

<sup>114</sup> Editorial, *Desegregation Dilemma*, CHRISTIAN SCI. MONITOR, July 30, 1996, at 20.

<sup>115</sup> See Judson, *supra* note 93 (describing contact between *Sheff* attorneys and civil rights lawyers in other states hoping to emulate *Sheff* in evading federal court retrenchment).

authority of unfavorable federal precedent. The case was about a crucial problem confronting American democracy. In addressing that problem, the court's opinion speaks in emotional, moral tones to reach and inspire members of the general public. And the opinion urges politicians and ordinary people to respond to its holding with democratic vigor, encouraging a popular debate about national constitutional values and priorities—the American *nomos*.

## VI. VARNUM AND SAME-SEX MARRIAGE

Can the potential of state constitutional decisions to serve as federal constitutional demosprudential dissents find expression in cases other than *Sheff*? The Iowa Supreme Court's recent same-sex marriage decision, *Varnum v. Brien*,<sup>116</sup> suggests that *Sheff* might not be just an outlier.

First, although decided strictly on state constitutional grounds, Justice Cady's decision in *Varnum* is entirely bereft of any suggestion that the justices would have decided the case differently if they were sitting on the U.S. Supreme Court. The justices applied federal-style equal protection reasoning,<sup>117</sup> they cited federal precedents,<sup>118</sup> and they expressed a (unanimous) moral confidence that transcended text or jurisdiction.<sup>119</sup> The *Varnum* court sought to effectuate the aspirational values of the state constitution, as Schapiro would encourage, but the values the court identified are national in scope and significance, as the court self-consciously noted: "The same-sex-marriage debate waged in this case is part of a strong national dialogue centered on a fundamental, deep-seated, traditional institution that has excluded, by state action, a particular class of Iowans."<sup>120</sup> *Varnum*, to its very core, is *about* national constitutional values.

Furthermore, the decision proudly rejects U.S. Supreme Court jurisprudence on the issue at bar, and in that sense works as a federal dissent, consistent with interactive federalism. Some rejection is explicit, as where the court lists a series of Iowa constitutional decisions extending equality protections in advance of the U.S. Supreme Court's recognition of

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<sup>116</sup> 763 N.W.2d 862 (Iowa 2009).

<sup>117</sup> See *id.* at 879–80 (describing three tiers of equal protection review: rational basis, intermediate scrutiny, and strict scrutiny).

<sup>118</sup> See, e.g., *id.* at 880 (citing, among others, *Plyler v. Doe*, 457 U.S. 202, 217–18 (1982); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996)); see also *Varnum*, 763 N.W.2d at 885–86 ("Although neither we nor the United States Supreme Court has decided which level of scrutiny applies to legislative classifications based on sexual orientation, numerous Supreme Court equal protection cases provide a general framework to guide our analysis under the Iowa Constitution.").

<sup>119</sup> See *Varnum*, 763 N.W.2d at 890 ("Not surprisingly, none of the same-sex marriage decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society.").

<sup>120</sup> *Id.* at 878.

the same rights.<sup>121</sup> Some rejection is stated only indirectly, as where the court uses federal constitutional terms of art but reaches a conclusion contrary to that of the federal government.<sup>122</sup> And some rejection is entirely implicit, as where the court describes the same-sex marriage question as open under federal Supreme Court precedent,<sup>123</sup> without addressing the U.S. Supreme Court's decision dismissing a same-sex marriage appeal "for want of [a] substantial federal question" in 1972.<sup>124</sup> In acting as a dissent from U.S. Supreme Court constitutional understandings, the *Varnum* decision fulfills the functionalist role of state constitutions described by Gardner; the court protects its citizens from at least some of the federal government's intrusions on their right to equality. As Post and Siegel predicted, state constitutional same-sex marriage decisions serve as loci of contestation over national values and constitutional norms.<sup>125</sup>

Just as *Varnum* seems to match interactive federalist notions of the role of state constitutionalism in checking the federal government and courts, so too the decision fits well with the criteria for a demosprudential dissent. As a case about marriage, a recognized "fundamental right" under the federal Constitution, the issue can reasonably be described as one concerning "democracy." With respect to tone and accessibility, few recent constitutional decisions of any American court could match the powerfully inclusive embrace inherent in these plain and gentle lines:

This lawsuit is a civil rights action by twelve individuals who reside in six communities across Iowa. Like most Iowans, they are responsible, caring, and productive individuals . . . . Like many Iowans, some have children and others hope to have children. Some are foster parents. Like all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected—a belief embraced by our state motto . . . . Each maintains a hope of getting married one day, an aspiration shared by many throughout Iowa.<sup>126</sup>

The steady repetition of the plaintiffs' commonalities with "most Iowans" speaks directly to common folk, reminding them of who they are and what sort of community they hope to maintain. The court's emotional, moral, and simply-phrased tone accomplishes nothing from a coldly

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<sup>121</sup> See *id.* at 877 (noting Iowa's prescient rejection of the later-overturned federal holdings in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1871), and others).

<sup>122</sup> See *id.* at 906 ("We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.").

<sup>123</sup> *Id.* at 878–79 n.6.

<sup>124</sup> See *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

<sup>125</sup> See Post & Siegel, *supra* note 32, at 381–82.

<sup>126</sup> *Varnum*, 763 N.W.2d at 872.



legalistic perspective, but it seems to attempt a reassurance for the ordinary reader that the court's decision deserves respect.

*Varnum*, along with other same-sex marriage cases on both sides of the issue, appears to have inspired a national debate by activists, politicians, and the public about the constitutional values the decision expresses. Activists and organizers for Lambda Legal, the national LGBTQ-rights organization whose lawyers won the decision in *Varnum*, also played a central role in the legal and political fights over same-sex marriage in California.<sup>127</sup> Newspaper reports suggest that *Varnum*'s influence falls well beyond the Iowa cornfields; one California minister told a reporter he thought the decision would spark a popular backlash against "'activist judges' in general," but a California gay-rights activist predicted to the same journalist that Iowa's reputation as "Middle America" and "the heartland" would open more minds to the possibility of following *Varnum*.<sup>128</sup> John Logan, a sociologist, agreed that *Varnum*'s origin in a rural, Midwest state could make same-sex marriage seem more "related to core American values" than similar decisions in the high courts of Massachusetts and California.<sup>129</sup> Furthermore, state constitutional decisions like *Varnum* might already be increasing the political pressure on President Obama to expand federal rights for same-sex couples (a vivid example, if true, of how Gerald Rosenberg's focus on quantifiable shifts in polling data might overlook more important aspects of deliberative democracy).<sup>130</sup>

## VII. CONCLUSION

State constitutional scholars, working over the last decade, have developed a rich set of theories to explain how state constitutional decisions can serve as a liberty-enhancing counterweight to U.S. Supreme Court decisions. In focusing on the state-federal relationship, however, the scholarship on interactive federalism has paid little attention to the relationship of this judicial dialogue to deliberative democracy.

On the other hand, the very recent development of demosprudence theory greatly advances our understanding of the connection between

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<sup>127</sup> See Lambda Legal, *Varnum v. Brien*, <http://www.lambdalegal.org/in-court/cases/varnum-v-brien.html> (last visited Oct. 13, 2009); Lambda Legal, California, <http://www.lambdalegal.org/states-regions/california.html> (last visited Oct. 13, 2009); see also John Schwartz, *Ruling Upholds California's Ban on Gay Marriage*, N.Y. TIMES, May 27, 2009, at A1.

<sup>128</sup> Jessica Garrison & Maura Dolan, *Iowa's OK of Gay Marriage Could Bolster Prop. 8 Foes*, L.A. TIMES, Apr. 4, 2009, at A1.

<sup>129</sup> See Amy Lorentzen, *Same-Sex Marriage Upheld in Iowa: State First in Nation's Heartland to Join Massachusetts, Connecticut*, STAR-LEDGER (Newark, N.J.), Apr. 4, 2009, at 3 (explaining that decisions in Massachusetts and California could be viewed as extremism on the coasts, rather than related to core American values).

<sup>130</sup> See Michael D. Shear, *At White House, Obama Aims to Reassure Gays*, WASH. POST, June 30, 2009, at A1 (reporting that President Obama promised to work toward repeal of the federal Defense of Marriage Act that prohibits federal recognition of same-sex marriages).

judicial and popular constructions of constitutional values. But that scholarship overlooks almost entirely the extraordinary capacity of state constitutional decisions to offer an alternative site for legitimate contestation of U.S. Supreme Court jurisprudence.

This Essay has asked whether these two schools of thought might contribute to each other. By studying two state constitutional opinions, it tested the idea that these types of decisions might sometimes work as demosprudential dissents. Both *Sheff v. O'Neill*, the Connecticut school desegregation case, and *Varnum v. Brien*, the Iowa same-sex marriage case, appear to function both as examples of interactive federalism and as examples of demosprudential dissents. Perhaps future scholarship will continue to espouse an integrated approach toward state constitutionalism and demosprudence theory.